

CALCUTTA HIGH COURT

Devji Shivji

Vs

Santi Swaroop Chaturvedi

(Harries, C.J. Banerjee, J.)

30.06.1950

JUDGMENT

Harries, C.J.

1. This is an appeal from a order of Sinha J. refusing to set aside an ex parte decree made against the appellant. It was admitted before Sinha J. that the deft, was served w a summons. It appears that the deft, wrote letters-to the Registrar of this Court saying that he was ill, but the learned Resistrar of this Court made it clear that he could not interfere & that the appellant would have to take proper steps in the case. The appellant never entered appearance & in due course the case came into the undefended, list & a decree was made in favour of the plff. The date of the decree is 28-11-1949.

2. The period of limitation for applications to-set aside an ex parte decree is thirty days from the date of the decree or, where no summons was duly served, thirty days from the date when the applicant had knowledge of the decree, the period of limitation being provided by Article 164, Limitation Act. The appellant having admitted that he was duly served with a summons the period of limitation applicable in this case is thirty days from the date or the decree. An application, however, to set aside this ex parts decree was not made until 21-2-1950 & was therefore over fifty days late. No application was made to this Court to condone the delay & to extend the time for making the application under Section 5, Limitation Act.

3. The application came in due course before Sinha J. & the only point that appears to have been taken before Sinna J. was that this period of limitation prescribed by Article 164 did not apply to applications made to the Original Side to set aside ex parte decrees. Reliance was placed by the appellant upon a decision of this Court in 'S.N. Banerjee v. H.S. Suhrawardy', 32 C. W. N. 10. In that case it was held that Order 9, Rule 13, Civil P. C. is directed in terms to a practice different from that which obtains on the Original Side of the High Court. It refers to cases in Mofussil courts ' where the procedure as to appearance is different & although it has been the practice on the Original Side to follow the analogy of that rule on general principles of justice, the High Court on the Original Side cannot be tied down to its exact words on the footing that they are directly applicable & exhaustive, & has unfettered discretion to restore suits on proper terms independently & in spite of Order 9, Rule 13.

4. I find it rather difficult to appreciate why Order 9, Rule 13, Civil P. C. which is part of the statutory law of the land is not applicable to proceedings in the High Court on its Original Side, because the procedure on that side of the High Court is different from the procedure in Mofussil Courts. If the procedure followed on the Original Side of this Court makes it difficult to apply the "general law of the land that is no reason for holding that the general law of the land does not apply to this High Court.

5. Order 49, Rule 3, Civil P. C. expressly provides that certain rules shall not apply to any Chartered High Court in the exercise of its Ordinary or Extraordinary Original Civil Jurisdiction. But it is to be observed that none of the rules in Order 9 are stated to be inapplicable to Chartered High Courts exercising Ordinary Jurisdiction. It appears to me therefore that Order 9 Rule 13 was intended to apply & does apply to the Original Side of this High Court & it is no answer to say that it would be held not applicable because the procedure of this Court makes it difficult to apply the rule.

6. The matter however does not rest there because there is an express decision of a Bench of this Court that Order 9, Rule 13 does govern applications for setting aside ex parte decrees on the Original Side & that the period of limitation is that prescribed by Article 164, Limitation Act. The Bench decision to which I have already made reference was considered in *'Surendra Nath Roy v. Hrishikesh Saha'*. But the Bench held that there was no reason why the matter should not be governed by Article 164, Limitation Act, which provided that an application for an order to set aside a decree passed ex parte should be made not later than thirty days from the date of the decree. The Court was not prepared to come to the conclusion that such an application on the Original Side was not made under Order 9, Rule 13, Civil P. C., but was made under some provision not contained in the Civil P. C. & therefore the Limitation Act would not be applicable.

7. I may add that the Bench case which held that applications for setting aside 'ex parte' decrees made on the Original Side were not made under the provisions of Order 9, Rule 13 has been constantly dissented from & that the view of this Court for a period of time has been the view expressed in the later Bench decision. Sinha, J., was of opinion that he was bound by this later Bench decision & therefore held that the period of limitation was thirty days from the decree. He held accordingly that the application was out of time.

8. Mr. Roy who has appeared on behalf of the appellant has contended that there was in this case sufficient cause for extending the time for making this application. The appellant however is in this difficulty that he filed no application under Section 5, Limitation Act, for extension of time & produced no evidence before the learned Judge which would justify an extension of time. Indeed it is conceded that the learned Judge was not asked to extend the time on any ground whatsoever. The whole case before the learned Judge was confined to the one point as to whether Article 164, Limitation Act applied to applications made for setting aside decrees on the Original Side of this Court. Reliance was placed on the view of Rankin, C. J., that Order 9, Rule 13, Civil P. C. had no application to such applications & therefore Article 164 would not apply. The learned Judge was never asked to consider whether or not there were grounds upon which he could extend the time.

9. Although no application under Section 5, Limitation Act, was made in the Court below & although no evidence was called to support such an application, Mr. Roy has asked us to hold that this is a case in which time should have been extended. If we extended the time under Section 5, Limitation Act, we would in effect be rendering nugatory the precise terms of Article

164, Limitation Act. That provides that time will only begin to run from knowledge of the decree when a summons has not been served. When a summons has been duly served time begins to run from the date of the decree.

10. However it appears to us that there are really no grounds whatsoever for extending time even if an application had been made under Section 5, Limitation Act. (His Lordship after discussing the conduct of the appellant concluded:) In any event I find it impossible to interfere with the order of Sinha, J., in these circumstances. In the result, therefore, this appeal fails & I would dismiss it with costs. The order staying execution is discharged & the respondent is entitled to the costs of that application.

Banerjee, J.

11. I agree.

Cases Referred.

146 C. W. N. 280