

(1957) 01 CAL CK 0016
In the Calcutta High Court
Case No : Suit No. 280 of 1956

Debi Prasad Dutt

APPELLANT

Vs

Mrs. Asutosh pramanik

RESPONDENT

Date of Decision : 14-01-1957

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 4, Order 22 Rule 4(4), Order 5 Rule 1, Order 9 Rule 13, 146
Limitation Act, 1963 — Article 164

Citation : (1958) 1 ILR (Cal) 212

Hon'ble Judges : Mallick, J

Bench : Single Bench

Advocate : Somnath Chatterjee, for the Appellant; A.N. Sen, for the Respondent

Final Decision : Allowed

Judgement

Mallick, J.—This is an application to set aside an ex-parte decree.

2. The suit was instituted for the recovery of a certain sum of money against two Defendants, Ashutosh Pramanik and Kedarnath Sasmal. On February 27, 1956 the writ of summons was served on Ashutosh Pramanik. We are not concerned in this application with the decree passed against Kedarnath Sasmal the other Defendant. The time to enter appearance expired on March 9, 1956. Ashutosh Pramanik died on March 16, 1956 without entering appearance in this suit. On April 25, 1956 the suit appeared in the Undefended List and the Court was informed that the Defendant Ashutosh Pramanik was dead and the Plaintiff would have to take steps to substitute his legal representatives in his place and stead. On April 27, 1956 a summons was taken out by the Plaintiff. The summons provides, inter alia:

(a) For recording the death of the Defendant Ashutosh Pramanik.

(b) For substituting his widow and his son Monimohan Pramanik as the Defendants in place and stead of Ashutosh Pramanik and for such other orders

or directions as may be found necessary.

3. The summons appears to have been served on the legal representatives of Ashutosh named in the petition. On April 30, 1956 an order was made on the said summons directing substitution and consequential Amendments of the plaint. The order, however, did not direct fresh writ of summons to be issued and served on the substituted Defendants nor did it state the time within which the substituted Defendants were to enter appearance and file their written statements.

4. On May 25, 1956 the suit came up before me to be heard as an Undefended Suit. I should note here that the order dated April 30, 1956 was not perfected by that time and the plaint was not corrected in terms of the order dated April 30, 1956. The present summons was taken out by the substituted Defendants on August 13, 1956 to set aside the said ex-parte decree, and the grounds on which the ex-parte decree as against the substituted Defendants is sought to be set aside are set out in Paragraphs 6 and 7 of the petition. It is alleged that the substituted Defendants did not appear in Court pursuant to the Master's Summons taken out by the Plaintiff for substitution because they thought that it was a formal application and there was nothing to oppose. They came to know however on July 17, 1956 from one Pannalal Pramanik that an ex-parte decree had been passed against them in the above suit even though no writ of summons had been served on them and they were not otherwise informed as to the date on which they were required to enter appearance and file their written statements.

5. Mr. Chatterjee appearing in support of the application contended that the suit was improperly placed in the Peremptory Undefended list on May 25, 1956 and a decree was improperly obtained on that date. The order for substitution passed on April 30, 1956 was not perfected till long after May 25, 1956 so that the substituted Defendants could not under the Rules enter appearance and file their written statement. Further the order, dated April 30, 1956, neither directed a fresh writ of summons to be served on the substituted Defendants nor gave directions as to when appearance is to be entered and written statement is to be filed. The order, dated April 30, 1956, was, therefore, not a proper order. He referred to the Rules 15, 16 and 17 of Chapter VIII of the Rules of this Court. It is further contended by Mr. Chatterjee that a suit can only be placed in the Undefended list when the time to enter appearance or to file written statement has expired. In the instant case the Court not having laid down any time within which to enter appearance and file written statement the Plaintiff was not entitled to have the suit placed in the Undefended list for being heard. In the result in the instant case the substituted Defendants got no opportunity to contest the suit by entering appearance and filing a written statement.

