
(1972) 03 GAU CK 0008
In the Gauhati High Court
Case No : Misc. Appeal (First) No. 1 of 1969

Pulin Das Kakati

APPELLANT

Vs

Rajendra Nath Hazarika

RESPONDENT

Date of Decision : 24-03-1972

Acts Referred:

Limitation Act, 1908 — Article 158

Citation : (1972) 03 GAU CK 0008

Hon'ble Judges : R.S. Bindra, J;M.C. Pathak, J

Bench : Division Bench

Advocate : K. Mazumdar, for the Appellant; D.K. Sarmah, B.K. Goswami and S.K. Sen, for the Respondent

Final Decision : Allowed

Judgement

R.S. Bindra, J.—This appeal by Pulin Das Kakati is directed against the order dated 12-9-1968 by which his application under Order 9, Rule 13, Civil P. C. for setting aside the ex parte final decree, dated 21-3-1966. was rejected with costs by the Assistant District Judge No. 2, Gauhati

2. In a suit for rendition of accounts filed by Rajendra Nath Hazarika, the respondent herein, against Pulin Das Kakati a preliminary decree was passed and a commission issued for looking into the accounts and making a report to the Court. Before the Commissioner could submit his report, Pulin Das Kakati. who was then an employee in the army in the rank of Major, it appears, moved his Commanding Officer for requesting the Court to stay the proceedings in the terms of the Indian Soldiers (Litigation) Act, 1925. hereinafter called the Act. The Commanding Officer addressed a letter to the Court requesting for stay of the proceedings and the proceedings were stayed by the Court until 30th April 1965 by its order dated 23-1-1965 Rajendra Nath Hazarika having felt aggrieved with that order filed a revision petition in the High Court to challenge its validity. However, his revision petition was rejected by the High Court on 26-11-1965. The case was placed before the trial Court thereafter on 13-12-1965 when the

Court directed that it should come up before it on 29-1-1966 "in presence of the learned Advocates of both the parties for orders. Inform". None of the Advocates having put in appearance before the Court on 29-1-1966, the Court adjourned the case to 11th February. 1966, for being put up before it "in presence of lawyers of both parties for orders. Inform". On the latter date it was reported to the Court that the plaintiff's Advocate had not been informed and so necessary direction in that respect was issued by the Court while adjourning it to 21st March. 1966. It is on that date that the suit was decreed in the presence of the plaintiff's Advocate after going through the Commissioner's report which had been received in the meantime.

3. It was on the 14th March. 1968, that Pulin Das Kakati presented an application under Order 9. Rule 13 of the Code praying for setting aside the ex parte final decree dated 21-3-1966. The allegations made in support of that prayer were that the summons issued to him by the Court had been suppressed, that he had never learnt that the proceedings had been started by the Court after having once stayed them, and that he had learnt about the final decree on 13th March, 1968, from one Haladhar Choudhury. It was stated further that the petitioner being employed in Military was posted outside Gauhati and so could get no knowledge of the fraud played on him by Rajendra Nath Hazarika in the matter of securing the final decree at his back.

4. Rajendra Nath Hazarika opposed the prayer made for setting aside the decree. His defence was that the petition dated 14-3-1968 of Pulin Das was barred by time, that it was not maintainable under Order 9, Rule 13, Civil P. C. and that Pulin Das Kakati having put in appearance before the Commissioner through his Advocate Shri S. N. Medhi, it was wrong on his part to allege that he had no knowledge of the proceedings or of the final decree.

5. The learned Assistant District Judge held in the impugned order that the application made by Pulin Das Kakati was barred by time and that Pulin Das Kakati had also failed to show sufficient cause for non-appearance in the case. In the opinion of the Assistant District Judge. Pulian Das Kakati "had knowledge of the Commission and the final decree long before he filed the petition Under Order 9. Rule 13. Civil P. C. dated 21st March. 1968".

6. Shri K. Mazumder, who represented the appellant, submitted that after the proceedings had been stayed by the Court on 23-1-1965 under the provisions of the Act, Pulin Das had not received any notice from the Court in connection with the revival of the proceedings, that Pulin Das learnt about the final decree only on 13th March, 1968, and moved the Court for setting it aside on the next day, and that as such the application was not barred by time and that sufficient cause had been shown by Pulin Das for setting aside the ex parte decree. Shri P. Choudhury. who appeared for the decree-holder, however, urged that actually the decree was not ex parte. that the application under O. 9, R. 13, Civil P. C. was therefore misconceived, that at any rate the application was barred by time, and that Pulin Das had failed to show sufficient cause for setting aside the decree.

