

Abed Ali Vs. Prafulla Kumar Sen

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Court : Kolkata

Decided On : Mar-12-1951

Reported in : AIR1952Cal544

Judge : Harries, C.J., ; Das and ; Banerjee, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 9, Rule 13; ;Limitation Act, 1908 - Section 5 - Schedule - Article 164

Appeal No. : Full Bench Ref. in Appeal No. 16 of 1951

Appellant : Abed Ali

Respondent : Prafulla Kumar Sen

Advocate for Def. : Arun Sen and ; Pranab Sen, Adv.

Advocate for Pet/Ap. : N.B. Mukherjee, Adv.

Judgement :

Harries, C.J.

1. This is a Reference made to a Full Bench by a Bench of this Court in an appeal from an order of a single Judge sitting on the Original Side. The Bench referring the case pointed out that there was a conflict of authority and that' however the case was decided, another Bench decision of this Court would have to be, dissented from. That being so the referring Bench was of opinion that it had no

alternative but to refer the case to a Full Bench.

2. To appreciate, the points involved it will be necessary shortly to set out the facts which gave rise to this litigation.

3. The defendant-appellant resides in a village called Kulgachia in the District of Howrah, the village being about twenty-eight miles away from Calcutta. He carried on the business of manufacturing mosquito netting and eventually one Maniruddin who had purchased, netting from the defendant-appellant introduced the latter to the plaintiff Prafulla Kumar Sen Gupta. The , plaintiff ordered quantities of mosquito netting from the defendant and made payments in advance. The allegation was that the defendant had failed to supply a quantity of netting which had already been paid for and on January 6, 1950 the plaintiff filed a suit on the Original Side of this Court claiming a sum of Rs. 2,872/-being money advanced by the plaintiff against deliveries of cloth which the defendant had failed to deliver.

4. On July 12, 1950 an ex parte decree was made by a single Judge sitting on the Original Side for Rs. 2,872/- together with costs. The defendant failed to appear at the hearing and it is said that his failure to appear was due to the fact that no writ of summons was served upon him.

5. On September 29, 1950 the Taxing Officer on the Original Side of this Court wrote to the defendant informing him inter alia of this ex parte decree which had been passed against him. The receipt of this letter is admitted and therefore there can be no doubt that within a day or two of September 29, 1950 the defendant-appellant well knew that a decree had been passed against him.

6. The Court was in vacation throughout the latter part of September and the whole of the month of October and did not reopen until November 20. No application was made on behalf of the defendant-appellant to set aside this ex parte decree at the reopening of the Court, but an application was filed on 29-11-50. This application eventually came before Sarkar J. and a point was taken on behalf of the plaintiff respondent that the application was out of time and therefore barred by limitation. The plaintiff-respondent contended that the application to set aside this ex parte decree was made under Order 9, Rule 13 of the Code of Civil

Procedure and that the period of limitation applicable to such an application was thirty days by reason of Article 164 of the Limitation Act.

7. On behalf of the defendant-appellant it was contended that Order 9, Rule 13 had no application to the Original Side of this Court and that the application was an application invoking the Court to exercise its inherent jurisdiction to set aside this ex parte decree. As the application was an application made to this Court to exercise its inherent jurisdiction it was contended that Article 164 of the Limitation Act could not apply, nor indeed could any article of the Limitation Act be made applicable. That being so it was contended that though the application for restoration was made beyond thirty days, nevertheless the Court could entertain the application.

8. That the application to set aside the ex parte decree was made beyond thirty days is beyond all question. As I have already stated the defendant-appellant well knew of this decree certainly by October 1 or 2, 1950. By Article 164 the defendant-appellant had thirty days from the date of the decree or from the date of his knowledge of the decree, to make the application. Quite clearly this application was made beyond thirty days of the date of the decree and beyond thirty days of the date when he admittedly got to know of the decree. As the Court was in vacation it might be said that the application could not be filed until the Court reopened. The Court however reopened on November 20, 1950 and no application was made until November 29, 1950. That being so, the application was clearly out of time if Article 164 of the Limitation Act applied.

9. Sarkar J. was faced with a conflict of authority. There was a comparatively recent decision of this Court 'SURENDRA NATH ROY v. HRISHIKESH SAHA', 46 Cal W N 280 in favour of the view that the period of limitation was thirty days from the date of knowledge of the decree. On the other hand there was an earlier Bench decision of this Court 'S. N. BANERJEE v. H. S. SUHRAWARDY', 55 Cal 473, in which it was held that O, 9, Rule 13 of the Code of Civil Procedure did not apply to applications to set aside ex parte decrees made on the Original Side and therefore the Court in exercising its discretion could do so independently of the discretion given by Order 9, Rule 13 of the Code of Civil Procedure. This case is

not a case which in terms deals with limitation but the view which it takes does appear to me to be in conflict with the view taken in the later case to which I have made mention.

