A GAUHATI UNIVERSITY

v.

SHRI NIHARLAL BHATTACHARJEE

NOVEMBER 2, 1995

B [K. RAMASWAMY AND B.L. HANSARIA, JJ.]

Code of Civil Procedure, 1908/Limitation Act, 1963 :

Or. IX, Rules 6, 13/Schedule, Article 123—Suit—Summons—Service C *of—Summons served on defendant but not in due time Suit decreed ex parte—Application for setting aside ex-parte decree rejected as barred by limitation—Held, summons not duly served as defendant did not have due time—Court to direct notice of future date to defendant—In absence of such notice, limitation to begin from knowledge of ex parte decree.*

D **The appellant-University was served on 28.5.1990 with summons for appearance as defendant in a suit before the Civil Court on 29.6.1990. The University sent a letter to the court seeking adjournment. The case was adjourned, but the University was not intimated of the next date. The suit was decred *exparte*. The application under Or. IX Rule 13, C.P.C. filed by** E **the University for setting aside the *ex parte* decree was rejected as barred by limitation. The University, being unsuccessful in appeal before the High Court, filed in the present appeal by special leave.**

Allowing the appeal, setting aside the *ex parte* decree and remitting the matter to the Civil Court, this court.

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HELD : 1. Limitation begins to run under Article 123 of the Schedule to the Limitation Act, 1963 from the date of decree if the summons is proved to be duly served. When the summons, through served, but the defendant did not have due time, Clause (C) of Rule 6 of Order IX, C.P.C. envisages G **further notice to be given to the defendant fixing a future date. [766-F]**

2. In the instant case, though notice was served on the defendant-University on May 28, 1990, the date fixed for appearance being May 29, 1990 there was no time much less sufficient to reach the Court for appearance on that date. While adjourning the suit to July 19, 1990, the said H **date was not communicated to the University. Thus, the summons was not**

duly served. The limitation began to run only when the University had knowledge of the *ex parte* decree. From the date of the knowledge, admittedly, the application under Order IX, Rule 13 was filed within 30 days.

[766-G-H, 767-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1246 of 1995.

From the Judgment and Order dated 26.5.95 of the Gauhati High Court in C.R. No. 94/95.

P.K. Goswami, Kailash Vasdev, Rajiv Mehta and Ms. Vanita Sahni for the Appellant.

B. D. Ahmed, Parijat Sinha, for Lawyers Associates for the Respondent.

The following Order of the Court was delivered :

Leave granted.

The appellant-University was impleaded as a party-defendant to the Title Suit No. 61/90 on the file of the Munsiff No. (1), District Karimganj in Assam. The suit was posted for appearance on May 29, 1990 but the summons were served on the appellant on May 28, 1990. He sent a letter to the Court seeking adjournment. Though the case was adjourned to July 19, 1990., the adjourned date was not intimated to the university. In consequence, the University did not enter appearance and the suit was ultimately decided *exparte.* The appellant filed an application under Order 9 Rule 13 CPC to set aside the *ex parte* decree. The Trial Court held that it was barred by limitation under Article 123 of the Schedule to the Limitation Act, 1963. On appeal, the High Court confirmed the order. Thus, this appeal by special leave.

Column 3 envisages that limitation would run from the date of the decree, or where the summons or notice *was not duly served,* when the applicant had knowledge of the decree. The question, therefore, is whether the appellant has been duly served.

Order 5 Rule 6 CPC provides that :

"*6. Fixing day for appearance of defendant.* - The day for the

A appearance of the defendant shall be fixed with reference to the current business of the Court, the place of residence of the defendant and the time necessary for the service of the summons; and the day shall be so fixed as to allow the defendant sufficient time to enable him to appear and answer on such day."

B Order 9 Rule 6 speaks of due service.

"6. *Procedure when only plaintiff appears,* - (1) where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then -

C (a) When summons duly served. - if it is proved that the summons was duly served, the Court may make an order that the suit be heard *exparte;*

(b) When summons not duly served. - if it is not proved that the summons was duly served, the Court shall direct a second summons D to be issued and served on the defendant;

(c) When summons served but not in due time - if it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the E summons, the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant."

It would thus be seen that when the summons is proved to be duly served, then the limitation beings to run under Article 123 from the date F of decree. But when the summons, though served, but the defendant had not had due time, clause (c) Rule 6 of Order 9, envisages further notice to be given, fixing a future date and the Court shall direct notice of such date to be given to the defendant. In this case, admittedly, no such step had been taken.

G It is seen that though notice was served on the appellant on May 28, 1990 and the date fixed for appearance was May 29, 1990, there was no time much less sufficient, to reach the Court for appearance on that date. While adjourning the suit to July 19, 1990, the said date was not communicated to the appellant, as envisaged in clause (c) Rule 6 of Order 9. Thus, H the summons was not duly served. The limitation began to run only when

the appellant had knowledge of the *ex parte* decree. From the date of the knowledge, admittedly, the application was filed within 30 days. The Courts below had not adverted to this aspect from this perspective. A

The appeal is accordingly allowed. The *ex parte* decree is set aside. The matter is remitted to the Trial Court. The appellant shall appear on December 4, 1995 before the Trial Court which would take such steps as are needed for filing the written statement etc. No costs. B

R.P. Appeal allowed.