CALCUTTA HIGH COURT

Kumud Nath Roy Chowdhury

Vs

Jotindra Nath Chowdhury

(Mookerjee and Teunon, JJ.)

13.01.1911

JUDGMENT

Mookerjee and Teunon, JJ.

1. This appeal is directed against an order of refusal of the Court below to set aside ail ex parte decree. On the 27th September, 1907, the present respondent, who had taken an assignment of a mortgage bond, commenced an action to enforce the security against the mortgagors, who formed a family of five brothers. Of these, the first three entered appearance in the suit and disputed the claim of the plaintiff. There was no appearance on behalf of the other two defendants. On the 24th July, 1908, a decree upon contest was made against the first three defendants, and an ex parte decree against the other two defendants. On the 26th June, 1909, two applications were made, one by each of these defendants to set aside the ex parte decree. On the 20th April, 1910, the Subordinate Judge dismissed both the applications. He held that the summons was not duly served, but that as the applicants knew about the suit, when it was actively defended by their eldest brother, the applications were barred by limitation. One of the brothers alone, by name Kumud Nath Roy Chowdhury, has preferred this appeal, and on his behalf the decision of the Subordinate Judge has been assailed on two grounds, namely, first, that the period of limitation applicable to, the case is that provided by Article 164 of the Limitation Act of 1887, which was in force when the ex parte decree was made, and that as no steps have yet been taken to execute any process for enforcement of the judgment, no question of limitation arises; and, secondly, that even if Article 164 of the Limitation Act of 1908, which came into force after the ex parte decree had been made, and before the application to set it aside had been presented, be held to be applicable, there is no evidence to show that the petitioner had knowledge of the ex parte decree more than thirty days before the application was made. These points have been strenuously contested on behalf of the respondent decree-holder, and it has further been urged on his behalf, first, that the summons was duly served upon the petitioner, and, secondly, that as an appeal had been presented by the contesting defendants against the decree, the Subordinate Judge had no jurisdiction thereafter to entertain any application to set

aside that decree at the instance of even the defendant against whom it had been made ex parte. The questions, therefore, which emerge for consideration from the arguments addressed to us on both sides, are, first, was summons duly served upon the appellant, the petitioner in the Court below? Secondly, had the Court below jurisdiction to entertain the application at the instance of the appellant after an appeal had been preferred against the decree by the contesting defendants? And, thirdly, was the application barred by limitation?

2. In so far as the fire of these grounds is concerned, under Rule 13 of Order IX of the Civil Procedure Code of 1908, the burden is upon the petitioner to satisfy the Court that the summons was not duly served upon him. Now Rule 9 of Order V provides, that where the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction, who is empowered to accept service of the summons, the summons shall be delivered to "the proper officer to be served by him. Rule 12 next provides that, wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient. Rule 17 provides the procedure to be followed when the' defendant refuses to accept service or cannot be found, and lays down that when the serving officer cannot find the defendant, he shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain. Now, in the case before us, the summons was taken for service to the ancestral family house of the defendant in Taki within the jurisdiction of the Court of the Subordinate Judge of the 24-Perganas. The defendant was not found in the house; there was no one present upon whom the notice could be served, nor had the defendant any agent empowered to accept service. As a matter of fact, the defendant is an overseer under the Maharaja of Cossimbazar, and since 1897, has lived at Murshidabd. He asserts - and there is no reason to distrust his testimony - that he has not been at Taki for five or six years. Under these circumstances, the summons was affixed to the outer door of the house at Taki, because, as the serving officer stated in his return, he found that all the rooms were locked up, and no one lived in the house at the time. The learned vakil for the respondent has contended that the summons was duly served under the provisions of the law, because as the house was owned by the defendant, he must be taken to have resided there; in other words, it has been argued that for the purposes of the service of summons, residence is identical with ownership. This position is manifestly untenable. The term "resides" is not defined in the Code, but in the Oxford Dictionary (vol. VIII, page 517), it is stated to mean "dwelling permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place." Substantially the same definition was given by Mr. Justice *Bayley in R. v. North Curry*[1] when he observed as follows : - "What is the meaning of the word resides? I take it that, that word, where there is nothing to show that it is used in a more extensive sense, denotes the place where an individual eats, drinks and sleeps, or where his family or servants eat, drink and sleep." To the same effect is the observation of Mr. Justice Blackburn in In re Oldham (1870) 1 Om. & Ha. 158 "A man's residence is where he habitually sleeps." The argument, however, that residence is convertible and identical with ownership, lias sometimes been advanced, and it was expressly