10. Faced with this conflict of authority Sarkar J. felt bound to follow the latest authority and held that the application to set aside an ex parte decree made on the Original Side was made under Order 9, Rule 13 of the Code of Civil Procedure & therefore Article 164 of the Limitation Act applied and as the present application was made beyond limitation he dismissed the application. The defendant-appellant appealed and, as I have stated, the Bench which heard the appeal, referred the matter to this Full Bench because of this conflict of authority. The questions referred to the Full Bench are as follows:

1. Do the provisions of Order 9, Rule 13 of the Code of Civil Procedure apply to applications made on the Original Side to set aside ex parte decrees?

2. Are applications to set aside ex parte decrees on the Original Side governed by Article 164 of the Limitation Act?

3. Is the case of 'S. N. BANERJEE v. H. S. SUHRAWARDY', 32 Cal W N 10, correctly decided?

11. This Full Bench therefore must give its answers to these questions and further under the Rules of the Original Side must decide the whole appeal.

12. The main point which has to be decided is whether applications to set aside ex parte decrees made on the Original Side are made under the provisions of Order 9, Rule 13 of the Code of Civil Procedure. That rule is in these terms:

'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; & 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.'

13. Order 49, Rule 3 of the Code of Civil Procedure provides that certain rules shall not apply to any Chartered High Court in the exercise of its ordinary or extraordinary original civil jurisdiction.

14. The rules of Order 9 however are not amongst these rules and there is therefore nothing in the Code itself which would make Order 9, Rule 13 inapplicable to applications to set aside ex parte decrees on the Original Side of this Court. The wording of the rule creates no difficulty and the rule could very well apply in terms to the Original Side. It gives the Court a right to set aside an ex parte decree on the application of a defendant if he satisfies the Court (1) that the summons was not served upon him, or (2) that he was prevented by any sufficient cause from appearing.

15. The allegation in the present case is that the writ of summons was not served upon the defendant-appellant who, as I have said lived at Kulgachia in the Howrah district. It is suggested that the writ of summons was sent to the Howrah District Court for service on the defendant-appellant, but that the processes were suppressed and that the return of service was fabricated. It is unnecessary to consider the facts and it is sufficient to say that clearly this was an application made to set aside an ex parte decree on the ground that the defendant failed to appear at the hearing by reason of the fact that the summons was never served upon him. The case therefore would fall within the precise words of Order 9 Rule 13 of the Code of Civil Procedure.

16. It has however been contended on behalf of the defendant-appellant that this rule can have no application whatsoever to applications to set aside ex parte decrees made on the Original Side because the procedure relating to appearance on the Original Side is different from that governing appearance in cases in the districts. As the procedure for appearing is different it is said that Order 9, Rule 13 cannot apply to the Original Side and therefore Article 164 of the Limitation Act which, it is conceded, governs applications under Order 9, Rule 13 cannot apply to applications made on the Original Side.

17. This contention does find support from the Bench decision to which. I have made reference, namely, 'S. N. BANERJEE v. H. S. SUHRAWARDY', 55 Cal 473. In that case a Bench consisting of Rankin, C. J. and Mitter, J. held that Or. 9, Rule 13 is directed in terms to a practice different from that which obtains on the Original Side of the High Court. It refers to the case which is the usual case in a mofussil Court, where a summons has gone to a defendant informing him that on a given date the case will come on before the Court for hearing or for settlement of issues. In the mofussil therefore the question arises in the form whether or not the defendant was prevented by sufficient cause from appearing when the suit was called on for hearing. In the High Court the question is whether or not the defendant has entered appearance in the office. If he has not entered an appearance within a certain time, then his right to enter appearance comes to an end upon the suit being sent to the undefended list, in the absence of leave from a Judge. It was further held that it was the general practice on the Original Side to follow the analogy of Rule 13 of Order 9 of the Code on general principles of justice. As a rule the case will not be restored unless there be sufficient cause for the party not being ready to go on with the case when the case comes before the Court. But on the Original Side, at all events, the terms of Rule 13 do not prevent the Court, where there is an element of negligence, from restoring in its discretion the suit upon proper terms. The main purpose of Rule 13, Order 9 is to give a right to a party who could show sufficient cause to get a restoration on certain terms independently of having to make a plea to the mercy of the Court.

