

(2008) 05 RAJ CK 0122
In the Rajasthan High Court

Chhagan Lal @ Chhagan Mal and Another	APPELLANT
Vs	
Shri Suresh Chauhan and Others	RESPONDENT

Date of Decision : 02-05-2008

Acts Referred:

Limitation Act, 1963 — Section 5

Citation : (2008) 3 CivCC 449 : (2008) 4 RCR(Civil) 209 : (2008) 2 RCR(Rent) 249 : (2008) 3 RLW 2011

Hon'ble Judges : Narendra Kumar Jain, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Narendra Kumar Jain, J.—Heard learned Counsel for the parties.

2. Undisputed facts of the case are that the plaintiffs- respondents filed a suit for eviction in respect of the disputed property against the defendants-petitioners in the trial court in March, 1998, wherein service of summons on defendants was affected on 2nd July, 1998; after service of summons, on behalf of the defendants, Shri Sunil Kaushik, Advocate, filed his "vakalatnama" in the trial court on 2nd July, 1998, and sought for time to file written-statement. The case was adjourned from time to time till 23rd October, 1999 for filing written-statement, but, on that date, neither the defendants nor their counsel were present, therefore, the trial court passed an ex-parte order against them and fixed the case for plaintiffs' evidence. Ultimately, the suit for eviction was decreed ex-parte by the trial court vide judgment and decree dated 23rd March, 2000. The petitioners thereafter filed an application under Order 9 Rule 13 CPC for setting-aside the exparte decree in the trial court on 31st May, 2000, which was contested by the plaintiffs. The trial court dismissed the said application of the defendants vide order dated 23rd March, 2002. Thereafter, the defendants preferred an appeal, which was also dismissed by the appellate court vide order dated 3rd September, 2004. Being aggrieved with the same, the defendants have preferred this writ petition before this Court challenging the aforesaid two orders

passed by the courts below.

2. The learned Counsel for the defendants-petitioners contended that soon after service of summons of the suit on the defendants, they engaged one Shri Sunil Kaushik, Advocate, to represent their case, who filed his "vakalatnama" on their behalf in the trial court on 2nd July, 1998 and prayed for time to file written statement. Their Advocate also assured to intimate them from time to time about the proceedings of the suit and that he would call them as and when their presence is needed in the trial court, however, the Advocate did not inform them about the proceedings of the suit, therefore, they could not come to know about passing of ex-parte decree on 23.3.2000, and the defendants came to know about it only on 03.05.2002, the date when they received a notice dated 01.05.2000 from the plaintiffs; immediately thereafter they made an enquiry about the case and, on coming to know about ex-parte decree, they filed the application without any further delay on 31st May, 2000 itself.

3. The learned Counsel for the defendants further contended that the trial court, while dismissing their application, committed an illegality in observing that the application under Order 9 Rule 13 CPC has been filed after a delay of six months whereas the application was filed on 31st May, 2000 for setting- aside the ex-parte decree dated 23rd March, 2000 i.e. within a period of 2 months and 7 days; the defendants came to know about passing of decree on 3rd May, 2000, the date when they received a notice dated 1st May, 2000 from the plaintiffs' counsel. In case the limitation is counted from the date of knowledge of passing ex-parte decree, then obviously the application was filed within a period of 30 days itself. He further contended that the same mistake has been committed by the appellate court while dismissing their appeal, which is clear from Para 3 of the order of the appellate court impugned in this writ petition, wherein the appellate court has observed that appeal has been preferred after 22 months, whereas the appeal was filed within the period of limitation. The appeal of the defendants has not been dismissed on the ground of delay in filing thereof. He contended that from the aforesaid observations of both the courts below, it is clear that their application for setting-aside the ex-parte decree as well as appeal have been dismissed without due application of mind, therefore, the impugned orders of the courts below are liable to be set-aside by this Court.

4. On the other hand, the learned Counsel for the respondents contended that the suit for eviction on the ground of personal bona-fide necessity was filed in the trial court on 27th March, 1998 and service of summons of the suit was affected on the defendants on 2nd July, 1998, which is clear from the fact that Shri Sunil Kaushik, Advocate, filed his "vakalatnama" on their behalf in the court and prayed for time for filing the written- statement, and for this purpose the trial court allowed him the time till 23rd October, 1999, but on that date the defendants or their counsel did not appear in the trial court which resulted in passing of ex-parte order against the defendants. Thereafter the trial court passed ex-parte judgment and decree on 23rd March, 2000.

5. The learned Counsel for the plaintiffs further contended that it was a suit for eviction and only for the purpose of causing delay of the proceedings, the defendants or their counsel did not appear on 23rd October, 1999 and, therefore, the learned trial court rightly passed ex-parte order against the defendants. He also contended that the defendants had knowledge of passing of ex-parte order but they did not move an application immediately after passing of ex-parte decree on 23rd March, 2000, therefore, the courts below were fully justified in passing the impugned orders rejecting the application of the petitioners for setting-aside the ex-parte decree as well as their appeal and, in these circumstances, there is no merit in this writ petition and the same may be dismissed.

6. I have considered the submissions of learned Counsel for both the parties in the light of reasons assigned by both the courts below and also perused the other documents annexed with the writ petition.