negatived by Gibson J., in *R. v. Fermanagh*[2] It was ruled in this case that the residence of a man is primarily the dwelling and home where he is supposed usually to live and sleep; it may also include a man's business abode, the place where he is to be found daily, but it was added that it would be a manifest abuse of language, ' without warrant if any dictionary, law, or usage, to describe a permanent absentee as resident in a place merely by virtue of ownership. This view was affirmed by Holmes L. J. in *R. v. Tyrone*[3] In the case before us, it is impossible, in our opinion, seriously to maintain the view that the defendant resided in his paternal house at Taki within the meaning of Rules 9 and 17 of Order V of the Code, although as a matter of fact, he lived permanently at Murshidabad where he was employed in the service of the Maharaja. We may further observe that the service in this case was made in contravention of Rule 17, inasmuch as the copy of the summons was affixed on the outer door of the house before all due and reasonable deligence had been exercised to find out the defendant. In this respect, the new Code, has altered the law, in that substituted service can be justified under the present rule only when it is shown that proper efforts were made to find the defendant. It is fairly clear that the plaintiff knew that the defendant did not ordinarily reside in the ancestral house at Taki, and yet insisted upon the service of the summons at that place. We must, therefore, overrule the contention of the respondent and affirm the view taken by the Subordinate Judge, that the summons in this case was not duly served. It follows, consequently, that under Order IX, Rule 13, the petitioner is entitled to invite the Court to set aside the ex parte decree as against him.

3. In so far as the second point is concerned, it has been argued by the learned vakil for the respondent that the Subordinate Judge had no jurisdiction to entertain the application to set aside the ex parte decree, because the contesting defendants had preferred an appeal to this Court against the decree. In support of this view, he lias placed reliance upon the cases of *Dhonai Sardar v. Tarak Rath Chowdhury*[4] *nd Sankara Bhatta v. Subraya Bhatta*[5]. In answer to this argument, it has been contended on behalf of the appellant that the cases mentioned are distinguishable, inasmuch as the t application to set aside the ex parte decree in these cases, was made to the Original Court after the decree had been affirmed on appeal, and that the case now before us is completely covered by the decision in *Sarat Chandra Dhal v. Damodar Manna*[6] which was affirmed on appeal under Section 15 of the Letters Patent *Damodar Manna v. Sarat Chandra Dhal*[7] In our opinion, the objection by the respondent must be overruled. It is worthy of note, that this point was not urged in the Court below, and there is no legal evidence on the present record to show that an appeal against the decree has been preferred to this Court by the contesting defendants. We do not desire, however, to rest our decision upon what may be deemed a technical ground. We shall assume that the appeal was lodged in this Court on the 15th April, 1909, and though presented out of time, was directed to be registered, on the 7th May, 1909. That appeal, however, is still pending in this Court, and the decree of the Original Court is still in full force and operation; it has not been superseded by any decree on appeal or merged therein. Under these circumstances, it is difficult to appreciate how on principle the view can be maintained, that the jurisdiction of the Original Court to entertain an application to set aside the decree, in so far as it is ex parte has been taken away. It has been broadly contended, however, by

the learned vakil for the respondent, upon the authority of expressions to be found in the judgments in *Dhanai Sardar v. Tarak Nath Chowdhury*[8] *Ramanadhan Chetty v. Narayanan Chetty*[9] *and Sankara Bhatta v. Subraya Bhatta*[10] that the immediate effect of the presentation of an appeal to a Superior Court against the decree of a Subordinate Court, is to destroy the jurisdiction of the latter Court to deal with the judgment in controversy in any way. We are not prepared to accept this proposition as well founded on principle, and it is, as a matter of fact, opposed to the decision of the House of Lords in *Mellish v. Richardson*[11] in which it was ruled, that where the Court would otherwise have the authority to amend the judgment, it may be done after an appeal has been taken. This view is entirely inconsistent with the theory that the mere presentation of an appeal puts it beyond the power of the Original Court to deal in any manner with the judgment under appeal. The position is obviously different after the adjudication of the appeal, when the original judgment has been superseded by the judgment of the Court of Appeal : *Brij Narain v. Tejbal*[12] The view we take has been adopted also in a long series of decisions in the American Courts, amongst which reference may be made to Exp. Henderson (1887) 4 Southern 284 and Texas *Railway Company v. Walker*[13] We must, therefore, adhere to the principle which underlies the decision of this Court in *Damodar Manna v. Sarat Chandra Dhal*[14] and overrule the contention of the respondent, that the Original Court could not entertain the application to set aside the ex parte decree presented by the appellant, merely because the contesting defendants had preferred an appeal to this Court.