18. It is to be observed that in the case of 'S. N. BANERJEE v. H. S. SUHRAWARDY', 55 Cal 473, the writ of summons had been served and the question of limitation did not arise because the application to set aside the decree was made well within thirty days of the ex parte decree. What the Bench had to consider was whether there was sufficient excuse for the failure to enter appearance and to appear at the hearing. The Bench was of opinion that Order 9, Rule 13 could not in terms apply because a person who failed to enter appearance on the Original Side had no right to appear at the hearing. Therefore the Bench appears to have thought that the wording of Order 9, Rule 13 was inapplicable and therefore the case would have to be decided by invoking the inherent jurisdiction of the Court.

19. With very great respect to the very distinguished Judges who decided this case I am unable to accept the view therein laid down. As I have already pointed out, there is nothing in the wording of Order 9, Rule 13 which would make it inappropriate to proceedings on the Original Side. In terms the rule applies to all cases where a defendant has failed to appear at the hearing by reason either of non-service of the writ of summons or for some sufficient cause. I am unable to see why this rule should not apply to proceedings on the Original Side though the procedure which has to be followed if a suit is heard is different on the Original Side from that obtaining in the mofussil.

20. If a summons is not served and the defendant fails to appear at the hearing because he has not been served then it appears to me wholly immaterial that the procedure in the mofussil and on the Original Side is different in the case where the summons has been served. If the summons has not been served then the defendant cannot comply with the procedure laid down either for the mofussil or the Original Side and his failure to appear at the hearing whether such hearing be in the mofussil or on the Original Side is due to the same cause, namely, failure to serve him with the summons.

21. Again where the summons has been served, but the defendant fails to appear at the hearing, it does not appear to me to matter that the procedure which such a defendant has to follow in the mofussil is different from that on the Original Side. If there is sufficient cause for his failure to appear at the hearing, then it seems to me that the decree can be set aside either in the mofussil or on the Original Side under the express terms of Order 9, Rule 13. It may be that owing to differences in procedure what might be sufficient cause for failing to appear in the mofussil might not be sufficient cause on the Original Side or vice versa. But it appears to me that we cannot infer that Order 9, Rule 13 was never intended to apply to the Original Side merely because the defendants who are served with the summons have to follow a somewhat different procedure on the Original Side from that which they have to follow in the mofussil.

22. This Bench decision was followed by a single Judge of this Court in the case of 'RAMJAN ALI v. ABDUL GAFFUR', 32 Cal W N 411. In that case a suit was

decreed ex parte by the High Court on the Original Side because of the defendant's failure to appear although he had entered formal appearance previously and he applied to have the suit restored more than thirty days after the date of such decree. Pearson J. held that the failure to appear was a matter concerned with the procedure peculiar to the Original Side of the High Court, to which Order 9, Rule 13 of the Code of Civil Procedure does not in terms apply. The application therefore was not under the Code and consequently not governed by Article 164 of the Limitation Act.

23. This case is directly in point and deals with the period of limitation for applications such as the present. Pearson, J. followed the Bench decision to which I have made reference and came to the conclusion that applications to set aside ex parte decrees on the Original Side were not made under Order 9, Rule 13 of the Code of Civil Procedure. Of course if they were not made under that rule it might well be said that the period of limitation laid down by Article 164 of the Limitation Act would not apply because the periods of limitation prescribed by that Act apply to proceedings under the Code of Civil Procedure.

24. In this case the writ of summons had been served and it appears to me that the question which arose was whether or not the defendant was prevented by sufficient cause from appearing, and Order 9, Rule 13 expressly provides that the ex parte decree can be set aside if a defendant establishes sufficient cause. Pearson, J. following the Bench decision appeared to think that Order 9, Rule 13 was in terms inapplicable to applications on the Original Side. But as I have already pointed out the words used in Order 9, Rule 13 are appropriate for applications to set aside ex parte decrees made not only in the mofussil but on the Original Side of this Court.

25. It was contended before us that because this Court has made certain rules which amend or annul certain of the rules of Order 9, then Order 9, Rule 13 cannot possibly be made applicable to proceedings on the Original Side.