7. In this case the plaintiffs filed a suit for eviction and the notices whereof were served on the defendants, which is clear from the order-sheet dated 2nd July, 1998 as their counsel filed his "vakalatnama" and prayed for time to file written-statement, which was allowed. The case was adjourned from time to time but on 23rd October, 1999 neither the defendants nor their counsel appeared in the trial court, which resulted in passing of ex-parte order and thereafter ex-parte decree was passed on 23rd March, 2000. The learned Counsel for the respondents has not disputed that the application under Order 9 Rule 13 CPC was filed by the defendants on 31st May, 2000 but his submission is that the defendants had knowledge about ex-parte order dated 23rd October, 1999 and ex-parte decree dated 23rd March, 2000.

8. The trial court, while rejecting the application of the petitioners, has observed that as per Article 123 of the Limitation Act the application under Order 9 Rule 13 CPC ought to have been filed by the defendants within a period of 30 days from the date of decree and not from the date of knowledge of the ex-parte decree, whereas the present application for setting-aside the ex- parte decree was filed after a delay of six months. The observation of the learned trial court appears to be contrary to the record itself as both the parties have not disputed that ex-parte decree was passed on 23rd March, 2000 and present application under Order 9 Rule 13 CPC was filed on 31st May, 2000 i.e. after 2 months and 7 days and it was not filed after a delay of six months as observed by the trial court. The case of the petitioners is that they engaged their lawyer Shri Sunil Kaushik, who assured to inform them if their presence is required in the Court, but they did not hear anything from their counsel, therefore, they could not attend the case and remained dependent on their counsel. They did not come to know about passing of ex-parte order on 23rd October, 1999 or ex-parte decree on 23rd March, 2000 but they came to know about it only on 03.05.2000, the date when they received a notice dated 01.05.2000 from the plaintiffs' counsel and soon thereafter they took immediate action in the matter and, after obtaining certified

copies of the relevant papers, they filed an application without any further delay on 31st May, 2000 itself i.e. within a period of 30 days from the date of knowledge; whereas the case of opposite party is that the defendants had knowledge of passing of ex-parte order as well as ex-parte decree, and, only for the purpose of causing delay in the proceedings, the written- statement was not filed within time and no action was taken by them for filing the application for setting-aside ex-parte decree within the period of limitation.

9. In view of the admitted facts that summons were served on the defendants-petitioners on 2nd July, 1998 and ex-parte decree was passed on 23rd March, 2000 and admittedly the application under Order 9 Rule 13 of the CPC for setting-aside the ex-parte decree was filed in the trial court on 31st May, 2000, I find that the petitioners claim of the period of limitation from the date of knowledge and not from the date of decree in the present case is not sustainable. Further they did not file any application u/s 5 of the Limitation Act for condonation of delay in filing the application. A specific question was put to the learned Counsel for the petitioners during the course of arguments to show as to whether any application was filed by the defendants u/s 5 of the Limitation Act for condonation of delay in filing the application under Order 9 Rule 13 of the CPC as the period of limitation, according to the Article 123 of the Limitation Act, is 30 days from the date of decree and not from the date of knowledge as in the present case the summons were served on the defendants on 2nd July, 1998, the learned Counsel for the petitioners is unable to satisfy this Court about filing of application u/s 5 of the Limitation Act for condonation of delay in filing the application under Order 9 Rule 13 CPC. The petitioners have annexed a copy of the application u/O 9 Rule 13 CPC (Annexure-3) wherein they have not even made a prayer for condonation of delay in filing the application along-with a prayer for setting-aside the ex-parte decree and the reason is that they claimed limitation from the date of knowledge i.e. 3rd May, 2000 and not from the date of ex-parte decree dated 23rd March, 2000. Article 123 of the Limitation Act is reproduced as under:

Article Description of Period of Time from which period application limitation begins to run

123 To set aside a Thirty days The date of the decree or decree passed where the summons or ex parte or to notice was not duly re-hear an served, when the appeal decreed applicant had knowledge or heard ex of the decree parte.

10. The above provisions make it clear that the period of 30 days to file an application for setting-aside ex-parte decree is applicable from the date of decree. So far as the date of knowledge is concerned, the same is relevant where the summons or notice was not duly served. In the present case the learned Counsel for the defendants-petitioners does not dispute that summons were duly served on the defendants-petitioners as "vakalatnama" on their behalf was filed by their Advocate Sunil Kaushik in the trial court on 2nd July, 1998, and they made a prayer for filing the written- statement. In these circumstances,

although, the courts below have not considered this issue but I find from the reply of the defendants to the application under Order 9 Rule 13 CPC that a specific objection was raised that the application is barred by limitation, even thereafter the learned Counsel for the defendants did not file any application u/s 5 of the Limitation Act to condone the delay in filing the application under Order 9 Rule 13 CPC. Had the application u/s 5 of the Limitation Act been there, a liberal view could have been taken to condone the delay in filing the application under Order 9 Rule 13 CPC, but this is a case where, as admitted by the learned Counsel for the petitioners, no application u/s 5 of the Limitation Act was filed nor any prayer was made in this regard in the application under Order 9 Rule 13 CPC for setting-aside the ex-parte decree also.

11. In view of the above, it is clear that the application under Order 9 Rule 13 CPC was filed after expiry of period of limitation without any application for condonation of delay u/s 5 of the Limitation Act and in absence of application the delay could not have been/cannot be condoned. In these circumstances, I find that there is no merit in this writ petition and the same is liable to be dismissed.

12. The writ petition is accordingly dismissed with no order as to costs.

13. Consequent upon dismissal of the writ petition itself, the stay application, filed therewith, does not survive and the same is also dismissed.