6. Mr. Sen appearing for the Plaintiff contended that the order obtained on April 30, 1956 for substitution without any direction on the Defendants within what time they are to enter appearance and file their written statement was a proper

order. He contended that the writ of summons having already been served on the original Defendant no fresh writ need be served on the substituted Defendants. In answer to Mr. Chatterjee's contention that on April 30, 1956 the date set out in the summons to enter appearance and file written statement had already expired Mr. Sen contended that the substituted Defendants should have come at the hearing of the summons asking for such a direction and they having failed to ask for such a direction must be held to have intended not to contest the suit. I am not prepared to hold that at the time of the hearing of the application the Defendants sought to be substituted were to appear and ask for directions as to dates within which appearance were to be entered and written statements filed and that in default of such appearance they would lose their right to enter appearance and contest the suit. The summons, on the face of it, indicated that not only the Plaintiff would ask for substitution but would obtain suitable consequential directions. The only consequential directions in an application of this nature must be the fixing of the time within which the substituted Defendants are to enter appearance and to file their written statement. The Defendants sought to be substituted therefore were entitled not to incur cost by appearing at the time of the hearing. In my judgment, it was the Plaintiff's duty to ask for a direction fixing the date for entering appearance and filing the written statement and in the absence of such a direction an order for substitution becomes an empty formality. The reason for substitution is to give an opportunity to the substituted Defendants to enter appearance and contest the suit and not merely to bring the heirs of the deceased Defendant on record.

7. It is, however, contended by Mr. Sen that the application is time-barred. It is common ground that Article 164 will govern this case and the only dispute on this point is as to the starting point of limitation. Would limitation start from the date of the decree or from the date of the knowledge of the decree? If the starting point is the date of the decree then the application is clearly barred. If, on the other hand the starting point is the date of the knowledge of the decree then it has to be decided whether the date of knowledge of the decree as alleged by the substituted Defendants in the petition is acceptable. If it is found that the applicant came to know of it earlier, that is more than 30 days before the date of the application, then also the application must be held to be time-barred.

8. Mr. Sen contended that in the instant case the starting point of limitation is the date of the decree. His argument is that the summons having admittedly been served on the original Defendant, the instant case is one in which the summons must be held to have been served on the substituted Defendants as well. The substituted Defendants, according to Mr. Sen are subject to all the obligations qua procedure--as the original Defendants. The service on the original Defendant having been already effected according to law such service is binding on the substituted Defendants and they are not entitled to be served with the summons afresh. Again if the original Defendant allowed time to expire to enter appearance and file written statement before death the substituted Defendant would not be entitled to enter appearance and file the written

statement without an order of the Court. If in such a case an ex-parte decree is passed the substituted Defendant as the legal representative of the original Defendant is no doubt entitled u/s 146 of the CPC to make an application to set aside the ex-parte decree but such an application must be made within 30 days of the date of the decree because the original Defendant could not have made an application beyond that date. No direct decision has been cited by either party on the point and this seems to be a case of first impression. Mr. Sen has however cited a few cases in support of his argument and I may as well deal with these cases now. The first decision cited by Mr. Sen is the case of *S. v. enkatasubbier v. S. Krishnamurti* AIR (1915) Mad. 204, decided by a Division Bench of the Madras High Court consisting of White, C.J., and Oldfield, J. In this case the Defendant died after the decree was passed and an application was made by the legal representative of the deceased Defendant to set aside the ex-parte. decree under Order 9 Rule 13 of the Code of Civil Procedure. The Court following the decision of this Court in the case of *Ganoda v. Shibnarain* I.L.R.(1901) 29 Cal. 33 held that such an application is maintainable by the legal representative of the deceased Defendant u/s 146 of the CPC and that the starting point of limitation is the date of the decree and not the date of knowledge on the part of the legal representative. This case is clearly distinguishable because in the cited case the decree was passed against the Defendant who was alive at the date of the decree. The case therefore is clearly a case of an ex-parte decree against a Defendant on whom summons was duly served. In the instant case, however, the decree has been passed not against the original Defendant on whom the summons was served but against the substituted Defendants on whom no summons was served at all. Mr. Sen contends that in both the cases decrees have been passed against the legal representatives of the original Defendant though in the case cited the original Defendant died after the decree and in the instant case he died before the decree. But this makes all the difference for whereas in the cited case the summons was duly served on the Defendant whose representative seeks to set aside the ex-parte decree, in the other case the decree is sought to be set aside not by the legal representative of the Defendant but by the Defendant himself against whom the ex-parte decree was passed.

