
(1910) 08 BOM CK 0012
In the Bombay High Court
Case No : O.C.J. Suit No. 213 of 1910

Shavaksha Ruttonji Bomonji

APPELLANT

Vs

Hugh Hogarth and Sons

RESPONDENT

Date of Decision : 18-08-1910

Acts Referred:

Limitation Act, 1963 — Section 5

Citation : (1910) 12 BOMLR 886

Hon'ble Judges : Beamon, J

Bench : Single Bench

Judgement

Beaman, J.—I am strongly inclined to the view expressed by the Calcutta High Court in *Motee Chand Baboo v. Radha Madhub Chund Baboo* (1856) 2 S W.H. M. 34 that applications for review of judgment. cannot be entertained where there has been no contest, a(sic) where the plaintiff has obtained an ex parte decree. There a(sic) special provisions governing applications to have an ex parte decree set aside, and a special period of limitation; as there are other special provisions and a different period of limitation for applications for review of judgment. Section 5 of the Limitation Act enables a Court to extend the period allowed for making an application for review of judgment, but confers no such power in respect to an application to have an ex parte decree set aside. The law allows an ex parte decree to be set aside for two reasons only:—(1) Want of service, (2) Inability for a sufficient cause of the defendant to be present. The reasons for allowing a review of judgment are wholly different, although they include a general reason "for any sufficient cause" which it is contended may include the reasons upon which alone an ex parte decree can be set aside. In face of the two Allahabad decisions, one of the Full Bench, in *Bhup Kaur v. Muhammadi Begam* ILR (1883) All. 37 and *Ghansham Singh v. Lal Singh* ILR (1886) All. 61 it cannot be denied that there is authority for the proposition, that the reasons for granting the review of judgment may be extended so as to include the reasons ordinarily peculiar and confined to an application to have an ex parte decree set aside. I am very reluctant to adopt or lend any countenance to a view which

appears to me, speaking with all respect, opposed to the plain policy of the legislature. For what does the contention founded on that proposition come to? In the present case, admittedly this. The defendants complain that they were not served with summons, and, therefore, would be entitled as of right to have the ex parte decree set aside. But as they have not taken steps to make that appropriate application within time, they seek to evade the consequences of their neglect by bringing an admittedly inappropriate application for review of judgment upon the identical ground, which the law of limitation forbids them to take where the application is for setting aside the ex parte decree. And there is this inconvenience that, owing to this difficulty, most of the argument has been ? a confined to the legal technicality, while the substantial ground upon which the defendants ask for relief has not been much discussed. Where an application to have an ex parte decree is before the Court in proper form, the issue is sharply defined: Was there good service? If there was, was the defendant prevented by any sufficient cause from appealing? Here I have been told that there was no service, because the persons whom the plaintiff believed to be the defendants' agents and served were n(sic) in fact. That probably is so, but the point was almost first sight of in the legal arguments. Assuming that want of notice is a sufficient cause for reviewing an ex parte decree, I still think that the case would need to be very exceptional before I should allow a defendant to have recourse to this way of avoiding a bar of limitation. What is alleged to have happened in the present case, and is not I think seriously denied, is that the plaintiff served notice on Turner Morrison & Co., who were the defendants' agents for the particular contract. That contract had ended in the previous December, and the defendants deny that after that Turner Morrison & Co. were their agents in any sense, either special or general. Their regular agents are Messrs. Graham & Co. On the 24th March, five days before the ex parte decree was obtained, the defendants knew that a summons had been served upon their supposed agents, Turner Morison & Co. Possibly they could not in the time then at their disposal have taken any effective steps to hinder the plaintiff obtaining the ex parte decree which was granted on the 29th March. On the nth May the plaintiff served the defendants with the decree and demanding execution. If the defendants had then even written to their agents to move to have it set aside for want of service, they would have been in ample time, as the vacation did not end till the 10th June. But being Glasgow merchants it may fairly be conceded that they were ignorant of the provisions of the law in this country and might be excused for a little dilatoriys. Unfortunately the law allows no excuse. Within thirty days of becoming aware of the existence of an ex parte decree, the party aggrieved must make his application, or submit to the decree. It is contended that the defendants could not have done what was needful in time, as they had no Bombay Attorneys, and did not know how to proceed; that they would have been required to make affidavits in support of an application to have the ex parte decree set aside, and so forth. I do not think that there is anything really conclusive in this line of argument. It might well be that where owing to rare circumstances a defendant against whom an ex parte decree has been obtained

