

(1968) 04 PAT CK 0021

In the Patna High Court

Case No : A.F.O.O. No's. 104 and 105 of 1964

Satya Narain Dhandhanian and Another

APPELLANT

Vs

Firm Narsing Das Bhudarmal and Another

RESPONDENT

Date of Decision : 25-04-1968

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 5 Rule 20(1), Order 5 Rule 20(2), Order 9 Rule 13

Citation : AIR 1969 Patna 112

Hon'ble Judges : K.B.N. Singh, J;Anwar Ahmad, J

Bench : Division Bench

Advocate : B.P. Rajgarhia, Rudra Deo Kumar Sinha and sudha Rani Jayaswal, for the Appellant; B.P. Rajgarhia, Rudra Deo Kumar Sinha and sudha Rani Jayaswal for Respondent Nos. 2 in M.A. 104/64 and 3 in M.A. 105/64, Ramnandan Sahay Sinha and Lala Sachindra Pd., for the Respondent

Final Decision : Dismissed

Judgement

Anwar Ahmad, J.—These two appeals are directed against the common order passed by the Subordinate Judge, Second Court, Monghyr dismissing the applications filed by the appellants under Order 9, Rule 13 of the CPC for setting aside the ex parte decree passed in Money Suit No. 30 of 1961 in favour of respondent No. 1. The appellant in Miscellaneous appeal No. 105 of 1984 is the mother of the appellants in Miscellaneous Appeal No. 104 of 1964.

2. The learned Subordinate Judge has dismissed both the applications under Order 9 Rule 13 on the grounds (1) that the applications are barred by limitation; (2) that the appellants had full knowledge of the suit as well as of the date fixed for hearing and (3) that the appellants have not made out sufficient cause for their non-appearance when the suit was taken up for ex parte hearing.

3. The ex parte decree was passed on the 15th May 1963. The applications under Order 9, Rule 13 of the Code giving rise to Miscellaneous Appeals 105 and 104 of

1964 were filed on the 4th July and the 13th July 1963 respectively that is to say, both these applications were filed beyond the period of thirty days from the date of the decree.

4. The case of the appellant in Miscellaneous Appeal No. 105 of 1964 was that she was a pardanashin lady and a permanent resident of Calcutta. Her case was being looked after by her karpardaz who lived in Monghyr. He died on the 2nd May 1963 and, since then no steps could be taken on her behalf. She had no knowledge about the case and only learned about it on the 1st July 1963. Thereafter, she took all necessary steps in the case and got the record of the money suit inspected. Then she came to know that even her lawyer had no information about the date fixed for the hearing of the suit and therefore, could not send any intimation to her. The case of the two appellants in the other appeal was that they had no knowledge of the institution of the money suit and no summons had been served on them. They first came to know on the 5th July 1963 about the suit and the ex parte decree passed therein. They then hastened to get the record of the money suit inspected and, thereafter came to know about the fraud practiced upon them by respondent No. 1.

5. Respondent No. 1, filed a rejoinder to the two applications under Order IX Rule 13. His case was that the appellant in Miscellaneous Appeal No. 105 of 1964 had entered appearance in the suit and, thereafter deliberately left doing pairvi in the suit and, as such her application was not maintainable. The further case of respondent No. 1 was that the applicants in both the appeals were jointly doing pairvi through their relation and had knowledge about the suit and sufficient opportunity to appear before the Court.

6. The records of the money suit disclose that the appellant in Miscellaneous Appeal No. 105 of 1964 filed vakalatnama and written statement in the suit on the 1st February and the 10th April 1963 respectively. The records of the money suit further disclose that on the application of respondent No. 1 the Court passed an order for substituted service, as the appellants were avoiding summons. The order of the Court below dated the 28th February 1963 goes to indicate that the same had already been duly published in the Calcutta Gazette.

7. In order to prove her case, the appellant in Miscellaneous Appeal No. 105 of 1964 examined seven witnesses including herself. Respondent No. 1 examined three witnesses. The learned Subordinate Judge, on a consideration of the evidence on record, has found that her plea that her case was looked after by her karpardaz who died on the 2nd May 1963 has not been established. He had also found that she had full knowledge of the date on which it was decreed ex parte. Accordingly, her application under Order IX, Rule 13 was held to be barred by limitation.