9. The second case relied on by Mr. Sen is the case of *Saligram v. Pundalik* AIR (1955) Nag. 238 decided by a Division Bench of the Nagpur High Court. In this case an application was made to set aside an ex-parte decree for foreclosure not by the mortgagor Defendant but by the transferee of the equity of redemption. The Applicant transferee was not a party to the mortgage suit. The Court held that such an application lies by one deriving title from the Defendant u/s 146 of the CPC and that for the purpose of limitation Article 164 would apply. It was, however held that limitation would run not from the date of the decree but from the date of knowledge of the person applying to set aside the decree. The reason given by the Court was that the right to make an application to set aside the decree is a personal right of the applicant and is not a right that he derived from the original judgment-debtor. In the instant case the substituted Defendant

having already been made a party to the suit acquired a personal right under the Code to set aside the ex-parte decree and on the authority of the Nagpur case it can well be argued that limitation would run not from the date of the decree but from the date of knowledge. This decision therefore instead of supporting Mr. Sen seems to be against his contention.

10. The fallacy in Mr. Sen's argument is this that after substitution, the substituted Defendants are no longer the legal representatives of the original Defendant but they are Defendants themselves. As parties to the proceedings they acquire personal rights under the code, to enter appearance, to file written statement and also to set aside an ex-parte decree should such a decree be passed against them. When a new Defendant is added, he is entitled under the code to be served with summons, to enter appearance and file his written statement. A substituted Defendant is equally entitled to be served with the summons to enter appearance and file his written statement. In my judgment there is no warrant in making a distinction between an added Defendant and a substituted Defendant. The fact that in the case of an added Defendant a suit for the purpose of limitation, is treated as instituted on the day he is added whereas in the case of a substituted Defendant the suit is taken to have been instituted not at the date of substitution but at the date of institution, makes no difference. It is admitted that a substituted Defendant like a new Defendant is required to enter appearance and file his written statement. Why should he then be not equally entitled to the service of the writ of summons as a new Defendant? Mr. Sen argues that under Order V, Rule 1, only one writ of summons can be issued on one party so that if a writ has been issued and served on the original Defendant no second writ can be issued because there is no new suit. According to him a new writ of summons is issued against the added Defendant because the suit is a new suit as against him. I do not agree. I do not read Order V., Rule 1 as providing for the issuance of only one summons. The Court is entitled and in many cases does direct the issue of more than one summons. A writ summons is issued and served on an added Defendant not because it is a new suit but because the policy of law is to give intimation to the Defendant to enter appearance and contest the case. The summons is ordered to be issued and served on the new Defendant for that purpose. It follows that no distinction can logically be made between an added Defendant and a substituted Defendant in the matter of the service of summons and I hold accordingly. Even if it is held that in the case of substituted Defendant, summons is not required to be served, that does not in my judgment affect the starting point of limitation under Article 164 of the Limitation Act. In any case, if in fact summons is not served on a Defendant, whether he is required to be served or not, the starting point of limitation would be the date of knowledge and not the date of the decree. This construction is warranted by the plain language of Article 164.

11. Mr. Sen built up his argument on the basis that the substituted Defendants derive all his rights and obligation qua procedure-from Section 146 of the Code of Civil Procedure. In doing so Mr. Sen committed an error. In the case of

substituted Defendants who are parties to the litigation, Section 146 of the Code need not be taken recourse to. The opening words of Section 146 clearly indicate that it is to be made applicable in a case where there is no other provision in the Code. The opening words are Save as otherwise provided by this Code or by any law for the time being in force.