7. In the order or precedence, the first point that falls for determination is whether the decree dated 21-3-1966 is ex parte. It was contended by Sri Choudhury that the Court had passed the final decree under Rule 3. Order 17, Civil P. C. and not under Rule 2 of that Order and that as such the application under Rule 13 of Order 9 is not legally competent, the proper remedy of Pulin Das against the decree dated 21-3-1966 being one of appeal. He cited AIR 1924 198 (Privy Council) in support of that contention.

8. Rule 3 of Order 17 provides that where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witness, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding such default, proceed to decide the suit forthwith. On the plain reading of the Rule it is evident that its provisions do not come into play unless (i) the hearing is adjourned on the application of a party to the suit, (ii) the hearing is adjourned on the application of the party who subsequently makes the default, (iii) the adjournment is granted to enable the party to produce his evidence, or to cause the attendance of the witness, or to perform any other act necessary to the further progress of the suit and (iv) the party fails to perform any of the acts for which the adjournment was granted within the time allowed by the Court. We feel satisfied that the decree dated 21-3-1966 was not passed in terms of Rule 3 for never since the dismissal of Rajendra Nath's revision petition by the High Court on 26th November, 1965, the defendant Pulin Das had put in appearance in the court and so the question of his claiming any adjournment for any of the purposes mentioned in Rule 3 could not arise, and prior to 26th November, 1966, further proceedings in the case had been stayed by the High Court. Therefore, the trial court had no alternative but to proceed ex parte against Pulin Das on 21-3-1966 and the decree made by it on that date could never be a decree on merits. The trial court itself never doubted that the decree made by it was ex parte, a fact quite apparent from its impugned order dated 12-9-1968 wherein the decree is described as ex parte in unqualified language.

9. The Privy Council judgment in the case of Lachmi Narayan lends no support to the point raised by Shri Choudhury. What happened in that case was that after a preliminary decree for partition of the properties in dispute had been passed the plaintiff failed to appear in court on 5-11-1919, the date fixed for taking further proceedings in the case. The trial court dismissed the suit for want of prosecution by the plaintiff. The decree of dismissal of the suit was challenged before the High Court of Patna and that High Court happened to quash it on the basis that 5-11-1919 was not a date of hearing in the case. The defendant having felt aggrieved went in appeal to the Privy Council and the Privy Council dismissed his appeal with the observations

After a decree has once been made in the suit, the suit cannot be dismissed unless the decree is reversed on appeal. The parties have, on the making of the decree, acquired rights or incurred liabilities which are fixed, unless or until the

decree is varied or set aside. After a decree any party can (as already stated) apply to have it enforced.

It looks apparent to us that the only point decided by the Privy Council was that once a preliminary decree has been passed in a partition suit, it is not open to the Court to dismiss the suit if any of the parties fails to proceed further in the matter of division of the properties by metes and bounds. Reference to R. 2, O. 17, had no doubt been made in the judgment of the High Court at Patna but their Lordships of the Privy Council dismissed the appeal not on the point on which the High Court had set aside the order dated 5-11-1919 of the trial court, but on the finding that after the preliminary decree had been passed the Court had no jurisdiction to dismiss the suit in default of further proceedings in the matter.

