

(2009) 08 DEL CK 0420

Delhi High Court

Case No: FAO No. 448 of 2001

Smt. Satrupa Aggarwal

APPELLANT

Vs

Sh. Nath (HUF) through is Karta

RESPONDENT

Shri Sri Nath and Others

Date of Decision: Aug. 7, 2009

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 1 Rule 10, Order 22 Rule 10, Order 43 Rule 1, Order 5 Rule 20, Order 9 Rule 13
- Limitation Act, 1963 - Article 123, 10, 11, 12, 13

Citation: (2010) 1 ILR Delhi 157

Hon'ble Judges: Vidya Bhushan Gupta, J

Bench: Single Bench

Advocate: Saahila Lamba, for the Appellant; Nemo, for the Respondent

Final Decision: Dismissed

Judgement

V.B. Gupta, J.

Present appeal has been filed under Order 43 Rule (1) read with Section 104 and 151 of CPC (for short as "Code"), against order dated 2nd June, 2001, passed by Additional District Judge, Delhi, vide which applications filed by appellant under Order IX Rule 13 and Order XXII Rule 10, of the Code, were dismissed.

2. Brief facts are that, on 19th January, 1989, respondent Nos. 1 and 2 herein, filed a suit for declaration and perpetual injunction against M/s D.K.G. Finance and Chit Fund Private Ltd. (for short as "M/s D.K.G.")

3. Case of respondents before trial court was that, they had purchased property No. 36, Hanuman, Road, New Delhi, vide registered sale deed dated 17th December, 1963. Since that date, they had been using and enjoying the space of land and common road (pathway) to reach Hanuman lane, without any interruption.

4. In February, 1988, M/s D.K.G., blocked three feet wide passage running along with back side of the wall of respondents. house, which damaged their property and also effected their right of easement.

5. M/s D.K.G. were duly served for 18th October, 1989 and their counsel put in its appearance, when the case was pending before this Court. Subsequently, the case was transferred to District Judge, who assigned it to Additional District Judge. That court issued notice to M/s D.K.G. as well as its counsel. Service upon M/s D.K.G. was effected through pasting, while its counsel remained unserved. Vide order dated 14th September, 1994, M/s D.K.G was proceeded ex-parte.

6. On 10th September, 1996, it was observed by the trial court that M/s D.K.G, could not be proceeded ex-parte, since, they had been served by way of pasting at G-56, Green Park, New Delhi, whereas, in written statement it is stated that M/s D.K.G. no longer resides at the address given in the plaint. The address filed by M/s D.K.G is 42- B, Hanuman Lane, New Delhi. Hence, court notice was ordered to be issued at 42-B, Hanuman Lane, New Delhi for 29.11.1996.

7. On 29.11.1996, court notice was not received back, as such, fresh court notice was ordered to be issued for 30th January, 1997. On 30th January, 1997, trial court passed the following order:

30.1.1997

Present: Counsel for plaintiff.

Notice sent to defendant received back with the report that presently no such firm exists at the given address. Similarly, the report was on the notice sent for the date 29th of Sept. 1996. Deft. had already been proceeded ex- parte and the case was ordered to be fixed for ex-parte evidence and arguments. It is on 10th Sept. 1996 that the Ld. Predecessor ordered fresh service at fresh address 42-B, Hanuman Lane, New Delhi. At this address also deft. does not resides. This was the address furnished by the deft. himself. Defendant himself has not cared to put in appearance despite the fact that the case was very much in his knowledge since the written statement is very much on record. In these circumstances the defendant is ordered to remain ex-parte as before. Let the case be adjourned for arguments to 3.3.1997.

8. Thereafter, vide judgment dated 3rd May, 1997, an ex- parte decree was passed for declaration and mandatory injunction in favour of respondent Nos. 1 and 2 and against M/s D.K.G.

9. On 4th September, 1998, present appellant as well as respondent Nos. 3 to 13, filed applications under Order IX Rule 13, under Order XXII Rule 10 and under Order 1 Rule 10 of the Code. Vide impugned order, these applications were dismissed. Appellant who was one of the applicants, alone had filed the present appeal.

10. In these applications, it was stated that a hole was made in the wall of property bearing No. 42-B, Hanuman Lane, New Delhi and a police complaint was lodged about the demolition of portion of the wall. On enquiries from police it transpired that execution of Court order has taken in pursuance of the decree passed in a suit filed by respondent No. 1, against M/s D.K.G, but particulars of the suit were not disclosed to the applicants. The applicants continued to make efforts and came to know of the present suit. On inspection of relevant file it transpired that M/s D.K. G. had sold different portions of property constructed on plot No. 42-B, Hanuman Lane, New Delhi to different persons by virtue of registered sale deed executed at different times. Present appellant had purchased space No. 105, on first floor of property No. 42-B, Hanuman Lane, New Delhi, on 2nd February, 1990. M/s D. K. G did not inform about pendency of any suit or proceedings, to any of the applicants. Had it informed the applicants about pendency of the suit, the applicants ought to have moved an application as required. In none of the sale deed, M/s D.K. G had pointed out about the pendency of any suit. It is evident that portion of the property had already been transferred, prior to the service of summons upon to M/s D.K.G.