26. The rules of procedure governing service of process and appearance of parties on the Original Side of this Court are contained in Ch. 8 of the Rules of the Original Side. Rule 15 provides that the defendant must enter appearance to a writ

of summons by filing with the proper officer in the office of the Registrar, on or before the day fixed for his appearance in the writ, a memorandum in writing stating that he intends to defend in person.

27. Rule 16 provides that in default of an appearance being entered within the time mentioned in the writ of summons for such appearance the suit is liable to be heard ex parte.

28. These two rules differ from the rules laid down by the Code. But even so, it only means that certain of the rules contained in Order 9 have been amended or abrogated. Order 9, Rule 1 of the Code of Civil Procedure provides:

'On the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the Court-house in person or by their respective pleaders, and the suit shall then be heard unless the hearing is adjourned to a future day fixed by the Court.'

29. That rule is not applicable to the Original Side and there can be no doubt that by reason of Section 129 of the Code of Civil Procedure rules governing the procedure on the Original Side could be made which are at variance with the rules in the Code of Civil Procedure:

'Notwithstanding anything in this Code, any High Court constituted by His Majesty by Letters Patent may make such rules not inconsistent with the Letters Patent establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code.'

30. It is clear therefore that the rules contained in Ch. 8 of the Original Side Rules, though they are in conflict with some of the rules of Order 9, are valid and override the provisions of those rules. That however does not mean that Order 9, Rule 13 is in any way affected. It is to be observed that there is no rule in Ch. 8 or indeed anywhere in the Original Side Rules relating to applications for setting aside ex parte decrees. The Original Side Rules are silent on the matter and as Order 9, Rule 13 has not been made inapplicable to the Original Side by Order 49, Rule 3, I

see no reason whatsoever why Order 9, Rule 13 should not govern applications made to set aside ex parte decrees on the Original Side.

31. It was contended on behalf of the appellant that there were other Bench decisions which supported the view taken by Rankin, C. J. in 'S. N. BANERJEE v. H. S. SUHRAWARDY', 55 Cal 473. Reference was made to 'KASSIM EBRAHIM SALEJI v. JOHURMULL KHEMKA', 43 Cal 447. But it appears to me that that case has no application whatsoever to the facts of the case which we are considering. All that that case lays down is that if a defendant has not been served then it is immaterial whether he knew of the proceedings against him or not. The Court held that knowledge of the institution of the suit derived by the defendant aliunde was not sufficient in the absence of proper service of a summons. It is to be observed that the application in this case was within thirty days and the question of limitation did not arise. What was suggested was that though the writ of summons may not have been served nevertheless the defendant knew of the proceedings and therefore it could not be said that he failed to appear by reason of non-service of the summons. The Court held that if the summons was not served then it was immaterial whether the defendant obtained knowledge of the proceedings by any other means. As he was not served there was no obligation upon him to appear at all.

32. It was contended however that if he had knowledge of the proceedings the defendant would be deemed to have constructive knowledge of the decree and therefore if a period of thirty days was the period of limitation that would have to be calculated, in every case where a defendant had knowledge of the proceedings, from the actual date of the decree. It seems to me however that a defendant might well have knowledge of the proceedings without having the slightest knowledge of the decree passed against him. It does not appear to me that this case of 'Kassim Ebrahim v. Johurmull Khemka', 43 Cal 447, can help the defendant-appellant in any way whatsoever.

33. Reference was also made to another Bench case of this Court, 'JHABARMULL DUDHWALLA v. BHAGATRAM SEROWGIE', 51 Cal W N 189. In that case a Bench followed the earlier case of 'KASSIM EBRAHIM v. JOHURMULL KHEMKA',

43 Cal 447 and again affirmed the principle that a defendant who has not been served with a writ of summons may apply to set aside an ex parte decree, though it might be established that he had obtained knowledge of the proceedings aliunde. Again the question of limitation never; arose in this case as the application was within thirty days and indeed the Bench that decided this case took the view that the application was an application under Order 9, Rule 13. Both the Judges who decided the case expressed that view and it appears to me that this case so far from supporting the appellant is very much against him.

34. A view contrary to that taken by Rankin, C. J. was taken by a Bench of this Court in the case of 'SURENDRA NATH v. HRISHI KESHAHA', 46 Cal WN 280, in which it was held that an application to have an ex parte decree passed on the Original Side of the High Court set aside is governed by Article 164 of the Limitation Act and must be made within thirty days from the date of the decree or the date of the applicant's knowledge of the decree.