10. On the authority of two decisions of the Assam and Nagaland High Court, viz., AIR 1961 Ass 99, *Mst. Giri Agarwallini v. Baleswar Tewari* and AIR 1964 Ass 144, *Mohanlal v. Lachman. Shri Choudhury* next contended that once the summons is issued and served and the suit is decided thereafter in the absence of the defendant the decree passed shall always be considered as one made on merits and not ex parte. It is difficult to accept this proposition as of universal application. One can easily conceive cases where the provisions of R. 2 and R. 3 of O. 17 simultaneously become operative. As an instance, the defendant may have secured an adjournment from the Court for the purpose of producing his witnesses on his own responsibility and on the date next fixed by the Court he (the defendant) fails to appear in the Court, or the plaintiff had secured an adjournment for identical purpose but he failed to appear on the adjourned hearing. The question that would arise for determination in such circumstances would be. in the case of defendant's absence, whether the Court should proceed ex parte against him or decide the suit on merits, and in case of plaintiff's absence whether the suit should be dismissed in default or decided on merits. There is sharp conflict of judicial opinion, in India on how the Court should proceed in such circumstances. One view expressed is that the Court should proceed ex parte against the defendant at whose instance the adjournment had been granted and who had failed to put in appearance, and if the plaintiff had not turned up on the date fixed after getting an adjournment for taking further steps in the suit then the suit should be dismissed in default of his appearance. In other words, the Court should proceed under Rule 2, ignoring for the time being the default made in terms of Rule 3. Another view shared by a few High Courts in India is that the Court should in such circumstances decide the suit on merits and the decree made by it shall be open to challenge only in appeal and not by a proceeding taken under Order 9 by the plaintiff or the defendant, as the case may be. Yet another view expressed, which appears to adopt the middle course, is that if enough of material is available on the record then the Court should decide the suit on merits rather than dismiss it in default of appearance of the plaintiff or make an ex parte decree because of non-presence of the defendant,

11. A perusal of the two authorities cited by Shri Choudhury shows that this High Court has preferred to follow the middle course mentioned above, namely, if on account of the absence of the plaintiff or the defendant a situation contemplated by Rule 3 of Order 17 arises, and there is enough material on record to decide the suit on merits, then the Court should decide it on merits, and the decree made in such an event shall be open to challenge only in appeal and not by a proceeding under Order 9. We believe that this is the soundest of all the three views and there is considerable justification for our adopting it for it has the merit of frustrating the design, if any, of the defaulting party in prolonging the litigation or keeping its final outcome uncertain. This view, however, must be subject to the proviso that if there is not enough of material on the record by the date the default occurs, the Court should, and probably it will have no alternative but to proceed under R. 2 rather than under Rule 3 because it cannot award a decree for or against the party in default unless there is evidence or other material on record to justify such a course. This exactly is the view taken by the High Courts of Calcutta and Lahore. The Calcutta High Court held in *Brojendra Nath Ganguly Vs. Promatha Bhusan Dev and Others*, that in a case where there are no materials on the record, the proper procedure to be followed would be that laid down in Rule 2. but if there are materials on the record the Court ought to proceed under Rule 3. It was observed further that to apply the procedure laid down in Rule 3 to a case there must be the presence of both the elements, which are (i) the adjournment must have been at the instance of a party and (ii) there must be materials on the record for the Court to proceed to decide the suit, and that the presence of one without the other does not justify the application of Rule 3. An identical view was expressed by the Lahore High Court in the case of *Sher Ali v. Mangu*. 52 Ind Cas 292 : (AIR 1919 Lab. 344). We respectfully agree with this view and so repel the contention of Shri Choudhury that irrespective of the state of record, the Court is bound to pass a decree on merits if the defendant fails to appear in Court after having once put in appearance In response to the summons served on him.

12. The next point urged by Shri Choudhury was that since the Court had given direction on 13-12-1965 that Advocates for the parties should be informed to put in appearance before it on 29-1-1966. and that since Shri A. Kalita, the counsel for the defendant Pulin Das, had made a note in the order sheet on 25-12-1965 about his having seen the Court's order dated 13th December, 1965. it should be presumed in face of the provisions of Rule 5 of Order 3 that service had been duly effected on the defendant and so his non-appearance on 21-3-1966 provided sufficient justification for the Court to proceed to decide the suit. The opposite counsel Shri Majumdar submitted, in reply to that point, that since Pulin Das had affirmed in his Court statement that he was not definite if the signature marked X in the order-sheet was that of Shri A. Kalita and had stated further that neither Shri A. Kalita nor anybody else had notified him that the proceedings in the suit had been revived, the presumption mentioned in Rule 5 would not arise. Rule 5 provides that any process served on the pleader of any party or left

at the office or ordinary residence of such pleader and whether the same is for personal appearance of the party or not. shall be presumed to be duly communicated and made known to the party whom the pleader represents. and. unless the Court otherwise directs. shall be as effectual for all purposes as if the same had been given to or served on the party in person.

