

(2010) 08 MP CK 0058

In the Madhya Pradesh High Court

Case No : Civil Revision No's. 350, 351, 353 and 356 of 2009

Shri Jagat Guru Shankrachariya

APPELLANT

Vs

Siddhu Engineering Works and Others

RESPONDENT

Date of Decision : 13-08-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 7, Order 5 Rule 20, Order 9 Rule 13, Order 9 Rule 7, 115
Constitution of India, 1950 — Article 227
Limitation (Amendment) Act, 1908 — Article 164
Limitation Act, 1963 — Article 123, 12, 12(2), 12(3), 12(4)
Madhya Pradesh/Chhattisgarh Accommodation Control Act, 1961 — Section 13(6)

Citation : (2010) 4 MPHT 334 : (2010) 4 MPLJ 635 : (2011) 2 RCR(Civil) 392 : (2011) 1 RCR(Rent) 35

Hon'ble Judges : K.K. Lahoti, J;A.K. Mishra, J

Bench : Division Bench

Judgement

Arun Mishra, J.

The reference has been made by learned Single Judge vide order dated 26-3-2010. Following question has been referred for consideration:

Whether the view of the learned Single Bench of this Court in the matter of Mohan @ Munna Pachauri (supra), that the period spent for obtaining certified copy of ex parte decree cannot be excluded for calculating the limitation under Article 123 of the Limitation Act is the correct view or the earlier contrary view of the Single Bench of this Court in the matter of Shakuntala Singh (supra) is correct?

The petitioner has filed an eviction suit against respondents/defendants. In the said Civil Suit, summons were duly served upon the defendants. Defendants appeared before the Trial Court, written statement was also filed. As the rent was not deposited, an application u/s 13(6) of M.P. Accommodation Control Act, 1961 was filed. The Trial Court ultimately ordered striking-off the defence of defendants/tenants. Thereafter, defendants were proceeded ex parte. The Civil

Suit was filed in the year 2003. The defendants again appeared in the Civil Suit on 26-8-2006 and filed an application under Order 9 Rule 7 for setting aside the ex parte order. The said application was dismissed as not maintainable as the case was already closed for judgment. On 12-9-2006, ex parte judgment and decree was passed in favour of the petitioner, even then application was not filed within 30 days to set aside ex parte judgment and decree. It is submitted that on 16-11-2006 application was filed under Order 9 Rule 13, CPC for setting aside ex parte decree without filing any application seeking condonation of delay. The plea was taken that the defendants had applied for certified copy of the judgment and decree, which was supplied on 1-11-2006, therefore, the application filed under Order 9 Rule 13, CPC was within the period of limitation. The petitioner filed reply to the application contending that application was barred by limitation.

The Trial Court vide order dated 23-4-2007 rejected the application filed under Order 9 Rule 13 of CPC relying upon Article 123 of Limitation Act, which specifically provides that time runs from the date of decree and in case summons were not duly served, from the date the applicant had knowledge of the decree. Aggrieved by the order passed by the Trial Court rejecting application under Order 9 Rule 13, the judgment debtors preferred Miscellaneous Appeals before the District Judge, Jabalpur. The District Judge, Jabalpur opined that application filed under Order 9 Rule 13 was within a period of 30 days excluding the period of copying days and remanded the case to the Trial Court to decide the application on merits vide order dated 15-5-2007, hence Writ Petition Nos. 4994/2008, 4995/2008, 7664/2007 and 4993/2008 were filed before this Court.

The writ petitions were decided by common order dated 5-5-2008 by Single Bench of this Court. Single Bench of this Court held that the District Judge has not taken note of Article 123 of Limitation Act and effect of non-filing of the application u/s 5 of the Limitation Act. As summons were duly served, the application under Order 9 Rule 13 was required to be filed within 30 days from the date of decree. Aggrieved by order, Writ Appeal Nos. 704/2008, 705/2008, 706/2008 and 707/2008 were filed by judgment debtors before Division Bench of this Court. The Division Bench vide order dated 28-8-2008 set aside the order passed by Single Bench and directed the Single Bench to decide question of maintainability of writ petition under Article 227 of the Constitution of India or a revision is maintained u/s 115 of CPC. The Division Bench has also observed that in case decision of Shakuntala Singh v. Basant Kumar Thakur and Ors. 2003 (3) MPLJ 414, is not in accordance with law or can be disapproved or can be distinguished then the Single Bench shall refer the matter to the Larger Bench. Thereafter, due to amendment made in the High Court rules, the petitions under Article 227 were heard by the Division Bench of this Court and the question of maintainability was decided vide order dated 9-10-2009 along with W.P. No. 8714/2007. It was held that revision lies against such an order, the writ petitions under Article 227 of the Constitution of India were not maintainable, they were ordered to be converted into revisions in the facts and circumstances of the case.

