

Gauhati University

Vs

Niharlal Bhattacharjee

Civil Appeal No. 10246 of 1995

(K. Ramaswamy, B. L. Hansaria JJ)

03.11.1995

ORDER

1. Leave granted.

2. The appellant-University was impleaded as a party-defendant to the Title Suit No. 61 of 1990 on the file of Munsif No. (1), District Karimganj in Assam. The suit was posted for appearance on 29-5-1990 but the summons was served on the appellant on 28-5-1990. He sent a letter to the court seeking adjournment. Though the case was adjourned to 19-7-1990, the adjourned date was not intimated to the University. In consequence, the University did not enter appearance and the suit was ultimately decided ex parte. The appellant filed an application under Order 9 Rule 13 CPC to set aside the ex parte decree. The trial court held that it was barred by limitation under Article 123 of the Schedule to the Limitation Act, 1963. On appeal, the High Court confirmed the order. Thus, this appeal by special leave.

3. Column 3 envisages that limitation would run from the date of the decree, or where the summons or notice was not duly served, when the applicant had knowledge of the decree. The question, therefore, is whether the appellant has been duly served.

4. Order 5 Rule 6 CPC provides that :

"6. Fixing day for appearance of defendant. - The day for the appearance of the defendant shall be fixed with reference to the current business of the Court, the place of residence of the defendant and the time necessary for the service of the summons; and the day shall be so fixed as to allow the defendant sufficient time to enable him to appear and answer on such day."

Order 9 Rule 6 speaks of due service.

"6. Procedure when only plaintiff appears. - (1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then -

(a) When summons duly served. - If it is proved that the summons was duly served, the Court may make an order that the suit be heard ex parte;

(b) When summons not duly served. - If it is not proved that the summons was duly served, the Court shall direct a second summons to be issued and served on the defendant;

(c) When summons served but not in due time. - If it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant."

5. It would thus be seen that when the summons is proved to be duly served, then the limitation begins to run under Article 123 from the date of decree. But when the summons, though served, but the defendant does not have due time, clause (c) Rule 6 of Order 9, envisages further notice to be given, fixing a future date and the court shall direct notice of such date to be given to the defendant. In this case, admittedly, no such step had been taken.

6. It is seen that though notice was served on the appellant on 28-5-1990 and the date fixed for appearance was 29-5-1990, there was no time much less sufficient, to reach the court for appearance on that date. While adjourning the suit to 19-7-1990, the said date was not communicated to the appellant, as envisaged in clause (c) of Rule 6 of Order 9. Thus, the summons was not duly served. The limitation began to run only when the appellant had knowledge of the ex parte decree. From the date of the knowledge, admittedly, the application was filed within 30 days. The courts below had not adverted to this aspect from this perspective.

7. The appeal is accordingly allowed. The ex parte decree is set aside. The matter is remitted to the trial court. The appellant shall appear on 4-12-1995 before the trial court which would take such steps as are needed for filing the written statement etc. No costs.