

(1996) 09 SIK CK 0001

Sikkim High Court

Case No: Civil Revision No. 4 of 1996

Lakpa Sherpa

APPELLANT

Vs

Tempa Sherpa

RESPONDENT

Date of Decision: Sept. 12, 1996

Citation: AIR 1997 Sikk 1

Hon'ble Judges: Malay Sengupta, Acting C.J.

Bench: Single Bench

Advocate: A. Moulik, for the Appellant; N.B. Kharga, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Malay Sengupta, Actg. C.J.

1. This is a Civil Revision Application filed u/s 115 of the Civil Procedure Code. It is directed against an order passed on 11-6-96 by the learned District Judge, East and North, Sikkim in Civil Misc. Appeal No. 2 of 1995 allowing an application filed u/s 5 of the Limitation Act for condonation of delay in filing of the Appeal.

2. To appreciate the fact of the case, events in chronological order are to be looked into. A suit was filed and registered as Civil Suit No. 41 of 1993 by the Appellant, in the Court of learned Civil Judge, East Sikkim. This suit was registered on 19-10-93 after disposal of Civil Misc. Case No. 2 of 1993 arising out of an application to proceed with the suit as an indigent person. Summons of the suit was issued fixing 27-11-93 as the date for service return and appearance of the defendant. On 27-11-93 it was noticed that" the summons was not served till that date. Hence, the same was re-issued fixing 21-1-94 as the date for appearance of the defendant. On 21-1-94 the defendant sought for an adjournment and further sought for a direction on the plaintiff to supply copy of the plaint which was alleged to have not been annexed to the summon. 21-2-94 was the date fixed for supply of the plaint. Since the defendant was absent on that date the Learned Civil Judge fixed a longer date for ex-parte hearing of the suit. It was on 30-3-94. Ex parte evidence was recorded

on that date and 16-4-94 was fixed for order. Ex parte judgment was passed on that date.

3. The plaintiff decree-holder put the ex parte decree into execution on 20-7-94 and it was registered as Civil Execution Case No. 8 of 1994. Attempts were made for service of notice on the judgment-debtor but on a few subsequent dates the service could not be effected. Ultimately, after several attempts the notice sent under registered post came back on 15-6-95 with the postal endorsement that the judgment-debtor refused to accept the same. On 17-7-95 the judgment-debtor appeared before the executing court praying for setting aside the decree on the ground that he did not know anything about the decree and he could acquire knowledge of such a decree only on that date (17-7-95) when the court-people went to his residence to take measurement, etc. The prayer made by the judgment-debtor before the executing court and in execution case for setting aside the impugned decree was rejected and the learned Executing Court asked the judgment-debtor to make payment in instalments of Rs. 10,000/- each.

4. The judgment-debtor thereafter obtained certified copy of the judgment and decree and filed appeal before the learned District Judge, East and North Sikkim on 4-8-95 with further prayer to condone the delay in filing the appeal. The learned District Judge allowed the prayer for condonation of delay by his order dated 11-6-96. Against that, the decree-holder has come up with the instant revisional application on 18-7-96. It is being contested by the judgment-debtor.

5. It is too preliminary to note that when an ex parte decree is passed, the remedies available to the defendant include an appeal from the decree and, therefore the, defendant rightly took the decision to file Civil Misc. Appeal No. 1 of 1995 before the learned District Judge. It should be noted in this context that the defendant's earlier step on 17-7-95 to approach the Executing Court and that's too in the execution proceeding with prayer for setting aside the ex parte decree was erroneous on the face of it, and it was rightly rejected by the learned Civil Judge on 17-7-95.

6. It had been the contention of the defendant/appellant before the learned District Judge that summons was not "duly" served on him as it left small gap between the date of service of summon and the date fixed for appearance. Further plea was that the summon was not accompanied with copy of plaint. It has also been pleaded that no notice or intimation was sent to the defendant/appellant intimating the next date of hearing or otherwise of the case. The principal plea was, however, that he could not file the appeal before the learned District Judge in time, from the date of decree or order, as he acquired knowledge about such a decree only on 17-7-95.