cannot apply to have it set aside within thirty days, as to take an extreme case, where he receives information of the decree, in a foreign port, and is shipwrecked before he can communicate with local lawyers, the Court might follow the principle of the Allahabad Full Bench case and hold that there was a sufficient cause, notwithstanding the express prohibition C Limitation Act, for reviewing the ex parte decree. But the defendants certainly could, had they been energetic, have made their application in time, and as to the affidavits I do not know why counsel should not have moved to have the decree set aside and, in the special circumstances, have obtained an adjournment for the production of the required affidavits. In fact the defendants let time pass while they communicated with their present local attorneys, with the result that not only is the application for having the ex parte decree set aside, but also the application for review, long beyond time. Now if these facts had occurred in the case of an Indian firm, I should have had no hesitation in holding that the defendants were not entitled to come in under the review section to evade the consequences of having been too dilatory to obtain the advantage of the section providing for setting aside an ex parte decree. Even as it is, I feel, and have felt, the gravest doubt whether I ought to allow this application. I do not stickle much over extending the time prescribed for presenting an application for review. Were that all the delay might easily be condoned. It is the other point which raises the real difficulty. For, if we adopt the principle generally and without qualification, it will come to this that any party to an ex parte decree, who has not followed the right procedure, may still obtain relief by following the wrong procedure. A case would need to be very strong to warrant any Court, in my opinion, stretching the general words of the review section so far, and I may add that the case with which the Allahabad Full Bench had to deal was a singular case, the facts of which doubtless weighed heavily with their Lordships and disposed them to take a most liberal view of their powers. What really emerges out of the considerations, which have been suggested to me on both sides, is that the defendants have had an ex parte decree passed against them, without ever having been, served with notice, and, therefore, without ever having had an opportunity of defending themselves. Had they come in with an application to have that ex parte decree set aside on that ground, there can be no doubt that the Court would have granted it unhesitatingly. Ought they to be deprived of this relief owing to the fact that, being in Glasgow, and presumably unacquainted with our law of procedure, they have been in fault, and so have allowed the time, within which they ought to have made that application, to elapse? For, in spite of its new form, this is in substance the same application, and the only ground upon which it could be granted is the ground on which an application to have the ex parte decree set aside would have been J granted. And this way of putting the case raises again the question of principle, whether, when a party is barred in respect of an application to have an ex parte decree set aside, however strong his case might otherwise have been, he can elude that bar and get over the want of power in the Court to enlarge the period, by taking advantage of another provision of the law directed to the attainment of other purposes ? For my own

part I doubt still. But I may cover myself under the authority of the Allahabad Full Bench, while with respect reserving my agreement with it, and say that a party is so entitled. Then I think there can be little question, on the merits, that the defendants ought to have an opportunity of being heard. It was said for the plaintiff that even up to the present, the defendants have not disclosed any case on the merits. I have nothing to do with that at this stage. His counsel declares that while it may be correct to say that no such definite disclosure has been made, the defendants really have a very strong case on the merits. But I have frequently had occasion to point out that in dealing with applications to have an ex parte decree set aside-and this is in reality such an application though it has been forced into another form-the Court has nothing whatever to do with the merits. If the defendants have not been served, or having been served have been prevented by an adequate cause from appearing to defend themselves, then the Court must set aside the ex parte decree without any regard to the alleged merits. And the same I suppose, if we concede that an application for review, may, in special circumstances, be based upon the same ground. I shall therefore allow this application for review of judgment, and hold that there was no service on the defendants, that they were therefore precluded from laying their defence before the Court, and consequently that the decree ought to be set aside and the case put down for re-hearing on a proper array of the parties interested. Costs of this to be costs in the cause.