
(1948) 09 GAU CK 0001
In the Gauhati High Court
Case No : Civil Rule No. 323 of 1948

Manindra Chandra Datta

APPELLANT

Vs

Churamani Thapa

RESPONDENT

Date of Decision : 15-09-1948

Acts Referred:

Limitation Act, 1908 — Article 164, 164

Citation : AIR 1949 Guw 5

Hon'ble Judges : Lodge, C.J. and Thadani, J

Bench : Division Bench

Advocate : Uma Kanta Goswami , Jogesh Chandra Sen, Advocates appearing for Parties

Judgement

Lodge C. J.

1. This rule was issued to show cause why an order allowing an application under O. 9, R. 13, Civil P. C., should not be set aside. The material facts are as follows:

[2] The present petitioner instituted a suit against the opposite parties in the Court of the Subordinate Judge of Lakhimpur. Notice was duly served upon the defendants. Though notice was duly served upon them, they filed no written statement. After several adjournments, the case was ultimately fixed for ex parte hearing on 27th May 1947. On that date, a Hazira was filed on behalf of the defendants and some at least of them were present in the court premises at some time on that date. The fact, that the Hazira was filed was not noted in the ordersheet. The case was called out for ex parte hearing and the names of the defendants were not apparently called out. No information of the fact that the case was being taken up was actually given to the defendants or to their pleader, and the suit was decreed ex parte on that date. The defendants applied on 15th September 1947, under O. 9, R. 13, Civil P. C., to have the ex parte decree set aside. The learned Special Subordinate Judge found that the defendants had been present in the court premises on the day on which the suit was decreed ex parte, but he held that the defendants were not aware of the fact that the decree

was passed ex parte and that they filed their application within 30 days of their knowledge of the ex parte decree, and on this finding allowed their application and set aside the ex parte decree and ordered that the suit be reheard.

[3] This rule has been obtained on the ground that according to the very findings of the learned Special Subordinate Judge, the application under O. 9, B. 13, Civil P. C., ought to have been dismissed. Limitation for an application under O. 9, B. 13, Civil P. C., is provided in Art. 164, Limitation Act; the period is 30 days and the date from which limitation runs is described in these words :

"The date of the decree or, where the summons was not duly served, when the applicant has knowledge of the decree."

In this case it is admitted that the defendants were duly served with notice. Therefore, the second or alternative date mentioned in Art. 164, Limitation Act, is inapplicable here and limitation began to run in this case from the date of the decree itself. The application was admittedly not made within 30 days of the date of the decree and was, therefore, palpably out of time. [4] Mr. Goswami for the respondents has contended that the decree ought not to have been passed against his clients, that his clients were sued as representatives of the deceased Nar Bahadur and that suit ought to have been decreed only against the assets of the deceased Nar Bahadur in the hands of the defendants. We have no material before us to decide finally whether that is a correct contention, but the judgment of the learned Special Subordinate Judge supports it and the learned advocate for the petitioner before us has assured us that the decree will not be executed except against the assets of the deceased Nar Bahadur in the hands of the defendants.

[5] The result, therefore, is that this rule must be made absolute with costs, and the order of the learned Special Subordinate Judge allowing the application under O. 9, B. 13, Civil P. C., set aside. Hearing fee Bs. 15.

Thadani J. I agree.

Rule made absolute.