11. Notice of these applications were issued to the respondents, and initially counsel appeared on behalf of respondents No. 1 & 2.

12. On 18th March, 2008, counsel for appellant appeared but nobody on behalf of respondents was present and matter was ordered to be listed in due course.

13. Again, on 21st July, 2009, none appeared on behalf of respondents. Arguments advanced by learned Counsel for appellant have been heard.

14. It is contended by learned Counsel for appellant that on 29th July, 2008, appellant got knowledge that "some decree" had been passed in respect of the property owned by her when a court bailiff came to her premises to execute the decree. Thereafter, appellant made enquiries and got knowledge about the particulars of decree. On 4th September, 1998, appellant filed the present application. The reasoning of trial court that appellant has no locus standi is in contradiction to the dictum laid down by Supreme Court in [Raj Kumar Vs. Sardari Lal and Others,](#).

15. Other contention is that exact particulars of the case and decree were not known to the appellant on 28th July, 1998, but she had the vague knowledge of the passing of decree dated 3rd May, 1997. Thus, limitation for filing of application under Order IX Rule 13 of the Code, cannot be said to have started running from said date. On this point, reliance has been put on a case decided by Supreme Court, reported as Panna Lal v. Murari Lal AIR 1967 SC 1384.

16. Another contention is that, it is evident from record that predecessor-in-interest of appellant was not properly served by the transferee court and as such there are sufficient grounds for setting aside the ex-parte decree.

17. Before delivering with the contentions of the appellant, it is appropriate to refer to the relevant provisions of the Limitation Act, 1963, as applicable to the present case.

18. Article 123 of Limitation Act, provides for 30 days time for filing such an application, it reads as under:

Description of application	Period of Limitation	Time from which period begins to run
To set aside a decree passed ex parte or to re-hear an appeal decreed or heard ex parte.	Thirty days	The date of decree or where the summons or notice was not duly served, when the applicant had knowledge of decree.

Explanation: For the purpose of this article, substituted service under Rule 20 of Order V of the Code of Civil Procedure, 1908 (5 of 1908) shall not be deemed to be due service.

In view of this provision, application for setting aside ex parte decree must be filed within 30 days, either from the date of decree or where the summons or notice were not duly served, from the date when the applicant had knowledge of the decree.

Supreme Court in [Sunil Poddar and Others Vs. Union Bank of India](#), held;

18. Accepting the recommendations of the Law Commission, the rule was amended by the CPC (Amendment) Act, 1976. Rule 13 of Order IX with effect from February 1, 1977 now reads thus;

13. Setting aside decree ex parte against defendant-In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an

order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit;

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.

Explanation.-Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree.

19. It is, therefore, clear that the legal position under the amended Code is not whether the defendant was actually served with the summons in accordance with the procedure laid down and in the manner prescribed in Order V of the Code, but whether (i) he had notice of the date of hearing of the suit; and (ii) whether he had sufficient time to appear and answer the claim, of the plaintiff. Once these two conditions are satisfied, an ex parte decree cannot be set aside even if it is established that there was irregularity in service of summons. If the Court is convinced that the defendant had otherwise knowledge of the proceedings and he could have appeared and answered the plaintiff's claim, he cannot put forward a ground of non service of summons for setting aside ex parte decree passed against him by invoking Rule 13 of Order IX of the Code. Since the said provision applies to Debt Recovery Tribunals and Appellate Tribunals under the Act in view of Section 22(2)(g) of the Act, both the Tribunals were right in observing that the ground raised by the appellants could not be upheld. It is not even contended by the appellants that though they had knowledge of the proceedings before the DRT, they had no sufficient time to appear and answer the claim of the plaintiff-bank and on that ground, ex parte order deserves to be set aside.

19. As per record, court notice to M/s D.K.G as well as their counsel was issued. The same was served upon the counsel, but he did not appear after the case was transferred to District court despite direction given by this Court, vide order dated 17.8.1993 to appear before the District court on 1.10.1993. Even after affixation of the court notice on the address given by M/s D.K.G in its written statement, no one appeared on its behalf.

