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**(2009) 11 CHH CK 0043**  
**In the Chhattisgarh High Court**  
**Case No : C.R. No. 97 of 2003**

Kanhaiyalal and Others

APPELLANT

Vs

Baishakhin Bai and Others

RESPONDENT

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**Date of Decision :** 23-11-2009

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13  
Limitation Act, 1963 — Article 123, 3

**Citation :** (2010) 1 MPJR 60

**Hon'ble Judges :** Nawal Kishore Agarwal, J

**Bench :** Division Bench

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## Judgement

N.K Agarwal, J.

Feeling aggrieved by the order dated 23-1-2003 passed in Misc. Civil Case No. 3/99 passed by the IInd Additional District Judge, Baloda Bazar, instant revision has been preferred by the applicants/plaintiffs.

Facts briefly stated are as under:-

Late Bhagvandin filed a suit against Thandu Dhobi bearing Civil Suit No. 20-A/77. During pendency of the suit, said Bhagvandin died. The applicants No. 1 to 8, legal representatives of said Bhagvandin, were substituted in his place.

Learned Civil Judge vide judgment and decree dated 8-7-85, dismissed the said suit.

The applicants No. 1 to 8 preferred a civil appeal against the said judgment and decree which was registered as Civil Appeal No. 79-A/98. During its pendency, some of the respondents therein also died and legal representatives of Thandu Dhobi alias Tahlu i.e. non-applicants No. 1 to 3 were brought on record.

The appellate Court proceeded exparte against the respondents herein and thereafter vide its judgment dated 4th August, 98 and decree dated 6th August, 98 allowed the appeal and decreed the suit. Thereagainst, the respondent No. 1

filed an application under Order 9 Rule 13 of C.P.C. for setting aside the judgment and decree passed in the first appeal on the ground that the said decree has been passed without any service of summons upon her and also upon the other respondents. Vide order impugned, the ex parte judgment and decree passed by the first appellate court has been set aside. Feeling aggrieved by this order, the instant revision has been preferred by the plaintiff/applicant.

Shri Manoj Paranjpe, learned counsel appearing for the applicants would submit that admittedly the application to set aside the ex parte judgment and decree has not been filed within the time prescribed under Article 123 of the Limitation Act, 1963. Respondent No. 1 has pleaded the date of knowledge as 21st July, 99 through Halka Patwari but the same has not been substantiated by leading cogent evidence in this regard. He would further submit that in such a situation since the burden has not been discharged by the respondent No. 1, the order passed by the Court below setting aside the judgment and decree is without jurisdiction. For this, he placed his reliance upon the judgment of Supreme Court in case of Mahabir Singh v. Subhash and others reported in AIR 2007 SCW 6733.

Per contra, Shri CD. Sharma, learned counsel appearing for the respondents No. 1 and 2 would submit that as per para 11 of the order impugned, it is crystal clear that the judgment and decree has been passed against the respondents without serving any summons upon them and in fact, the effect of which renders the said judgment and decree a nullity since no one can be condemned unheard. He would further submit that this is not a case where service report is bad due to some irregularity. The case in hand is a case in which summons were never served upon the respondents and the judgment and decree has been passed in their absence. He would also submit that the applicants herein even did not file any reply to the application nor filed any affidavit to rebut the contentions put forth by the respondents and, therefore, so far as the date of knowledge of is concerned, the fact of respondents' knowledge of the said judgment and decree stands unrebutted and in such a situation, it cannot be said that learned Court below has committed any illegality in passing the impugned order and the revision deserves to be dismissed.

I have heard learned counsel for the parties and perused the order impugned.

The core question arises for consideration in the instant case is:-

Whether learned Court below has committed jurisdictional illegality in passing the order impugned?

So far as the service of summons upon the respondents is concerned, looking to para 9 to 12 of the order impugned, there is not an iota of doubt in my mind that the said judgment and decree has been passed without due service of summons upon the respondents.

As per Article 123 of the Limitation Act, 1963, an application for setting a decree, decreed ex parte or heard ex parte has to be filed within 30 days from the date of

decree or where the summons or notice are not duly served when the applicant had knowledge of the decree.

The controversy herein revolves around the question about the proof of date of knowledge of the decree.

The Supreme Court in case of Mahabir (*supra*) has observed that it was for the defendants/respondents to establish as to when he came to know about passing of the *ex parte* decree. It was further observed by Apex Court that if an application is time barred then in terms of Section 3 of the Limitation Act, 1963, no Court shall have jurisdiction to entertain such application. There is no quarrel about the aforesaid proposition of law.

By applying the aforesaid proposition of law in the facts of the instance case, it would be crystal clear that the applicant herein failed to controvert the date of knowledge pleaded by the respondent No. 1, nor any material has been placed on record to rebut the contentions raised by the respondent No. 1 regarding the date of knowledge so as to put burden upon the respondent No. 1 to prove the same.

In view of the above and in the facts and circumstances of the case when summons were never served upon the respondents, it cannot be said that learned trial Court has committed any jurisdictional illegality in setting aside the said judgment and decree passed by the first appellate court.

In view of the above, the revision being devoid of substance is liable to dismissed and is hereby dismissed.