13. It is apparent that Rule 5 considers the service on the parties" pleader as effectual as on the party himself. This Rule is obviously founded on the legislative belief that no legal practitioner can deliberately jeopardise the interest of the client on whose behalf he is served. Such a course on his part would be against the ethics of the noble profession and the possibility of his being hauled up for professional misconduct provides a stern deterrent against its adoption.

14. However, if the pleader having accepted service actually fails to communicate the fact to his client a question will appropriately arise whether the party should be penalised for a lapse on the part of his pleader. We think the reply to that question would depend on the circumstances of each individual case. We are of the opinion that the presumption which the Rule sets out is rebuttable and not conclusive. We are fortified in this view by the decision of the Calcutta High Court in *E. F. Sandys v. Upendra Chandra*, (1909) 2 Ind Cas 547 (Cal). In the reported case the trial Court directed, on receipt of the records from the High Court pursuant to a remand order, that the pleaders should be informed of the date fixed for hearing. Order was brought to the notice of the pleader for the defendant, but that pleader failed to communicate the date of hearing to his client with the consequence that the suit was decreed *ex parte* against the latter. The High Court held, while setting aside the *ex parte* decree, that the presumption that the notice to the pleader was good notice to the party had been rebutted by the facts proved in the case and so the notice to the pleader was not effective notice to the defendant

15. Shri Choudhury cited a number of authorities of different High Courts to support the contrary proposition that presumption mentioned in Rule 5 is conclusive and not rebuttable. To begin with, he cited AIR 1946 266 (Lahore) . The only proposition enunciated in this case was that the provisions of sub-rule (2) of Rule 4 of Order 3 do not permit a Court to assume the power of attorney to have been revoked either wholly or partially unless it was done in writing and with the leave of the Court. The provisions of Rule 5 were not so much as referred to in the report and so this authority is not of help in interpreting the nature of presumption mentioned in Rule 5. Likewise, in the case of *Pannalal and Another Vs. Firm Ballaram Basia*, . the second authority relied upon by Shri Choudhury. the point at issue related to the interpretation of Rule 4 and not of Rule 5. It was held in that case that an application for restoration of a suit dismissed in default is a Part of the proceedings in the suit, and on the same reasoning the Advocate of the defendant does not require a fresh power to contest the application. It was held further that the authority of the Advocate of the defendant does not terminate on the dismissal of the suit *ex parte* and

therefore the service of the notice of the application for restoration of the suit on him is a valid notice. The point that falls for consideration in our case, we may emphasise, is not when the power of the Advocate to represent the client on the authority of the Vakalatnama comes to an end but it is whether the service of summons or notice made on Advocate would bind the client even if the Advocate fails to communicate the fact to his client. Therefore, the Rajasthan authority is also not of help in deciding the point that falls for determination in this appeal.

16. Our attention was also invited to the Supreme Court decision in Nilkantha Shidramappa Ningashetti Vs. Kashinath Somanna Ningashetti and Others, wherein it was held that according to Article 158 of the Limitation Act, 1908. the period of limitation for an application to set aside an award begins to run from "the date of service of the notice of the filing of the award" and that the notice which the Court is to give u/s 14 (2) of the Arbitration Act to the parties need not be a notice in writing and it may be given orally. It was further held that the communication of the information about the filing of the award to the pleader of the party is sufficient compliance with the requirements of Section 14 (2) since notice to the pleader is notice to the party in terms of Rule 5 of Order 3 of the Code. The precise point that cropped up before the Supreme Court was whether Article 158 of the Limitation Act enjoins a notice in writing or even an oral notice would meet its requirements. On the plain wording of column 3 of Article 158 the Supreme Court held that an oral notice will meet the requirements and then it was observed that an oral notice given to the pleader of the party was sufficient notice to the party. Here again we find that the Supreme Court was not invited to decide, nor it actually decided, the question what shall be the consequence if the pleader fails to communicate the fact of service made on him to the client. Therefore, in our opinion, the Supreme Court judgment also does not lend help to the contention of Shri Choudhury that once the pleader of a party is served with the summons or notice the party is bound by that service even though his pleader fails to contact him.