Thereafter, the Civil Revisions were registered. Matter came up for hearing before Single Bench, who has referred the aforesaid question to Larger Bench vide order dated 26-3-2010.

Ms. Neelam Goel, learned Counsel appearing for the petitioners has submitted that it is not the legal requirement to file certified copy of the judgment and decree along with the application under Order 9 Rule 13 of CPC. The time spent for obtaining the certified copy cannot be excluded u/s 12 of the Limitation Act. She has relied upon Article 123 of the Limitation Act that in such cases where summons have been served, appearance has been made, the period of the limitation is 30 days from the date of decree. She has also submitted that the case of Shakuntala Singh (supra), is different as in the said case service of summons itself was disputed. In the instant case, defendants/judgment debtors were duly served with the summons, they filed written statement, contested the suit for 3-4 years and only when their defence u/s 13(6) of M.P. Accommodation Control Act, 1961 had been struck-off, intentionally they absented and were proceeded ex parte. Once defence was struck off, they had nothing to defend in the case. The defendants were well aware of the ex parte proceedings. The defendants filed application under Order 9 Rule 7 of CPC before judgment was delivered. There was no justification to file application u/s 9 Rule 13, CPC belatedly. No application u/s 5 of the Limitation Act was filed. Thus decree cannot be set aside in the facts and circumstances of the case.

Shri R.K. Verma, learned Counsel appearing for respondents has submitted that the view taken by this Court in Shakuntala Singh (supra), is correct as certified copy was applied for after obtaining certified copy excluding the period spent for obtaining certified copy, application filed under Order 9 Rule 13 was within the period of limitation of 30 days, hence the reference be answered in favour of the respondents/judgment debtors.

The corresponding Article of Article 123 of Limitation Act, 1963 in the Limitation Act, 1908 was Article 164. Article 123 of the Limitation Act is quoted below:

Period of Time from which Description of application Limitation period begins to run 123. To set aside a decree Thirty days The date of the passed ex parte or to re-hear an decree or where the appeal decreed on heard ex summons or notice parte. was not duly served, when the applicant had knowledge of the decree. Explanation : - For the purpose of this article, substituted service under Rule 20 of Order V of the Code of Civil Procedure, 1908 shall not be deemed to be due service.

It is apparent from Article 123 of Limitation Act that the period of 30 days starts from the date of decree where the summons have been served and where summons or notices were not duly served, when the applicant had the knowledge of the decree, as also opined by various Courts in Mt. Bibi Rafiquan Vs. Gopi Mahton and Others, , Tara Sankar Ghose and Anr. v. Nasaruddi and Ors. AIR 1916 Cal 651, Manindra Chandra Datta v. Churamani Thapa and Ors. AIR

1949 Gau 5, Dr. Jagdish Prasad Vs. Satya Narain Singh and Others,

It has been laid down by a Division Bench of Calcutta High Court in Express Newspapers Ltd. Vs. Girdharilall Jhaharia and Others, , that period of limitation for setting aside an ex parte decree where defendants are duly served does not commence from the date of knowledge of decree. Similar is the view taken in International Cotton Traders, Tatabad, Coimbatore Vs. P. Narayanaswami,

The application under Order 9 Rule 13 has to be filed within 30 days of the date of decree as provided under Article 164 (Old) : Article 123 (New). The date of decree is not the date when the judge signs a decree but the date of judgment is to be the date of decree under Order 20 Rule 7 of CPC.

Section 12 of the Limitation Act is quoted below:

Exclusion of time in legal proceedings.- (1) In computing the period of limitation for any suit, appeal or application, the day from which such period is to be reckoned, shall be excluded.

(2) In computing the period of limitation for an appeal or an application for leave to appeal or for revision or for review of a judgment, the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be revised or reviewed shall be excluded.

(3) Where a decree or order is appealed from or sought to be revised or reviewed, or where an application is made for leave to appeal from a decree or order, the time requisite for obtaining a copy of the judgment shall also be excluded.

(4) In computing the period of limitation for an application to set aside an award, the time requisite for obtaining a copy of the award shall be excluded.

Explanation : - In computing under this section the time requisite for obtaining a copy of a decree or an order, any time taken by the Court to prepare the decree or order before an application for a copy thereof is made shall not be excluded.

