

Smt. Kamal Ray Vs. Bhagabat Singh

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Court : Orissa

Decided On : Apr-05-1977

Reported in : AIR1977Ori206; 44(1977)CLT22

Judge : S.K. Ray, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 5, Rule 10 - Order 9, Rules 13 and 14; [Limitation Act, 1963](#) - Schedule - Article 123

Appeal No. : Civil Revn. No. 199 of 1976

Appellant : Smt. Kamal Ray

Respondent : Bhagabat Singh

Advocate for Def. : N.C. Panigrahi, Adv.

Advocate for Pet/Ap. : B.L.N. Swamy, Adv.

Disposition : Revision dismissed

Judgement :

ORDER

S.K. Ray, J.

1. This is a plaintiff's revision petition directed against order D/- 22-4-76 of the Munsif, Bhubaneswar setting aside the ex parte decree passed against the opposite party under Order 9, Rule 13, C. P. C.

2. The petitioner filed O. S. No. 46 of 1971-I for declaration of his title to the suit property, for recovery of possession thereof after evicting the defendant therefrom and for cost and other ancillary reliefs. The suit was decreed ex parte on 25-1-74, A petition under Order 9, Rule 13 was filed for setting aside the ex parte decree. The plea of the opposite party was that the plaintiff obtained the ex parte decree against him by fraudulently suppressing summons, and that he became aware of the decree passed against him ex parte on 29-1-75 and filed his application under Order 9, Rule 13 on 12-2-75 within 30 days thereof.

3. Mr. Swamy's contention is that the application under Order 9, R, 13 was hopelessly barred by limitation not having been filed within the time prescribed therefor under Article 123 of Limitation Act. Article 123 of the Limitation Act provides a period of limitation of 30 days from the date of decree or where the summons or notice was not

duly served, when the applicant had knowledge of the decree. As the decree was passed on 25-1-74 and the summons was tendered to the defendant according to Peon's report (Ext. A) on 19-6-71 the petition under Order 9, Rule 13, C. P. C. having been filed on 12-2-75, is barred by time. Now Mr. Panigrahi, the learned counsel for the defendant-opposite party relies upon second part of this article for the purpose of saving limitation and argues that as the summons was not duly served the period of limitation is to be computed from the date of knowledge which is 29-1-75 and the petition for setting aside ex parte decree having been filed on 12-2-75 is within time. The question, therefore, that arises for determination is what is the proper meaning to be attributed to the expression 'duly served' in this article. Mr. Swamy cited two decisions on the question of interpretation of the expression 'duly served'. One is the case of Kundan Lal Brindaban v. Bani Frasad Baij Nath Prasad, AIR 1957 All 76, and the other is the case of Stock and Share Exchange Bureau v. Kothari & Sons, AIR 1941 Mad 435. The ratio decidendi of these two decisions is that due service in this article has reference not merely to the mode of service but to the propriety of the summons where it fixes a date of hearing on which it would be impossible for the defendant to appear. Applying this principle, it appears to me that, in the facts and circumstances of this case, mere tendering a summons by the Peon will not amount to due service of summons. Order 5. Rule 10, C. P. C. provides for the mode of service. It is complied with as soon as a copy of the summons is offered or tendered to the party. But G. R. & C. O. (Civil) Volume I, Chapter II, Rule 14 provides for the method of service. It enjoins that if the summons or notice, when tendered, is declined by a party, it should be proved that the party was informed that the document tendered was a summons or notice, and that he was made acquainted with the nature and contents thereof. So due service of summons comprises of, apart from tendering a copy of the notice, reading and explaining the contents thereof for the cognizance of the party as to the factum of pending litigation, the court in which it is pending and the date to which the said litigation is posted. On this point, the finding of the learned Munsif is that the defendant was not explained the contents of the summons and that the opposite party except signing his signature in English cannot read and obviously, therefore, cannot understand that language. He has, therefore, essentially come to the conclusion that even though copy of the summons was tendered, the contents thereof not having been read over and explained to the party, the summons could not be held to have been duly served. Therefore, for the purpose of Article 123 of the Limitation Act the period is to run, in the present case, from the date of knowledge of the defendant as to passing of the ex parte decree against him. There is no controversy in this case that the date of his knowledge is 29-1-75, computing from which the petition for setting aside the ex parte decree under Order 9, Rule 13 must be held to be within time. The sole point, therefore, fails. I am, therefore, not inclined to interfere with the order of the Munsif in setting aside the ex parte decree.

4. The revision is, accordingly, dismissed with costs which are assessed at three gold mohurs.