

Rawal Das Vs. Vasudevi

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Court : Rajasthan

Decided On : Mar-28-1978

Reported in : AIR1978Raj155

Judge : M.L. Jain, J.

Acts : [Limitation Act, 1963](#) - Schedule - Article 123; [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 115 - Order 9, Rule 6

Appeal No. : Civil Revn. Petn. No. 106 of 1978

Appellant : Rawal Das

Respondent : Vasudevi

Advocate for Pet/Ap. : P.C. Jain and; Prem Ashopa, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

M.L. Jain, J.

1. This petition is directed against the order of the Additional District Judge, Kote. The plaintiff-respondent had filed a suit for eviction against the petitioner-defendant on Feb. 23, 1973. The summons to the defendant was issued for

appearance on April 16, 1973. On that date, the Judge proceeded to record that the summons has not returned after service and may be issued again, but immediately the defendant appeared and wanted time for filing of a written statement. The case was then adjourned to May 17, 1973. He did not care to appear on that date or thereafter and an ex parte decree was passed for eviction against him on Sept. 12, 1973. When execution was levied, the defendant made an application on Dec. 7, 1973, for setting aside of the decree under Order 9 R, 13 C. P. C. The learned Munsif after recording the evidence held that the defendant was duly served for appearance on April 16, 1973, and he did appear on that date. He should have filed the said application within one month of the decree, The learned Munsif thereupon rejected the application. An appeal was filed but the Additional District Judge dismissed that appeal by his order dated 13th Feb. 1976. The record of the portion of the file in which the summons was kept was meanwhile weeded out and destroyed. It was, therefore, not possible for the court to verify whether the summons was served on the defendant or not. The learned Judge was, however, of the view that the appearance of the defendant stood recorded on April 16, 1973, in the order-sheet and he found it difficult to discard that record in the absence of any evidence that someone else had personated for the defendant on that date. The learned Judge also rejected the contention that the defendant was prevented from any sufficient cause from appearance from May 19, 1973 to Sept, 12, 1973 in the court.

2. By this revision petition, it was urged that under Article 123 of the [Limitation Act, 1963](#), an application to set aside a decree passed ex parte can be made within 30 days 'from the date of the decree or where the summons or notice was not duly served when the applicant had knowledge of the decree'. It was urged that the learned lower court has committed an illegality in the exercise of its jurisdiction inasmuch as it ignored the provision of law that the defendant was entitled to make an application upon having the knowledge of the decree because the summons was not duly served upon him. The learned counsel cited several rulings to show as to what the meaning of 'duly served' was. He contends that knowledge of the suit is not knowledge of the decree and cannot be equated to service of summons. He particularly referred to *General Auto Agencies v. Hezari Singh* 1677 Raj LW 377 : (AIR 1977 Raj 180) which was a suit regarding eviction under the Rajas-than

Premises (Control of Rent and Eviction) Act, wherein it was held that if the summons for the date fixed for the first hearing is served without a copy of the plaint, then, it not being a case of proper service, the appearance of the defendant on that date cannot be considered to be an appearance on the first date of hearing.

3. I need not go into the cases as to what a 'due service' means. The question whether the summons was served or not or if served was duly served or not, will arise under Article 123 of the Limitation Act only when the defendant has not appeared at all. When the defendant puts in appearance but subsequently absents himself and a decree is passed against him, under the said Article, time shall be reckoned from the date of the decree. It further appears that the defendant in this case must have appeared in response to the summons. He did not complain, that he got no copy of the plaint but rather asked for time to file the written statement. The courts below have come to the conclusion that the summons were served upon him and further there was no evidence to show that the person who appeared in the court was not the defendant. These are findings of fact and do not involve any question of jurisdiction. The petitioner cannot be allowed to take advantage of and make out a case out of the fact that the record of the service of summons was destroyed,

4. I, therefore, find no force in this revision petition and it is hereby dismissed summarily.