Sub-section (2) of Section 12 of the Limitation Act provides that in computing the period of limitation; (i) for an appeal or an application, (ii) application for leave to appeal, (iii) for revision, (iv) for review of a judgment, the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be revised or reviewed shall be excluded. An application under Order 9 Rule 13 cannot be said to be one covered under the aforesaid provision Section 12(2). Sub-section (3) of Section 12 is also not applicable. As per Sub-section (4) of Section 12 in computing the period of limitation for an application to set aside an award, the time requisite for obtaining a copy of the award shall be excluded. It is not the case of award hence Section 12(4) is not attracted. Thus, in our opinion, Section 12 of the Limitation Act cannot be said to be attracted for exclusion of the period

spent for obtaining certified copy of the judgment and decree and to explain delay in filing application under Order 9 Rule 13 of CPC. Section 12(2) of the Limitation Act provides for exclusion of time requisite for obtaining certified copies in certain cases. Application under Order 9 Rule 13 is not mentioned therein. This Court in *Zaibunnisa v. Jamilur Rashad* 1964 MPLJ 116, has observed that the proposition that where under the Limitation Act the period of limitation runs from "the date of the decree", then it begins from the date of the judgment, irrespective of the fact when the decree was drawn up, does not admit of any doubt. In *Thacker Shivji Kumverji v. Bhatia Thacker Kalyanji Ratanshi* AIR 1952 Kachh 48, similar view has been taken. In *Arjuna Charan Patnaik Vs. Purnanand Patnaik and Another*, , it has been opined that Section 12 of the Limitation Act does not cover an application for setting aside a decree. There is, therefore, no question of exclusion of time spent in obtaining certified copy of judgment and decree in respect of application under Order 9 Rule 13. We do not find any ground to take a different view.

In *Shakuntala Singh* (supra), the Single Bench of this Court has correctly opined that while filing application under Order 9 Rule 13 to set aside ex parte decree, filing of certified copy of judgment and decree is not necessary. We find that there is no conflict of opinion in *Mohan @ Munna Pachauri v. Jagdish Chandra Dubey* ILR 2008 MP 1402 and *Shakuntala Singh* (supra), in proposition that certified copy is not required to be filed along with the application filed under Order 9 Rule 13 of CPC, hence the period spent in obtaining certified copy cannot be excluded u/s 12 of the Limitation Act.

In *Sri Lal Sah and Others Vs. Gulabchand Sah (Dead) by Lrs. and Others*, the Apex Court has held that 30 days" period of limitation under Article 123 of Limitation Act, 1963 starts from the date of decree or where the summons or notice was not served, from the date of knowledge of decree. The District Judge has opined in said case that the period of limitation has to be computed under the first part of limitation namely date of decree not from the date of knowledge. The High Court opined that the delay in filing application under Order 9 Rule 13 of CPC ought to have been condoned by the Trial Court even though there was no application for condonation of delay. The submission that the applicant had no knowledge of decree was negatived. It was held that it was not possible to hold that the ex parte decree, if allowed to stand, would occasion a failure of justice or cause irreparable injury to respondent No. 1. The order of the High Court was set aside.

In *Jijibhoy N. Surty v. T.S. Chettyar* AIR 1928 PC 103, Privy Council has observed thus:

If, indeed, it could be shown that in some particular class of cases there could be no object in obtaining the two documents an argument might be offered that no time could be requisite for obtaining something not requisite. But this is not so. The decree may be complicated, and it may be open to draw it up in two different ways, and the practitioner may well want to see its form before

attacking it by his memorandum of appeal. As to the judgment, no doubt, when the cases does not come from up country, the practitioner will have heard it delivered, but he may not carry all the points of a long judgment in his memory, and as Sir John Edge says, the Legislature may not wish him to hurry to make a decision till he has well considered it.

The aforesaid decision is with respect to filing of appeal where the decree may be complicated, and it may be open to draw it up in two different ways, and the legal practitioner may well want to see its form before attacking it by his memorandum of appeal. The decision is not in the context of application under Order 9 Rule 13 of CPC, but is in the context of appeal. A perusal of judgment and decree may be necessary for filing appeal on merits. For filing application under Order 9 Rule 13, CPC, perusal of judgment and decree is not necessary as grounds under Order 9 Rule 13, CPC are limited and confined to sufficiency of cause to set aside ex parte decree.

The decision of Apex Court in *Addl. Collector of Customs, Calcutta and Another Vs. Best and Co.*, is also in the context of appeal and review where provision of Section 12(2) of the Limitation Act is applicable and it has been observed that even if the rules of the Court might not require a copy to be annexed, however, if a party, intending to file an appeal, desires to examine the decree or judgment, the exclusion could be provided. Section 12 is applicable to appeal or review. Since instant case, is not the case of appeal/review, in our opinion, Section 12 of the Limitation Act has no application to the application filed under Order 9 Rule 13 of CPC.