35. This was the case which Sarkar, J. followed and in my view this case correctly lays down the law applicable to these applications. The Bench did not give any detailed reasons for differing from the view expressed in 'S. N. BANERJEE v. H. S. SUHRAWARDY', 55 Cal 473, but they saw no reason whatsoever for holding that such applications were not governed by Order 9, Rule 13 of the Code of Civil Procedure and Article 164 of the Limitation Act. In my judgment the view taken in the case of 'SURENDRA NATH v. HRISHIKESH SAHA', 46 Cal W N 280, is the correct view and the contrary view expressed in 'S. N. BANERJEE v. H. S. SUHRAWARDY', cannot be maintained. . .

36. Learned Advocate for the appellant however asked us, in the event of our holding that Article 164 of the Limitation Act applied to this application, to condone the delay in making the application. The delay in making certain applications can be condoned Under-section 5 of the Limitation Act. But it appears to me that the delay in this case cannot possibly be condoned.

37. Section 5 of the Limitation Act is in these terms:

'Any appeal or application for a review of judgment or for leave to appeal or any other application to which this section may be made applicable by or under any enactment for the time being in force, may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period.'

38. The section does not in terms apply to applications to set aside ex parte decrees and it can have no application to this case unless the section has been made applicable by or under any enactment. Learned Advocate for the appellant has to concede that there has been no enactment making Section 5 of the Limitation Act applicable to applications to set aside ex parte decrees. Some Courts have framed rules making the section applicable. But whether such rules are sufficient it is unnecessary for me to express any opinion. This Court however has made no such rules and though Section 5 has been made applicable, for example, to applications in insolvency it has never been made applicable by any enactment to applications such as the one now before us. That being so, we cannot condone the delay under Section 5 of the Limitation Act.

39. In any event even if the section applied it would be quite impossible to condone the delay in this case. Admittedly the defendant knew of the decree at the very beginning of October 1950 and he could have taken the necessary steps to have the application filed on the reopening of the Court on November 20, 1950. He however did very little until the Court reopened and it was only nine days afterwards that this application was filed. The only excuse given for the delay is illness. But there is nothing to support the defendant's statement except his own word. There is no affidavit by any doctor and no details whatsoever of this illness are given in the petition which has been verified by the defendant-appellant. That being so the delay cannot be condoned and as the application was made beyond thirty days it was rightly dismissed by the learned Judge.

40. The result therefore is that we answer the questions submitted to the Full Bench as follows: Questions Nos. 1 and 2 are answered in the affirmative. In answer to question No. 3 we hold that the case of 'S. N. BANERJEE v. H. S.

SUHRAWARDY', 32 Cal W N 10 is wrongly decided in so far as it holds that Order 9, Rule 13 of the Code of Civil Procedure has no application to proceedings to set aside ex parte decrees on the Original Side.

41. For these reasons the appeal will be dismissed with costs.

42. The application made by the defendant-appellant for an injunction restraining the plaintiff-respondent from executing the decree is dismissed. No order is made as to costs in the application.

Das, J.

43. I agree with my Lord the Chief Justice.

Banerjee, J.

44. A defendant, against whom an ex parte decree has been passed under Order 9, Rule 6, Civil Procedure Code, for default of appearance at the hearing, may apply under Order 9, Rule 13, Civil Procedure Code, for an order to set aside the ex parte decree, and it is incumbent on him to satisfy the Court (a) that the summons was not duly served, or (b) that he was prevented by any sufficient cause from appearing when the suit was called on for hearing. As to (a), it is clear that there cannot be any difference between the original side of the High Court and a mofussil Court. If summons is not served, the defendant is not under any duty to appear neither in the original side nor in the mofussil. If, however, the summons has been served and the defendant has failed to appear when the suit was called on for hearing, he has got to show sufficient cause. In (b) also, I cannot see any difference between a mofussil Court and the original side of the High Court. It is quite true that as to entering of appearance, there is difference in the procedure between the original side and the mofussil Court. In the original side, appearance is entered under rules which are to be found in Chapter 8 of our Rules. (See Rule 15 etc.). If appearance is not entered, the suit is placed on the undefended list. Where a suit is heard ex parte against any defendant, such defendant may be allowed to cross-examine, in person, the plaintiff's witnesses, and to address the Court; but unless the Court otherwise specially orders, evidence is not received on

his behalf, nor is he allowed the assistance of an advocate or attorney. There is difference in procedure in this between the original side and the mofussil. But that does not touch the point under consideration. It may be that this difference may enlarge or restrict the meaning of the expression 'sufficient cause' in Order 9, Rule 13. But that does not make any difference in the matter of 'appearance when the suit is called for hearing.' Therefore I do not see why the difference in the mode of entering appearance in the suit, will make any difference in the law of limitation to be applied in the case. The reason why the ex parte decree is passed is that the defendant does not appear at the hearing when the suit is called on; not that he has failed to enter appearance in the way required by our rules.