17. The last authority cited by Shri Choudhury in this connection, is reported in Jugal Kishore Acharyya and Others Vs. Kapil Chandra Acharyya, . This is a Single Bench decision and the proposition enunciated therein was that under Rule 5 there is a presumption that notice which was served on the pleader is communicated to the client. It was observed further that the only method by which a pleader can avoid his duty on communicating notice served upon him is to file a document in writing under Rule 4 (2) of Order 3 of the Code showing that his authority is determined, else irrebuttable presumption mentioned in Rule 5 arises. The view taken in this Patna case is directly opposed to the one expressed by the Calcutta High Court in the case of E. F. Sandys. (1909) 2 Ind Cas 547 (Cal) (supra). The Calcutta decision, we find, is a Bench decision No other authority bearing on the proposition whether the presumption stated in Rule 5 is conclusive or rebuttable has been brought to our notice. On examining the phraseology of Rule 5 and weighing the arguments adopted by the Calcutta and Patna High Courts in support of their respective views, we have decided to

follow the view taken by the Calcutta High Court. Though E. F. Sandys' case (1909) 2 Ind Cas 547 (Cal) was decided by the Calcutta High Court in the year 1908. that decision it appears, was not brought to the notice of Wort, J., when he decided Patna case in 1934. The only reason given by Wort. J., in support of the proposition that the presumption that arised under Rule 5 is irrebuttable was that any other view would make the Court work impossible. True. that Rule 5 was adopted by the Legislature with a view to save time in the matter of service of processes and thereby expedite the disposal of the cases pending in the Court. However, it is not stated in Rule 5 that the presumption mentioned in it is necessarily irrebuttable, We believe that the Legislature did not intend that presumption to be conclusive irrespective of the fact whether the pleader failed to communicate to his client, by design or by lapse, the fact of the service having been affected on him. One can easily visualise cases where a pleader of highest integrity may have for certain good reasons failed to communicate the fact of service on him to his client. It would be an act of judicial hardship if in such exceptional cases the client should be left without a remedy.

18. We may illustrate the consequences which may ensue if the view taken by the Patna High Court were adopted in complete oblivion of the circumstances of the case. Suppose, for an instance, an Advocate after having been served with a notice, and before he could communicate the information to his client, is taken so gravely ill that he cannot attend to his personal and professional affairs, and the case of his client as a consequence goes by default. Will not the view taken in Patna High Court work a great hardship on the unfortunate client if he moved the Court for restoration of the suit or setting aside the ex parte decree, as the case may be. and the Court slams the door against him on the footing that there is irrebuttable presumption that the fact of service of notice on his pleader had been communicated to him? We believe it shall, and to keep the Court's options unfettered and with the object of relieving distress and hardship in genuine cases we prefer to follow the view taken by the Calcutta High Court, which view, we may reiterate is not opposed to the plain wording of the rule itself. The relevant words of the Rule are "shall be presumed to be duly communicated". This expression does not necessarily imply that the presumption is conclusive. The verb "shall", we think, does not cast an obligation on the Court completely divorced from the circumstances of the case. In the case before the Calcutta High Court the pleader had appeared in Court and testified that he had not informed his client about the notice served on him and that, as far as he knew, his client had not learnt about the notice as well. The High Court held, on the authority of the pleader's statement that the presumption that notice to the pleader was good notice to the party had been rebutted by the facts brought on the record.

19. To sum up. we are of the decided opinion that Rule 5 does not raise a conclusive presumption, that it is open to the client concerned to establish by appropriate evidence that a process served on his pleader had not been communicated to him. and that if he succeeds in establishing that fact the Court

may proceed on the basis that the service had not been effected on the client. Rule 5 comprises a provision of procedural and not of substantive law. All procedural laws are meant to subserve the interests of justice and not to frustrate the trial of cases on merits. Therefore, we reject the contention of Shri Choudhury that Rule 5 raises a conclusive and an irrebuttable presumption.

20. This takes us to the consideration of the examination of the material on record to determine whether Shri A. Kalita is proved to have been served with the notice of the Court's order dated 13-12-1965, and if so whether he had communicated to Pulin Das that the next date fixed in the case was 29th January, 1966.