4. In so far as the third point is concerned, it has been argued by the learned vakil for the appellant that as soon as the ex parte decree was made against him, a right accrued to him to have it set aside within the period prescribed by the Limitation Act of 1877, and that such right was not affected by the Limitation Act of 1908. It has been argued, on the other hand, that the application to set aside the ex parte decree, presented as it was after the Limitation Act of 1908 had come into operation, attracted the operation of the provision of the new Act, and in support of this view, reliance has been placed upon the case of *Basiruddin Mandal v. Sonaulla Mandal*[15]. This latter decision, however, furnishes no authority in support of the contention of the respondent, and it may be observed that the head note to the report is entirely c misleading. An examination of the judgment shows that the question of the applicability of the Act of 1908, was not decided. In the case before is also, the point need not be decided, because we have arrived at the conclusion, that whether-the provisions of the Act of 1877 or of 1908 be held applicable, the application is not barred by limitation. The petitioner asserts that he first became aware of the ex parte decree on the 1st Tune, 1909, and made the application to set it aside on the 26th June following. The learned Subordinate Judge, however, has held, that as his brothers had knowledge of the ex parte decree, the inference may reasonably be drawn that he had a similar knowledge of it. We are unable to accept this conclusion as based on a correct appreciation of the evidence. As pointed out by Mr. Justice *Davar in Pundlick v. Vasant Rao*[16]*,* the term "knowledge" in Article 164 of the Limitation Act of 1908, means a pertain and clear perception of a fact, the fact being the decree in the suit; the expression "knowledge of the decree" means knowledge not of a decree but of the particular decree which is sought to be set aside. Now, in the case before us, there is no

direct evidence on the record that the petitioner had knowledge of the decree before the 1st June, 1909. The circumstances, upon which reliance has been placed in support of the contrary view, are entirely inconclusive. As the petitioner asserts, the feelings between the brothers have not been of the very best and the eldest brother is said to have wasted their properties. The petitioner lives away from his brothers, and there is no tangible evidence to show that the latter communicated the fact of the decree to him. If has further been contended that as five thousand rupees was paid in partial satisfaction of the judgment-debt for which the brothers are jointly liable, the petitioner must have been aware of the decree, but the latter maintains that he has not paid any share of this sum. It further appears that the compromise attempted with the decree-holder fell through and there is nothing to shew that the petitioner was aware of the details of the proposed settlement. It has finally been suggested that as notices were issued on the occasion when the decree was made absolute the petitioner must at that time have been apprised of the ex parte decree. It transpires, however, that, the notice addressed to the petitioner was served in the ancestral house. Upon an examination, then, of all the circumstances of the case and of the evidence on the record as it stands, we find it impossible to maintain the view of the Subordinate Judge that the application is barred by limitation.

5. The result, therefore, is that this appeal must be allowed, the order of the Subordinate Judge reversed, and the ex parte decree set aside as against the appellant. The appellant is entitled to his costs both here and in the Court below, as on the face of the proceedings it is manifest that the plaintiff proceeded with the trial of the suit with full knowledge that the summons addressed to the defendant had not been duly served.

6. The question next arises, what is the effect of this order upon the decree so far as the other defendants are concerned. The proviso to Rule 13 of Order IX lays down that where the decree is of such a nature that it cannot be set aside as against the defendant only against whom it has been made ex parte, it may be set aside as against all or any of the other defendants also. We are unable, however, to deal with this matter at the present stage, because the other defendants have not been made parties to this proceeding. But it is desirable that the question should be decided before the suit is re-heard as against the appellant, because if the point is left open for controversy, it may obviously lead to grave complications. We, therefore, direct that a notice be issued upon the other defendants-mortgagors so as to enable them to state their objections, if any, to an order in terms of the proviso to Rule 13 of Order IX. As soon as they have been afforded an opportunity to be heard in this matter, we shall make a supplementary order in that behalf.

7. The entire decree was subsequently set aside. - Ed.

Cases Referred.

1(1825) 4 B. & C. 293 : 107 E.R. 1313
2(1897) 2 I.R. 559, 564
3(1901) 2 I.R. 497, 510

4(1910) 2 C.L.J. 53
5(1907) I.L.R. 30 Mad. 535
6(1908) 12 C.W.N. 885
7(1909) 13 C.W.N. 846
8(1910) 12 C.L.J. 53
9(1904) I.L.R. 27 Mad. 602
10(1907) I.L.R. 30 Mad. 535
11(1832) 1 Cl. & Fin. 224
12(1910) I.L.R. 32 All. 295 : L.R. 37 I.A. 70
13(1905) 87 S.W. 194
14(1909) 13 C.W.N. 846
15(1910) 15 C.W.N. 102
16(1909) 11 Bom. L.R. 1296