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LETTERS PATENT APPEAL

Before Bhandari, C.J. and Khosla, J.

SODHI HARNAM SINGH,—*Appellant,*

versus

SODHI MOHINDER SINGH,—*Respondent.*

Letters Patent Appeal No. 13 of 1952.

1953

5th August

Limitation Act (IX of 1908)—Section 5 and Article 164—Code of Civil Procedure (Act V of 1908)—Order IX Rule 13—Expression "Summons not duly served" in Article 164 of the Limitation Act and Order IX, Rule 13 of Civil Procedure Code, meaning of—Whether means only the summons issued in the first instance and not by the court to which the suit is transferred—Provisions of section 5 of Limitation Act, whether applicable to applications under Order IX, Rule 13, Civil Procedure Code.

H. S. sued for recovery of Rs 8,500 in the Court of Senior Sub-Judge, Ferozepur. Suit transferred to Mr. K. S. Gambhir, Subordinate Judge. H. S. applied under section 24, Civil Procedure Code for transfer of the suit to another Court. Suit transferred by District Judge to Subordinate Judge, Fazilka at Muktsar and parties directed to appear before Subordinate Judge, Muktsar on 18th March 1950. Defendant did not appear on 18th March 1950 and suit heard ex parte *on 10th April 1950 and decreed. Defendant Judgment Debtor applied on 9th June 1950 for setting aside* ex parte *decree under order IX rule 13, Civil Procedure Code. The application was rejected by the Trial Judge as barred by time. On appeal to the High Court the Single Judge allowed the appeal and held the application to be within time. The plaintiff Decree Holder went up in appeal under clause 10 of the Letters Patent.*

Held, that the application under order IX rule 13, having been made after 30 days of the decree was barred by time under Article 164 of the Limitation Act. The wording of the article refers to summons in the first instance and not to notices issued to parties subsequently whether such notices are necessary under law or not.

Held further, that the provisions of section 5 of the Limitation Act do not apply to applications under order IX, Rule 13 of the Code of Civil Procedure

Letters Patent Appeal under clause 10 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Kapur, passed in F.A.O. No. 101 of 1951 on 7th May 1952, reversing that of Shri Sewa Singh, Sub-Judge, 1st Class, Muktsar, dated the 19th May 1951, and setting aside the ex parte *decree and ordering that appellant should pay Rs 200 within six weeks from 7th May 1952, to Mr. Puri or to deposit in this Court failing which the appeal shall stand dismissed with costs, and further directing the parties to appear in the court of Senior Sub-Judge, Ferozepore on 14th July 1952.*

S. L. PURI, for Appellant.

M. L. SETHI, for Respondent.

JUDGMENT

Khosla, J.

KHOSLA, J. This appeal under clause 10 of the Letters Patent arises out of an application to set aside an *ex parte* decree passed in favour of Harnam Singh appellant. The facts briefly are that Harnam Singh brought a suit for the recovery of Rs 8,500 in the Court of the Senior Subordinate Judge, Ferozepore. The suit was transferred to the court of Mr. Gambhir. Subordinate Judge and then the appellant Sodhi Harnam Singh applied under section 24 of the Civil Procedure Code for the transfer of the suit to another court. This application was allowed by the District Judge who, on 18th February 1950. ordered that the case be transferred to the Court of Subordinate Judge. Fazilka at Muktsar. The Subordinate Judge at Fazilka used to visit Muktsar every month. Parties were also directed to appear before the Subordinate Judge, Muktsar on 18th March 1950. On that day the case was taken up by

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the Subordinate Judge at Muktsar but the defendant did not appear. The case was then heard *ex parte* and some evidence was taken on 10th April 1950. On the same day an *ex parte* decree was passed in favour of the plaintiff. On 9th June, 1950, an application was made by the defendant-judgment-debtor for setting aside the *ex parte* decree under Order IX, Rule 13, Civil Procedure Code. This application was dismissed by the trial Judge on the ground that it was barred by time under the provisions of Article 164 of the Limitation Act. Against that order an appeal was brought to this Court and Kapur J. took the view that the application was not barred by time. He based this decision on the fact that the District Judge on 18th February 1950, had not informed the parties that they were to appear in the Court of the Subordinate Judge, Muktsar on 18th March 1950, and the absence of the defendant was therefore due to his ignorance of the date of hearing at Muktsar. He further took the view that the expression 'summons' used in Article 164 included notices issued to the parties subsequently and that its meaning was not confined to the first summons issued in the case.

