

(1956) 08 AHC CK 0023
In the Allahabad High Court
Case No : F.A.F.O. No. 276 of 1946

Firm Kundan Lal Brindaban

APPELLANT

Vs

Firm Bani Prasad Baij Nath Prasad

RESPONDENT

Date of Decision : 20-08-1956

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 5 Rule 19, Order 9 Rule 13
Limitation Act, 1908 — Article 164

Citation : AIR 1957 All 76 : (1957) 27 AWR 45

Hon'ble Judges : Beg, J;Agarwala, J

Bench : Division Bench

Advocate : S.N. Verma and P.N. Shukla, for the Appellant; G.P. Bhargava and K.C. Mital, for the Respondent

Final Decision : Allowed

Judgement

Agarwala, J.—This is an appeal against an order refusing to set aside an ex parte decree. The suit was for damages for breach of contract valued at over Rs. 14,000. The date fixed for the filing of a written statement and for framing of issues was 28-5-1946. Summons was personally served on the defendant.

The defendant was a resident of another district. He arrived at the Allahabad railway station on 28-5-1946, but there was a curfew order and so he could not attend the Court. He stayed on for another day and still there was a curfew order and he could not attend the Court on that date as well. In the morning of 30th he went back to his district. The plaintiff also did not appear on the 28th of May, but appeared on the 30th of May and the Court passed the following order on that date:

"The case put up for orders today. Defendant is absent. There is no curfew order today. It is therefore ordered that the case be put up for final disposal on the 31st of May 1946. If the defendant appears on that date then he may file a written statement."

The defendant had no knowledge of this order and did not appear on 31-5-1946. But the plaintiff appeared and the suit was decreed ex parte.

2. The Courts remained closed for the summer vacation from the 2nd of June to the 2nd of July, 1946. On 3-7-1946 the defendant sent a reply- paid telegram, to the Court enquiring about the date in the case. It does not appear whether any reply was sent but the defendant came to know on 4-7-1946, that an ex parte decree had been passed against him on 31-5-1946.

One week later, i.e., on 11-7-1946 he came to Allahabad and made an application for setting aside the ex parte decree. This application was dismissed by the Court below on the ground that it was filed beyond 30 days of the date of the decree. Against this order the defendant has come up in appeal to this Court.

3. Article 164, Limitation Act applies to such applications which provides that an application for setting aside an ex parte decree may be made within 30 days of "the date of the decree or, where the summons was not duly served, when the applicant has knowledge of the decree." It is obvious that the application in the present case was made more than 30 days after the date of the decree. The only Question is whether the second part of the Article applies to the present case.

4. It is well settled that the service of summons spoken of in the third column of Article 164 relates to the service for the first date in the case. If a defendant has been duly served for the first date in the case it is not necessary for the Court to serve him with notice of the subsequent dates in the case, vide *Surjit Singh v. C. J. Torrie* AIR 1924 Lah 666 (A); *Baldev Singh v. Krishen* AIR 1931 Lah 268 (B); *Sham Sundar v. Devi Ditta*, AIR 1932 Lah 539 (C); *Tara Chand v. Ram Chand* AIR 1935 Pesh 7 (D).

5. The question that arises is as to what is the proper meaning to be attached to the words "duly served". The words "duly served" may at first sight refer to the mode of service, whether it is sufficient service or not sufficient service. But that apparently is not exhaustive of the implications of the phrase "duly served". Where summonses are served after the date which is fixed for appearance has expired, though the mode of service is perfect, i.e., there is personal service, it can hardly be said that it is "due service". In *Stock and The Stock and Share Exchange Bureau Vs. Kothari and Sons*, the Madras High Court held:

"The expression "duly served", if literally understood, would seem to have reference rather to the mode of service, than to the propriety of the summons where it fixes a day of hearing, on which it would be impossible for the defendant to appear. But the former can hardly be the sense in which the expression is used in Order 9, Rule 13 of the Code. It is conceded, and I think rightly, that where the summons is served on a defendant too late to afford him a sufficient opportunity of appearing at the hearing of the suit, it is not a case of a summons "duly served", within the meaning of the section."

6. We are in respectful agreement with this view. Due service has reference not

merely to the mode of service, but to the propriety or the summons where it fixes a date for hearing, on which date by reason of the delay in service or of some action of the Court itself or of its officer, or by reason of a governmental order it is not possible for the defendant to do what he is asked to do and the case cannot be taken up.

In the circumstances of the present case therefore we think that the service on the defendant for 28-5-1946 which was a date on which there was curfew order and persons were prevented from going to Court was not due service within the meaning of Art. 164. That being so, the starting point of limitation for an application to set aside the ex parte decree would be the date of knowledge of the passing of the decree. That date was 4-7-1946. The application having been made within 30 days of this date, was within time.

7. We therefore allow this appeal, set aside the order of the Court below and remand the case to that Court for restoring it to Its original number and deciding it according to law.