Pannalal

Vs

Murarilal

Civil Appeal No. 866 of 1964

(V. Bhargava, K. N. Wanchoo, R. S. Bachawat JJ)

27.02.1967

JUDGMENT

BACHAWAT, J. –

This appeal incidentally raises a question of interpretation of article 164 of the Indian Limitation Act, 1908. The respondent instituted two suits against the appellant in the court of the First Civil Judge, Kanpur. Suit No. 25 of 1958 was for the recovery of moneys due on a mortgage for Rs. 50,000. Suit No. 22 of 1958 was to recover a sum of Rs. 8,000 due on a ruqqa. On May 15, 1958, both the suits were decreed ex-parte. The appellant filed an application to set aside the ex-parte decree passed in Suit No. 22 of 1958. This application was numbered as miscellaneous case No. 104 of 1958. On August 16, 1958, the First Civil Judge, Kanpur, passed an order setting aside this ex-parte decree on certain conditions. The order sheet in O.S. No. 22 of 1958, Misc. Case No. 104 of 1958 on August 16, 1958 stated :

> "Heard parties counsel, accept the applicant's affidavit and hold that due to non-service applicant was prevented from being present. Allowed on condition of payment of Rs. 150 - as costs within a month and on condition that allotment shall continue.
>
> # Sd/- K. N. Goyal 16-8-58##
>
> Applicant is hereby informed of connected decree of 25 of 1958 as well.
>
> # Sd/- K. N. Goyal 16/8".##

An appeal by the appellant from this order was dismissed on September 25, 1958. On February 5, 1959, an advocate employed by the appellant to file a civil revision petition against the appellant order, obtained a certified copy of the order dated August 16, 1958. On February 24, 1959, a civil revision petition was filed by the appellant against the appellate order. On April 16, 1959, the appellant filed an application in the court of the First Civil Judge, Kanpur, under O.9, rule 13, C.P.C., for the setting aside of the ex-parte decree passed in Suit No. 25 of 1958. The Civil Judge dismissed the application. An appeal from this order filed by the appellant was dismissed by the High Court. Both the courts held that the summons in Suit No. 25 of 1958 was not duly served on the appellant but as more than 30 days had expired after the appellant had knowledge of the ex-parte decree, the application was barred by limitation under article 164 of the Indian Limitation Act, 1908. The appellant now appeals to this Court by special leave.

Under O.9, rule 13, C.P.C., a decree passed ex-parte against a defendant is liable to be set aside if the summons was not duly served or if the defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing. If the summons is not duly served, the defendant suffers an injury and he is entitled ex-debito justitiae to an order setting aside the ex-parte decree provided he applies to the court within the prescribed period of limitation. Under article 164 of the Indian Limitation Act, 1908, the period of limitation for an application by a defendant for an order to set aside a decree passed ex-parte was 30 days from "the date of the decree or when the summons was not duly served, when the applicant had knowledge of the decree". The onus is on the defendant to show that the application is within time and that he had knowledge of the decree within 30 days of the application. If the defendant produces some evidence to show that the application is within time, it is for the plaintiff to rebut this evidence and to establish satisfactorily that the defendant had knowledge of the decree more than 30 days before the date of the application.

In Pundlick Rowji v. Vasantrao Madhavrao (11 B.L.R. 1296), Davar J., held that the expression "knowledge of the decree" in article 164 means knowledge not of a decree but of the particular decree which is sought to be set aside, a certain and clear perception of the fact that the particular decree had been passed against him. On the facts of that case, Davar, J., held that a notice to the defendant that a decree had been passed against him in the High Court Suit No. 411 of 1909 in favour of one Pundlick Rowji with whom he had no dealings was not sufficient to impute to him clear knowledge of the decree in the absence of any information that the decree had been passed in favour of Pundlick Rowji as the assignee of a promissory note which he had executed in favour of another party. This case was followed by the Calcutta High Court in Kumud Nath Roy Chowdhury v. Jotindra Nath Chowdhury (I.L.R. 38 Cal. 394, 403). In Bapurao Sitaram Karmarkar v. Sadbu Bhiva Gholap (I.L.R. 47 Bom. 485), the Bombay High Court held that the evidence of two persons who had been asked by the plaintiff to tell the defendant about the decree and to settle the matter was not sufficient to impose knowledge of the decree on the defendant within the meaning of article 164. Macleod, C.J. said :

> "We think the words of the article mean something more than mere knowledge that a decree had been passed in some suit in some Court against the applicant. We think that it means that the applicant must have knowledge not merely that a decree has been passed by some Court against him, but that a particular decree has been passed against him in a particular Court in favour of a particular person for a particular sum. A judgment-debtor is not in such a favourable position as he used to be when he had thirty days from the time when execution was levied against him. But we do not think that the Legislature meant to go to the other extreme by laying down that time began to run from the time the judgment-debtor might have received some vague information that a decree had been passed against him".

This decision was followed in Batulan v. S. K. Dwivedi (I.L.R. 33 Pat. 1025, 1050-8) and other cases. We agree that the expression "knowledge of the decree" in article 164 means knowledge of the particular decree which is sought to be set aside. When the summons was not duly served, limitation under article 164 does not start running against defendant because he has received some vague information that some decree has been passed against him. It is a question of fact in each case whether the information conveyed to the defendant is sufficient to impute to him knowledge of the decree within the meaning of article 164. The test of the sufficiency is not what the information would mean to a stranger, but what it meant to the defendant in the light of his previous dealings with the plaintiff and the facts and circumstances known to him. If from the information conveyed to him, the defendant has knowledge of the decree sought to be set aside, time begins to run against

him under article 164. It is not necessary that a copy of the decree should be served on the defendant. It is sufficient that the defendant has knowledge of the material facts concerning the decree, so that he has a clear perception of the injury suffered by him and can take effective steps to set aside the decree.

In this case, in his application for setting aside the ex-parte decree, the appellant stated that he got the information of the passing of the ex-parte decree in suit No. 25 of 1958 for the first time from the respondent on April 13, 1959. It has been shown conclusively that this statement is false. The respondent filed an affidavit stating that the appellant was directly informed of the passing of this ex-parte decree by the First Civil Judge on August 16, 1958. This statement was not denied by the appellant. The courts below concurrently found that the appellant was personally present in the court of the First Civil Judge on August 16, 1958 when the learned judge informed him that an ex-parte decree had been passed against him in Suit No. 25 of 1958. The appellant was informed that suits Nos. 22 and 25 of 1958 were connected suits. The appellant knew that he had dealings with the respondent in respect of a ruqqa and a mortgage. He knew that the suit No. 22 of 1958 was filed on the ruqqa. From the information conveyed to him by the Civil Judge on August 16, 1958, it must have been clear to appellant that an ex-parte decree had been passed against him in favour of the respondent in suit No. 25 of 1958 on the basis of the mortgage. The appellant had thus on August 16, 1958 clear knowledge of the decree passed against him in suit No. 25 of 1958 which he now seeks to set aside. Time began to run against him from August 16, 1958 under article 164 of the Indian Limitation Act, 1908. The application filed by him on April 16, 1959 was, therefore, clearly barred by limitation and was rightly dismissed by the courts below.

In the result, the appeal is dismissed with costs.

Appeal dismissed.

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