8. Mr. Rajgarhia on behalf of the appellant, has challenged with his usual vehemence the findings arrived at by the Court below but in my opinion the decision of the learned Subordinate Judge proceeded on a proper assessment of

the evidence on record and nothing substantial has been pointed out by learned counsel to discredit the evidence of the witnesses examined on behalf of the respondent No. 1. As already stated, the appellant had entered appearance in the suit and filed her written statement. Her written statement and vakalatnama are on record. Therefore the oral evidence adduced on behalf of respondent No. 1 is in conformity with the documentary evidence on record. The Court below has rightly held that the application was barred by limitation. Article 164 of the old Limitation Act, which is applicable to the facts of the present case, runs as follows:--

"Description of Application. Period of Limitation. Time from which period begins to run.

By a defendant for an order to set aside a decree passed ex parte.

Thirty days.

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

On the findings arrived at by the Court below the appellant had knowledge about the suit and the ex parte decree passed therein. Learned counsel for the appellant has, however, contended that the period of limitation should be counted from the date of knowledge of the ex parte decree which, according to the appellant, was the 1st July 1963. I am unable to accept this submission of learned counsel as the date of knowledge put forth by the appellant has not been accepted by the Court below for cogent reasons. The starting point of the period of limitation must, therefore, be held to be the date of the ex parte decree, namely, the 15th May 1963. Therefore, the application filed by this appellant, as has been rightly held by the Court below is barred by limitation.

9. Miscellaneous Appeal No. 104 of 1964 has been filed by the sons of the appellant in Miscellaneous Appeal No. 105 of 1964. The record of the money suit does not disclose that either of the two appellants had entered appearance in the suit at any stage. The learned Subordinate Judge however, has arrived at a clear finding that the appellants had knowledge of the suit along with their mother and of the date fixed for its hearing and, as such their application under Order IX Rule 13 was barred by limitation.

This finding of the Court below is also based on a consideration of the evidence on record and the facts and circumstances of the case. Mr. Rajgarhia, for the appellant, has contended that the finding is not justified on the state of evidence on record, but to my mind, the finding arrived at by the Court below on this point cannot be successfully challenged. It will, however, be not necessary to refer to the arguments advanced by Mr. Rajgarhia in view of the order passed by the Court for substituted service on the appellants under Order V, Rule 20 of the CPC in the suit. Sub-rules (1) and (2) of rule 20 of Order V run as follows:--

"(1) Where the Court is satisfied that there is reason to believe that the

defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain or in such other manner as the Court thinks fit.

(2) Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally."

It is well settled that the words "shall be as effectual as if it had been made on the defendant personally" do not necessarily mean that the summons had been duly served but only that such service is as effectual as personal service for the purpose of going on with the proceedings in Court, and in spite of such service, it is open to the defendants to show that he had no knowledge of the claim.

Mr. Rajgarhia has, however, contended that substituted service can only be due service in the eye of law when the conditions laid down in sub-rule (1) were fulfilled. In support of his submission he has placed reliance on *G. Shanmukhi Vs. Utakur Venkata-srami Reddi and Another*. This Full Bench decision of Andhra Pradesh High Court supports the contention of learned counsel that substituted service can be only effective if the conditions laid down in Sub-rule (1) were established and that it is open to a defendant to establish that he never avoided service and that, in any case, notice of the claim had not been brought home to him. I respectively agree with the view of their Lordships in the aforesaid case but so far as the present case is concerned the appellants, in their application under Order IX, Rule 13, did not allege that the conditions laid down in Sub-rule (1) had not been fulfilled or that in spite of the substituted service, they had no knowledge of the claim. As a matter of fact in their application under Order IX, Rule 13, no mention whatsoever had been made of the substituted service.

It has, therefore, to be held that the substituted service was duly effected on the appellants and the (sic) to be regarded as effectual as if it had been made on them personally. The starting point of limitation will therefore, be the 15th May 1963, on which date the ex parte decree was passed. The application filed by these appellants on the 13th July 1963 under Order IX, Rule 13 was also barred by time."

10. For the reasons stated above, there is no merit in either of these appeals which are, accordingly, dismissed but without costs.

K. B. N. Singh, J.

11. I agree.