7. The contention of the appellant before us (respondent before the learned District Judge) is that in the application u/s 5 of the Limitation " Act, the only plea of the defendant/appellant was that he did not have any knowledge about the decree prior to 17-7-95. There was no other plea taken by the Defendant in his petition for

condonation of delay. Though the petition u/s 5, Limitation Act is very cryptic, we would propose to take into consideration all the relevant points raised by the respondent before us.

8. With regard to notice/intimation regarding date of ex parte hearing, the respondent himself is not very sure about the legal position. Learned Advocate for the respondent contends that during old days such intimations used to be sent to the defendant by the Court. No provision has, however, been shown in this context. It has also not been pleaded that such a practice, even it was there, still persists. On the other hand, the appellant places reliance in a case reported in AIR 1995 Mad 798 (sic) (S. M. Raja Goundar v. Sabapathi Mudaliar) where the Madras Court observed that no duty was cast upon the court to inform the party of the adjourned date. We may rely on this decision to reject the plea of the respondent in this respect.

9. The second plea is of the summons being not accompanied with copy of plaint. Under Order 5, Rule 2, C. P, C. the summons of Civil Suits must be accompanied with copy of plaint. In the instant case the defendant took the plea before the learned trial court that no copy of plaint was received by him. The Court, therefore, granted time for supply of copy of plaint. The aforesaid plea was taken by the defendant after making appearance before the trial court on 21 -1 -94 which was the due date fixed! for appearance of the defendant. The date for supply of copy was fixed on 21-2-94. Decision reported in [General Auto Agencies, Jaipur Vs. Hazari Singh](#), has been referred to by the respondent. The aforesaid decision relates to a different context. It was for reckoning ;the period for deposit of arrear rents in a premises tenancy case. It has been observed in that case that unless the defendant looks at the copy of the plaint he cannot assess the amount which he was to deposit in Court within one month from the first date of hearing. It has been observed that to assess the first date of hearing, the date should be the day on which the copy of the plaint is supplied. In our case the date for fixing first date of hearing: is not that way material. Again, in our case the defendant did not show any interest to receive the copy of the plaint on 21 -2-94 or on any subsequent date. Moreover, it is not the case that on that date the matter was taken up for ex parte hearing. In fact a longer date, till 30-3-94 was given by the trial Court for ex parte evidence. The ex parte order was passed even after some more days. Therefore, this plea of the respondent can also not be entertained.

10. The defendant/appellant places reliance on the decisions reported in [The Stock and Share Exchange Bureau Vs. Kothari and Sons](#), and in [Gauhati University Vs. Niharlal Bhattacharjee](#), to argue that when the gap between the date of service and the date of appearance is very narrow, it cannot be said that the summon was "duly" served. Though no such plea in writing was taken by the defendant earlier, the respondent was allowed to take that plea and the learned District Judge placed all his reliance on Gauhati University case in allowing the petition u/s 5 of the Limitation Act. It is true that under Article 123, Limitation Act the limitation would

begin to run from the date of decree when the summon was duly served. In all other cases including the case of service not within due time, the limitation would run from the date of knowledge of the passing of the decree. In the instant case we find that the defendant made his appearance on the due date of 21-1-94 and sought for an adjournment. The same was duly accepted by the trial court. Therefore, there was no reason for the defendant's non-appearance on the next date of 21-2-94 or on other subsequent dates. The thing would have been different if there was non-appearance of the defendant on the plea of inadequate time for appearance. Thus the aforesaid decisions cannot be applicable in this case. We, therefore, hold that limitation in the instant case should be held to have started running from 16-4-94 which was the date of the decree.

11. One cannot conceive of the position that after making his maiden appearance on 21-1-94 before the trial court, the defendant would remain completely silent about the fate of the suit and would come out of his slumber only after one and a half years, on seeing the process servers moving around his house with measuring tapes in their hands.

12. We cannot by any means endorse that the defendant has been successful in making out a case u/s 5, Limitation Act. The order of the learned appeal court also does not appear to be quite sound. The revision application should therefore; be allowed. It is, hence,

Ordered

that the Revisional Application be and the same is allowed on contest without costs. The impugned order passed on 11-6-96 by the learned District Judge,, East and North in Civil Misc. Appeal No. 2 of 1995 is set aside accordingly.