

(2016) 05 AHC CK 0155

In the Allahabad High Court

Case No : Matters Under Article 227 No. 959 of 2016

Smt. Vinod Rani Lamba and another

APPELLANT

Vs

Babu Ram Yadav and 3 others

RESPONDENT

Date of Decision : 19-05-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13
Constitution of India, 1950 — Article 226

Citation : (2017) 121 ALR 442 : (2016) 2 ARC 616 : (2017) 135 RD 427

Hon'ble Judges : Ram Surat Ram (Maurya), J.

Bench : Single Bench

Advocate : Suresh Kumar Gupta, Advocate, for the Appellant; Shailendra Singh, R.K. Pandey, Advocates, for the Respondent

Final Decision : Allowed

Judgement

Ram Surat Ram (Maurya), J.— Heard Sri Suresh Kumar Gupta for the petitioners and Sri R.K. Pandey for the respondents.

2. This petition has been filed for setting aside the order of Additional Civil Judge (JD), Kanpur Nagar dated 28.8.2015, passed in Misc. Case No. 4/74/14, by which he has dismissed the application under Order 9, Rule 13 CPC, filed by the petitioners and the order of Additional District Judge dated 19.1.2016, dismissing the revision of the petitioners against the aforesaid order.

3. Babu Ram Yadav and others (respondents-1 and 2) filed a suit (registered as O.S. NO. 813/2012) for cancellation of sale deed dated 2.4.1964. It is alleged that the defendants avoided service, therefore, the court got the summons published in the newspaper and in spite of publication, the defendants did not appear, as such, the court proceeded ex parte by order dated 9.4.2013 and after recording ex parte evidence and hearing the plaintiffs, the suit was decreed by ex parte judgment dated 30.11.2013.

4. Smt. Vinod Rani Lamba and Prashant Lamba (the petitioners) filed an

application under Order 9, Rule 13 CPC, along with an affidavit for setting aside the ex parte decree dated 30.11.2013 on 16.1.2014. The application was contested by the plaintiff-respondents and they have stated that in spite of knowledge of the suit, they deliberately did not contest the suit and allowed to proceed the suit ex parte, therefore, they are not entitled for setting aside the ex parte decree. The application was heard by Additional Civil Judge (JD), who by order dated 28.8.2015 found that the defendants have failed to prove that summons were not served upon them, nor they could know about the publication of summons in the newspaper. Thus, the presumption of service could not be rebutted by the defendants. On this finding, the application has been dismissed. The petitioner challenged the aforesaid order in appeal (registered as Misc. Civil Appeal No. 95/2015), which was heard by Additional District Judge, who by order dated 19.1.2016, upheld the finding and dismissed the appeal. Hence, this petition has been filed.

5. I have considered the arguments of counsel for the parties and examined the record. It is admitted that there was no personal service of the summons and service of summons has been effected through publication, which is a substituted service. Within the meaning of Explanation to Article 123 of Limitation Act, it is not a due service. On the basis of publication, the presumption regarding service was made. A Bench of three Hon''ble Judges of Supreme Court in *Puwada Venkateswara Rao v. Chidamana Venkata Ramana*, AIR 1976 SC 869 had held that the presumption stood rebutted on its denial. In this case, the petitioner has denied service of summons or knowledge of the suit, thus, on denial, the presumption stood rebutted and burden shifted upon the plaintiff-respondents to prove that summons were served upon them, but the plaintiff-respondents could not lead any evidence in this respect. This judgment has been followed subsequently in *A. Rama Rao v. Raghunath Patnaik*, AIR 2007 SC 3036, *State of West Bengal v. E.I.T.A India Ltd.*, AIR 2003 SC 4126, *V.S. Krishnan & Ors v. M/S Westfort Hi-Tech Hospital Ltd.*, (2008) 3 SCC 363 and *M.S. Madhusoodhanan and Anr. v. Kerala Kaumudi Pvt. Ltd. and Ors*, (2004) 9 SCC 204. The counsel for the respondents relied upon the judgment of this court in *Mohd. Sadab v. Naseem Ahmad*, 2015 (1) CLJ 785, in which, it has been held that the presumption could not be rebutted on denial. The law laid down in this case is contrary to the law laid down by Supreme Court in the aforementioned case, which has been subsequently followed in aforementioned four cases. This court respectfully disagrees to follow the judgment of Hon''ble Single Judge.

6. Further, the counsel for the respondents submitted that the ex parte judgment was passed on 30.11.2013, while the application under Order 9, Rule 13 CPC was moved on 16.1.2014. The period for filing the application under Order 9, Rule 13 CPC, as provided under Article 123 of the Limitation Act is 30 days. Thus, the application was beyond 30 days, as such, in view of the mandate of Section 3 of Limitation Act, the application was liable to be dismissed as time barred. Thus, no relief can be granted to the petitioners.

7. I have considered the arguments of counsel for the respondent in this respect. In the affidavit filed in support of the application under Order 9, Rule 13 CPC, it is stated that from the date of knowledge of the ex parte decree, which came in notice of the defendant on 4.1.2014, the application under Order 9, Rule 13 CPC was filed on 16.1.2014. Article 123 of Limitation Act provides that 30 days limitation will run from the date of decree or where the summon or notice was not duly served, when the applicant had knowledge of the decree. In the present case, later part will apply as the summons were not duly served upon the defendants, thus, the limitation of 30 days will run from the date of knowledge of the decree. As stated in the affidavit, the date of knowledge is 4.1.2014 and the application was filed on 16.1.2014, as such, it is well within time.

8. In the result, the petition succeeds and is allowed. The orders of Additional Civil Judge (JD), Kanpur Nagar dated 28.8.2015 as well as Additional District Judge dated 19.1.2016, are set aside. The ex parte decree passed in O.S. No. 813/2012 dated 30.11.2013 is also set aside. The suit is restored to its original number.