21. Respecting service of the notice on Shri A. Kalita reliance was placed by Shri Choudhury on a note in the order-sheet which states that on 25-12-1965 one Shri A. Kalita Advocate had seen the Court's order (apparently dated 13-12-1965). However, we have the sworn testimony of Pulin Das that he cannot affirm that that note in the order-sheet bears the signature of Shri A. Kalita, his Advocate. The decree-holder Rajendra Nath did not enter the witness box nor led any other evidence. Therefore, as at present, there is no evidence to take us to the conclusion that the aforementioned note was made by the defendant's Advocate Shri A. Kalita or that it bears the latter's signature. If we do not take that note into consideration then there is no material to establish that notice had been served on the defendant's Advocate. And if service of notice is not proved then the period of limitation for moving the application for setting aside the ex parte decree will begin to run from the date of knowledge of that decree on the part of Pulin Das. It is the case of Pulin Das that he learnt about the decree on 13th March, 1968, from one Haladhar Choudhury and this Haladhar Choudhury testified that it was he who had told Pulin Das on 13th March, 1968, that a decree had been passed against him. After close study of the statements of the two witnesses we feel satisfied that Pulin Das got knowledge of the decree for the first time on 13th March, 1968, and since he moved the application under Order 9, Rule 13, on 14th March, 1968. It was clearly within time.

22. Relying on the decision in Mahendra Lal v. Ramprasad, AIR 1961 Ass 80 Shri Choudhury submitted that respecting an application for setting aside an ex parte decree the Court has to look to the summons originally issued in the suit and not to any summons or notice issued subsequently when the suit after stay is revived. In the decision relied upon it was held by Mehrotra, J., as he then was: "The summons which is referred to in Article 164 is the summons in the suit itself. Where the summons was duly served and the defendant appeared on the date of hearing of the suit but the matter remained pending and when after the lapse of 2 years the case was ordered to be put up for hearing fresh summons was not issued to the defendant and the suit was decreed ex parte. it cannot be said that the summons was not duly served within meaning of Column 3 of Article 164 and hence, the starting point of limitation for setting aside the ex parte decree would be the date of the decree and not when the defendant had

the knowledge of the decree,"

No authority was cited by Mehrotra, J., in support of the view taken by him, nor Shri Choudhury could cite any other authority to buttress that view. With respect, we are unable to subscribe to the view taken in Mahendralal's case. If the suit remains stayed for a certain period and then it is decreed ex parte without serving any notice of revival of the proceedings on the defendant, who had put in appearance before the suit was stayed in response to a summons served on him. it would be highly unjust to hold that the period for setting aside an ex parte decree passed in such a case shall begin from the date of the decree itself. The proper view to adopt in such circumstances is that the period of limitation begins to run from the date of the knowledge of the ex parte decree. We may add that in such a case the decree should and can be set aside by the Court even in exercise of its inherent powers u/s 151 of the Code, for a litigant, it is settled, should never suffer for any wrong done by the Court. AIR 1954 Assam 168. Asrab Ali v. Manuhar Ali. is a Division Bench authority of this Court for the proposition that where the plaintiff obtains an ex parte decree without notice to the defendant and without disclosing to the Court the fact of prior order of stay of proceedings, the Court would be justified in setting aside the ex parte decree under its inherent powers even if the application to set aside the decree is barred by limitation. We respectfully agree with this rule enunciated by the Division Bench. This rule is both equitable and just and our case falls within its ambit, since, as held above the ex parte decree was passed on 21-3-1966 without notice to the defendant. We may appropriately mention that Pulin Das was an Indian soldier when he filed the application for setting aside the ex parte decree and may further invite reference to Section 11 of the Act which provides inter alia that in computing period of limitation prescribed by the Limitation Act for any suit, appeal or application to a Court, any party to which is or has been an Indian soldier, the period during which a soldier has been serving under any special conditions shall be excluded. We need not develop this point further as we feel satisfied that for The other reasons stated above the ex parte decree passed against Pulin Das has to be set aside.

23. No other point was raised in this Court by the parties' counsel.

24. In the result. we allow this appeal and on quashing the impugned order dated 12-9-1968 set aside the ex Parte decree dated 21-3-1966. The trial court shall give an opportunity to the parties to file objections, if any. against the report of the Commissioner and will then dispose of the case afresh in the light of its decision about that report. We made no order as to costs of this appeal.

M.C. Pathak, J.:

25. I agree.

Appeal allowed.