Against this decision of Kapur J. the present appeal has been preferred.

There are two points for our decision. The first is a question of fact, namely whether the District Judge, while passing orders transferring the case under section 24 of the Civil Procedure Code, informed the parties that they had to appear in the Court of Subordinate Judge at Muktsar on 18th March 1950. The second point is whether the application is barred by time under the provisions of Article 164.

On the question of fact the learned Judge appears to have taken the view that the order of the District Judge dated the 18th February 1950, was not made on that date and the parties were not informed of it. I find it difficult to accept this view since the order says—"Parties are directed to

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appear before the Subordinate Judge, Muktsar, on 18th March 1950". This is a categorical statement to the effect that parties had been directed and informed. This sentence was written separately on the reverse of the page on which the order transferring the case was typed and signed, but I have no doubt that this order was also made at the same time. It was added subsequently because the District Judge in the original instance forgot to include it in the main order. Parties were present on that date and usually in such cases they ask the Court to fix a date for appearance in the Lower Court, but whether they made a specific request to this effect or not, I have very little doubt that parties were told to appear at Muktsar on 18th March 1950. The correctness of the record was deposed to by the appellant Harnam Singh himself who stated that the parties were informed of the date on which they had to appear at Muktsar and at that time Dev Raj, the *Mukhtar* of the defendant, was present. It is significant that the *Mukhtar* did not choose to appear in the witness-box. The plaintiff's counsel appeared at Muktsar on the date fixed and he, therefore, knew of the date. I find it difficult to believe that the defendant was ignorant of this date. I, therefore, hold that parties were informed of the date on which they had to appear in Court of Muktsar.

With regard to the question of limitation, Article 164 of the Limitation Act, provides that an application to set aside an *ex parte* decree must be made by the defendant within thirty days of the date of the decree, or, where the summons was not duly served, the date when he came to know of the decree. The only question for determination in this case is what is the *terminus a quo* for computing the period of limitation. Kapur J. has taken the view that summons does not mean summons issued in the first instance and that it means also notices sent by the Court to which a suit is transferred. In this view of the matter Kapur J. held that the application was within time because the summons or the notices were never sent by the Subordinate Judge, Muktsar to the

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parties. It is, however, contended by Mr. Shambu Lal Puri that summons in this case were served on the defendant in the original instance and therefore the application should have been made within thirty days of the date of the decree.

An application to set aside an *ex parte* decree is made under Order IX, Rule 13, and in that Rule the expression used is "summons was not duly served". Courts have taken the view that this means the service of the first summons. There are three decisions of the Lahore High Court in which the word 'summons' in Article 164 of the Limitation Act was taken to mean summons in the first instance. The first of these is *Mt. Lal Devi and another* v. *Amar Nath* (1), in which Chevis J. took the view that an application to set aside an *ex parte* decree must be made within thirty days of the decree. In that case defendant had not received notices of an adjourned hearing and Chevis J. observed—

> "The words in Article 164 'where the summons was not duly served' seem to me to refer to the summons given for the first hearing of the suit, and I agree with Mr. Rustomjee: see his book on Limitation, Edition 2, page 546 that where, as in the present case, there has been due service of such summons, the mere fact that the defendant has not received notice of an adjourned hearing will not cause limitation to run from the date on which the defendant becomes aware of the decree having been passed."

The second case is *Surjit Singh* v. *Lieut. Capt. C. J. Torrie* (2). In this case Moti Sagar J., referred to the decision of Chevis J. cited above, and following it, held that the word 'summons' in Article 164 means summons in the first instance. The third decision *Sham Sunder-Khushi Ram* v. *Devi Ditta Mal and another* (3) is even more in point. In this

(1) A.I.R. 1920 Lah. 261
(2) A.I.R. 1924 Lah. 666
(3) A.I.R. 1932 Lah. 539

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case a suit originally pending in one Court was transferred to another Court. Notices were sent by the second Court and service of the notices was effected under Order V, Rule 20, Civil Procedure Code. The defendant failed to appear and an *ex parte* decree was passed. The application to set aside this *ex parte* decree was made more than thirty days after the date of the decree. Bhide J. held that the application was barred by time. He referred to the two cases cited above and observed—

> "To me also this seems to be the correct interpretation. The intention apparently is to give an extended period of limitation in cases where the defendant has no knowledge at all of the suit. But when he has knowledge of the suit, the mere fact that he did not get the due notice of a subsequent hearing can hardly be considered to be a ground for extension of the period. The words 'the summons' are significant."