12. When a legal representative is substituted as a Defendant under Order XXII, Rule 4 of the CPC he becomes a party to the proceeding and as such all proceedings can be taken by or against him. To enable him to apply to set aside an ex-parte decree, he need not take recourse to Section 146 of the Code. He as a Defendant to the action is entitled to make such an application. Section 146 was a new section introduced in 1908. In the old Code there was no express provision enabling legal proceedings to be taken by or against the legal representatives who was not a party to the proceedings. Some of the Courts including the Calcutta High Court held that proceedings can be taken by or against a legal representative even though he was not a party to the action. Some other High Courts held a contrary view. Thereupon in the amended CPC of 1908 this new section was introduced to fill up the lacuna to declare if not to enact that proceedings can be taken by or against a legal representative even though he was not a party to the proceeding. In the case of a substituted Defendant that question does not arise because he is already a party to the proceedings.

13. I may here note an argument put forward by Mr. Sen to the effect that the Calcutta High Court by its Amendment of Order XXII, Rule 4 introduced a new Sub-rule being Sub-rule 4 of Order 22, Rule 4. According to him under that sub-rule the decree in the instant case could have been passed even against the deceased Defendant without substituting his legal representatives and such a decree would have been binding on the legal representatives. Hence no injustice has been done to the substituted Defendants for non-service of the summons. Sub-rule 4 of Order XXII Rule 4 provides that the Court in its discretion may exempt the Plaintiff from the necessity of substituting the legal representative of a deceased Defendant who has failed to enter appearance and contest the suit at the hearing. From the language of Sub-rule 4 it appears to me to have been intended for a case not pending in the trial court but pending in appeal. It is only in the appeal stage that it could be ascertained whether the Defendant not merely did not enter appearance but contest the suit at the hearing. In any event it is clear that in such cases an order must be obtained dispensing with the necessity of substitution and if no such order is obtained the suit must abate under Order XXII Rule 3 of the Code of Civil Procedure. See the observations of Chakravorty, J. in the case of Sankari Prosad v. Kanailal (1948) 52 C.W.N. 599. In my judgment, if in the instant case the decree was obtained against the deceased Defendant without substituting the legal representative the decree would have been a nullity and would not have been binding on anybody. For reasons given above in my judgment in the instant case limitation would run not from the date of the decree but from the date of knowledge.

14. Mr, Sen next contended that even assuming that limitation started from the date of the knowledge of the decree the present application should be held to be time-barred because according to him the averments made in Paragraph 6 of the petition cannot be accepted. In Paragraph 6 of the petition it is stated that the Petitioners came to know on July 17, 1956 of the decree from one Pannalal Pramanik. Mr. Sen contended that Pannalal Pramanick does not come forward with an affidavit to corroborate the story of the Plaintiff and that in the absence of such a corroboration this statement of the Petitioner ought not to be accepted. I agree with Mr. Sen that such an affidavit should have been filed but the failure to file such an affidavit is not in my judgment sufficient to reject the Petitioner's case in as much as the story set out in Paragraph 6 of the petition is otherwise acceptable. I hold that the Petitioner came to know of the decree on July 17, 1956 and as such the present application is within time.

15. In the result the Petition is allowed and the ex-parte decree so far as the substituted Defendants are concerned is set aside. I direct that the Petitioners should enter appearance in the suit within three days from this date. Written Statement; to be filed within a week thereafter; Cross order for discovery within a week- thereafter, inspection forthwith and the suit do appear on the appropriate Prospective List six weeks hence with liberty to the Plaintiff to apply for an early date for hearing. In default of either entering appearance or filing the written statement within the time specified the suit will be transferred to the Undefended List. The Petitioner's costs of this application will be costs in the cause. The Plaintiff will bear his own costs. This judgment does not affect the decree passed against the other Defendant.