45. The High Court under Section 129 of the Civil Procedure Code can make rules to regulate its own procedure in the exercise of its original civil jurisdiction. The rules must not be inconsistent with the Letters Patent establishing the High Court, though they may not be consistent with the provision in the body of the Code.

46. The High Court has made rules modifying certain provisions of Order 9 but that does not mean that Rule 13 has been modified too. In fact there is no rule in our High Court Rules which modifies the provisions of Order 9, Rule 13. There is no reason, therefore, to suppose that Order 9, Rule 13, is not applicable to a decree passed by the High Court in the exercise of its ordinary original civil jurisdiction.

47. Order 49 which relates to Chartered High Courts provides that certain rules shall not apply to any Chartered High Court in the exercise of its ordinary original civil jurisdiction. But Order 9, Rule 13 is not one of the excepted rules.

48. Article 164 of the Limitation Act is in these words:

By a defendant, for Thirty The date of the dean order to set aside days, cree or, where the suma decree passed ex mons was not dullyparte. served, when the appli-cant has knowledge of the decree.

49. This article makes no reference to the Civil Procedure Code or to any other Act. This article makes no reference to Order 9, Rule 13, or any other provision of

the Code, It would seem that for the purpose of bringing the provisions of this article into operation it is not necessary to determine whether an application by a defendant for an order to set aside an ex parte decree is made in virtue of Order 9, Rule 13, Civil Procedure Code or apart from it. See 'CHETTYAR v. OFFICIAL RECEIVER, RAMNAD', 13 Rang 595 at p. 609.

50. If Order 9, Rule 13 does not apply which is the article that applies? It is argued on behalf of the petitioner that Section 151 of the Civil Procedure Code applies. We are not impressed with that argument. But assuming that Section 151 does apply, even so article 164 of the Limitation Act would apply. For assuming that Article 164 is limited to applications made under the Civil Procedure Code, an application under Section 151 is as much an application under the Code as an application under Order 9, Rule 13.

51. In 'TOTA RAM v. PANNA LAL', 46 All 631, it has been held that a Court cannot ignore the provisions of the law of limitation by appealing to Section 151 of the Code and in 'K. B. DUTT v. SHAMSUDDIN', 34 Cal WN419, occurs the following passage:

'I entirely dissent from the view that, if no case is made out under that rule (Order 9, Rule 13) it is open to the learned Judge to enlarge the rule by talking about Section 151.'

52. In construing provisions of the Limitation Act equitable considerations are out of place: 'NAGENDRA NATH v. SURESH', 60 Cal 1 (PC). My view on these considerations is that Order 9, Rule 13 does apply to an application for setting aside a decree made by the High Court in the exercise of its ordinary original civil jurisdiction and such application must be made within 30 days as provided in Article 164.

53. Assuming for a moment that Order 9, Rule 13 does not apply to decrees made by the Original Side, (which I do not for a moment hold), even so the article of the Limitation Act which is applicable to an application for setting aside an ex parte decree is Article 164 of the Limitation Act and must be made within 30 days. For, as I have already said, Article 164 does not make any specific reference either to

the Civil Procedure Code or any other Act or to Order 9, Rule 13 of the Code or any other provision of the Code. This article is couched in perfectly general terms.

54. The case of an ex parte decree is specially provided for in Article 164. Therefore the residuary article 181 has no application. It should be noted that though the word used in the article is 'decree', the article has been applied by the Madras High Court to an order in execution; see 'SUBBIAH NAICKER v. RAMNATHAN CHETTIAR', 37 Mad 462. There the learned Judges held that orders in execution came under Section 47, Civil Procedure Code, and are decrees as defined in Section 2 of the Code, and therefore ex parte orders passed in execution are ex parte decrees and so order 9, Rule 13 and Article 164 apply.

55. But it should be noted that they are not decrees. Section 2 of the Civil Procedure Code says that an order under Section 47 shall be deemed to be a decree. The words are, 'it shall be deemed to include the determination of any question within Section 47.' Really what the learned Judges did was to give an extended meaning to the word 'decree' in Article 164. The truth of the matter is that having regard to the words used in that article, it applies to all cases of ex parte decrees.

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