Certain decisions have been referred to in *Javed Khan Vs. Avtar Singh*, , wherein the application for setting aside ex parte decree was not submitted within the period of 30 days from the date of ex parte decree. No interference was made in the facts of the case.

Reference has also been made to the decision of this Court in *Ramdas v. Smt. Amrita and Ors.* 2006 (1) MPIR 410 , where application for setting aside ex parte decree was entertained after several years without filing application u/s 5 of the Limitation Act so as to condone the delay. In our opinion, the view taken in *Ramdas* (supra), is correct. The reference has also been made to various decisions opining that the Court cannot condone the delay in the absence of filing application u/s 5 of the Limitation Act; in the case of *Mangaldoi Tea Co. Ltd. Vs. Md. Abdul Latif Munshi*, , *Sidheswar Sahu Vs. Arakhita Jena and Another*, , *M/s. Bhagwan Dass Bros. v. Ghulam Ahmed Dar and Ors.* AIR 1992 Delhi 22 and *Jibkant Jha Vs. Maharani Adhirani Shri Raj Lakshmi and Others*,

Now we come to the question, which has been referred to us by the learned Single Judge. The learned Single Judge has opined that in *Shakuntala Singh* (supra), the view taken is that if a party against whom ex parte judgment and decree is passed, has applied and has awaited till the certified copy is received from the Court and thereafter applied for setting aside the ex parte judgment

and decree, the application cannot be rejected merely on the ground of limitation. As a matter of fact while construing the dictum in Shakuntala Singh (supra), to the aforesaid effect, the ratio of decision in Shakuntala Singh (supra), that no certified copy is required to be filed along with the application under Order 9 Rule 13 has been ignored. In essence the decision is that certified copy is not necessary to be filed nor it has been held that there is exclusion of the period spent in obtaining certified copy of the order. The effect of finding is that Section 12 of Limitation Act is not applicable. In the peculiar facts of the said case as service of summons itself was disputed, the condonation of delay which was ordered was not interfered with by this Court. We find that in Mohan @ Munna Pachauri (supra), view has been taken that the provision of Section 12 of Limitation Act will not apply to the proceedings under Order 9 Rule 13 of CPC. We find no conflict in the said view expressed in Mohan @ Munna Pachauri (supra), with the opinion expressed in Shakuntala Singh (supra), on said proposition of law. As already explained by us Shakuntala Singh's case (supra), does not lay down that there has to be exclusion of the period spent in obtaining certified copy from the period of 30 days prescribed in first part of Article 123 of Limitation Act, which commences from the date of decree in case summons have been served of the suit. In the instant cases admittedly summons were served, written statement was filed, on striking out the defence, the defendants were proceeded ex parte of which they were aware as they filed application under Order 9 Rule 7 of CPC.

Coming to the question as to so called conflict in aforesaid decision in Shakuntala Singh (supra) and Mohan @ Munna Pachauri (supra), whether delay can be condoned or not; in case certified copy has been applied for, in our opinion, various aspects have to be considered including the effect of non-filing of the application u/s 5 of Limitation Act seeking condonation of delay. Overall conduct of the applicant has to be considered during the trial, circumstances in which he was proceeded ex parte. Mere filing of certified copy is not enough to condone the delay. These aspects on merits have to be considered by the Single Bench.

In view of the aforesaid discussion our answer to the question referred is that the view expressed in Mohan @ Munna Pachauri (supra), that the period spent for obtaining certified copy of the ex parte decree cannot be excluded for calculating the limitation under Article 123 of Limitation Act is correct view. In case summons were served limitation to file application under Order 9 Rule 13 is 30 days from the date of decree. In our opinion, in Shakuntala Singh (supra), also this Court has correctly opined that certified copy is not necessary to be filed along with application under Order 9 Rule 13. The decision with respect to condonation of delay depends upon the facts of each case. In Shakuntala Singh (supra), very service of summon was disputed, decision has to be read in that context. In our opinion, period spent for obtaining certified copy of the ex parte decree cannot be excluded u/s 12 of the Limitation Act for the purpose of filing application under Order 9 Rule 13 of CPC. Section 12 of the Limitation Act has no application to the proceedings under Order 9 Rule 13 of CPC.

In view of the aforesaid answer to the question, let matter be placed before the Single Bench for deciding the case in accordance with law.