The learned Judge went on to say—

> "If the intention was to allow an extended period in any case where a notice of the date of hearing is not duly served during the course of the suit, the wording would have been, I think, different. In this case the suit was no doubt transferred to another Court, but such a transfer has not the effect of starting proceedings *de novo*. The suit is merely continued from the stage it had reached in the first Court. Following the interpretation accepted in the two rulings cited above, I hold that the learned Subordinate Judge had no jurisdiction to set aside the decree merely on the ground that the notice after the transfer was not duly served."

With great respect, I agree with these observations of Bhide J.

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I have already observed above that a similar expression in Order IX, Rule 13, Civil Procedure Code, has been interpreted as meaning service of summons in the first instance. This was the view taken in *Syed Shah Hamid Hussain* v. *Chairman of Patna Municipality* (1). There is one further argument which can assist us in interpreting the wording of Article 164. It is no doubt that in some cases extreme hardship may result if summons means summons in the first instance only, for one can imagine cases in which through no fault of the defendant an *ex parte* decree is passed to his complete ignorance. There may even be a case in which in spite of vigilance on his part he may not know that an *ex parte* decree has been passed, and in such cases it may be impossible for him to make an application under Order IX, Rule 13, Civil Procedure Code, within thirty days of the passing of the decree. The provisions of section 5 of Limitation Act do not apply to applications under Order IX, Rule 13, and so the Courts cannot grant any indulgence to a defendant who has suffered a hardship of this nature. This was realized by some of the High Courts in India and at least three of the High Courts, namely, Madras, Bombay and Nagpur have passed special rules under section 122 of the Civil Procedure Code extending the provisions of section 5 of the Limitation Act to applications made under Order IX, Rule 13, Civil Procedure Code.

In the Nagpur High Court a proviso has been added to Rule 13 in the following terms—

> "Provided also that no such decree shall be set aside merely on the ground of irregularity in service of summons, if the Court is satisfied that the defendant knew, or but for his wilful conduct would have known of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim."

This proviso clearly shows that the Nagpur High Court intended to limit the scope of Order IX, rule 13, Civil Procedure Code, in case of non-service of

(1) 15 I.C. 548-49

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summons in the first instance. In case summons had been served hardship was to be avoided by extending the provisions of section 5 of the Limitation Act to Article 164. A defendant could thus make an application more than thirty days after the passing of the *ex parte* decree against him even if he had been served in the first instance provided he could show that there was good ground for the delay occasioned in coming to Court.

There is only one case in which a slightly contrary view appears to have been taken. This was *Raghbir Brothers through Sadhoo Ram* v. *Daulat Ram* (1). In that case a suit was stayed under section 10 of the Civil Procedure Code and no notice of the resumed hearing was given to the parties. An *ex parte* decree was passed and the defendant then applied to have the decree set aside. Scott-Smith, J., took the view that since no summons was sent to the defendant when the case was restarted he was not bound to make an application within thirty days of the *ex parte* decree. Scott-Smith J. appears to have taken the view that when the suit was restarted it was a new suit.

It seems to me therefore that the wording of Article 164 refers to summons issued in the first instance and not to notices issued to parties subsequently whether such notices are necessary under law or not. This was the view taken by three Judges of the Lahore High Court in the three cases mentioned above and this is the view which appears to have moved the Madras, Bombay and Nagpur High Courts to frame a rule extending the provisions of section 5 of Limitation Act to an application of this type. It may be that there is a lacuna in the law but since the intention of the legislature as expressed in the statute is clear we must give effect to it. It is not the function of this Court to add to the law and we must confine ourselves to interpreting the law as it exists. Future hardship on parties can be avoided by adopting the course followed by some of the other High Courts. This appeal must be allowed and I

(1) 36 I.C. 32

would allow it with costs The application to set aside the *ex parte* decree is accordingly dismissed with costs throughout.

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BHANDARI, C. J. I agree

[Editor's Note: Since this judgment was delivered the Punjab High Court has made the following rule:—

"Order IX, Rule 13,

Rule 13 of Order IX shall be renumbered as rule 13(1) and the following added as sub-rule (2), namely:

"(2) The provisions of section 5 of the Indian Limitation Act 1908 (IX of 1908) shall apply to applications under sub-rule (1)."]