20. In these circumstances, limitation has to run from the service of notice, if the appellant had to move for setting aside the decree. However, appellant who was otherwise not defendant in the suit, filed in the trial court, filed application under

Order IX Rule 13 of the Code, pleading knowledge on a particular date. In entire application, nothing has been pleaded with regard to as to when appellant got the knowledge, regarding the pendency of the suit or execution. Relevant portion of the application, reads as under:

1. That a hole was made in the wall of the property bearing No. 42-B, Hanuman Lane, New Delhi. A police complaint was lodged about the demolition of portion of the wall in the form of hole made therein. On inquiries from the police it had transpired that the execution of court order has been taken in pursuance of the decree passed in a suit filed by one Shri Sri Nath against M/s D.K.G. Finance & Chit Fund Private Ltd. but the particulars of the suit were not disclosed to the applicants.
2. That the applicants continued to make the efforts and also to contact M/s D.K.G. Finance & Chit Fund Private Ltd. Lastly the applicants came to know of the filing of the present suit by Shri Sri Nath for the purposes of inspection, the applicants assigned the case of the counsel.
3. That the applicants came to know of the ex-parte decree passed by this Hon'ble Court in the above noted suit and the execution proceedings having taken place in pursuance of ex-parte decree on inspection of the file conducted by applicants. counsel.

21. Appellant in its entire application, miserably failed to mention about her knowledge, regarding the pendency of the execution petition. Contents of the application clearly shows that the appellant came to know about the execution of the decree only on the date when a hole was made in the wall of the property bearing No. 42-B, Hanuman Lane, New Delhi. The demolition was done on 29th July, 1998, which has been mentioned by respondents No. 1 & 2 in their reply, and the same has not been controverted by appellant in her rejoinder.

Supreme Court, in [Mahabir Singh Vs. Subhash and Others](#), while dealing with provisions of order IX Rule 13 of the Code held:

Thus, even assuming for the sake of argument that no proper step was taken by the appellant herein for service of summons upon the respondent and/or the service of summons was irregular, evidently, it was for the defendant-respondent to establish as to when he came to know about the passing of the ex parte decree. Even in his cross- examination, the first respondent has categorically admitted that he had approached the appellant herein for not giving effect thereto one and half year prior to filing of the application, and, thus, he must be deemed to have knowledge about passing of the said ex parte decree. The period of limitation would, thus, be reckoned from that day. As the application under Order IX Rule 13 of the CPC was filed one and a half year after the first respondent came to know about passing of the ex parte decree in the suit, the said application evidently was barred by limitation.

22. In the present case, appellant has not specified as to on which date, she came to know about passing of the ex parte decree. The application is vague and does not give any detail or particulars. In this regard trial court observed;

Accordingly, I find that it was on 29.7.1998, the applicants had got the knowledge regarding the execution proceedings in pursuance of the decree passed by the court against the JD. Accordingly, in view that Article 123 of the Limitation Act, the application for setting aside the ex-parte decree must have been filed within 30 days from the date of such knowledge of the applicants. Though, the JD was duly served with the notice and he had filed the WS and at the same time he was having knowledge regarding the date of appearance before the Ld. District Judge, as per the directions of the Hon"ble High Court and at the same time he was also served through his counsel to appear on a particular date. Even assuming that the limitation has to run from the date of knowledge in respect of moving the present application, I find that the present application that has been filed on 4.9.98 was filed after the expiry of the period of limitation of 30 days from the date of such knowledge on 29.7.98. No cause much less than sufficient cause has been explained in the entire application for explaining the delay in filing the said application falling within any of the provisions contained u/s 4 to 24 of the Limitation Act. Accordingly, I find that the present that the present application moved by the applicants on 4.9.98 for aside the decree dt. 3.5.97, is hopelessly barred by limitation.

23. So, apparently if it is assumed that appellant came to know only on 29th July 1998 about the ex parte decree having been passed in this case, even then the present applications are barred by period of limitation.

24. Coming to the case of Raj Kumar (Supra) as cited by learned Counsel for appellant, there is no dispute about the principle of law enunciated in this case. However, the facts of Raj Kumar (Supra) are all together different.

25. In Raj Kumar (Supra) case, the purchaser was not aware of the pendency of the suit, but the vendor stated in the sale deed that the property was not a subject matter of any litigation.

26. In the present case, the appellant who is the alleged purchaser of the property, has not placed on record copy of the sale deed so as to show that vendor in its sale deed has not stated that property sold to the appellant, is not a subject matter of any litigation. As such Raj Kumar (Supra) is not applicable to the facts of the present case.

27. As far as other judgments as cited by learned Counsel for appellant are concerned, the same are not applicable to the facts of the present case.

28. Accordingly, I do not find any infirmity in the impugned order passed by the trial court.

29. The present appeal is not maintainable and thus, the same is hereby dismissed.

30. No order as to costs.

31. Trial court record be sent back.