A MAHABIR SINGH

v.

SUBHASH AND ORS.

OCTOBER 12, 2007

B **[S.B. SINHA AND HARJIT SINGH BEDI, JJ.]**

Limitation Act, 1963—Section 3 and Schedule Article 123—Limitation for filing application for setting aside ex-parte decree—
C *Non-appearance of defendant despite delivery of summons—Ex-parte decree—Application for setting aside the decree after its execution—Defendant admitting to the effect that he had knowledge of the decree one and half years prior to filing of application—Maintainability of the application—Held: Application was not maintainable—Defendant*
D *was unable to establish absence of service of summons—Application was also barred by limitation—Code of Civil Procedure, 1908—Or. 9 r. 13.*

An *ex-parte* decree was passed on 19.2.1986, in a suit filed by the
E **appellant, as the respondent-defendant did not appear in the court despite service of summons on him. An application for mutation on the basis thereof was allowed on 7.3.1996. Respondent filed application for setting aside of the *ex-parte* decree on 7.2.1997. The respondent in his cross-examination admitted that he had approached the appellant for**
F **not giving effect to the decree one and a half year prior to filing of the application. Trial Court dismissed the application. Appeal thereagainst was also dismissed. High Court allowed the Revision application, on the ground that summons were not properly served and the appellant had not taken recourse to publication in the Newspapers. Hence the**
G **present appeal.**

Allowing the appeal, the Court

HELD: 1. The approach of the High Court was not correct. There

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exists a presumption that the official act has been done in ordinary course of business. Admittedly, an ex-parte decree was passed. Defendant for getting it set aside was required to establish that either no summons was served on him or he had sufficient cause for remaining absent on the date fixed for hearing the suit *ex-parte*. [Para 6] [440-E, F]

2. Article 123 of the Limitation Act, 1963 provides for 30 days time for filing such an application. 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 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. In terms of Section 3 of the Limitation Act, 1963, no court shall have jurisdiction to entertain any suit or application if the same has been filed after expiry of the period of limitation. The High Court could not have ignored the said jurisdictional fact.

[Paras 7, 8 and 9] [440-F; 441-C, D, E, F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4881 of 2007.

From the Judgment and final Order dated 14.02.2005 of the High Court of Punjab and Haryana at Chandigarh in Civil Revision Petition No. 5999 of 2003.

A. Nehra, Gagandeep Sharma and Rameshwar Prasad Goyal for the Appellants.

Manjit Singh, B.K. Satija and D. Mahesh Babu for the Respondents.

The Judgment of the Court was delivered by

A **S.B. SINHA, J.** 1. Leave granted.

2. Appellant is before us being aggrieved by and dissatisfied with a judgment and order dated 14.2.2005 passed by the High Court of Punjab and Haryana in Civil Revision Petition No.5999 of 2003 whereby and whereunder the Revision Application filed by the first respondent herein
B was allowed.

3. Appellant filed a civil suit on or about 6.4.1985. Summons of the suit were served upon the first respondent. He did not appear. An *ex parte* decree was passed against him on 19.2.1986. An application for
C mutation on the basis thereof was filed which was allowed on 07.03.1996. Allegedly, the first respondent having come to know about passing of the said *ex parte* decree on 03.02.1997, filed an application on 07.02.1997 for setting aside the same, in terms of Order IX Rule 13 of the Code of Civil Procedure. The learned Trial Judge, by reason of an order dated
D 28.07.2000, dismissed the said application, *inter alia*, holding that summons had been duly served upon the first respondent. It was furthermore noticed that the first respondent herein, while examining himself in the said proceedings under Order IX Rule 13 of the Code of Civil Procedure in his cross-examination, admitted that one and a half year prior
E to filing of the said application, he and his brother approached Dharam Singh for getting the judgment and decree set aside but he negated their plea.

4. An appeal was preferred thereagainst. The Appellate Court also
F affirmed the said finding holding :

> "12.In this case, Ex.A1 to Ex.A3 are the record of ownership which is not disputed. Ex. R3 I the copy of summon which clearly shows that Subhash refused to accept the service of summons. It also shows that the copy of summons was also affixed on his
G house. This report is duly attested by clerk of Court as per Ex.R4/ B and affidavit has also been given by Jogi Ram process server and affidavit has also been given by Jogi Ramprocess server and Subhash was to appear in court on 7.5.85 but he did not appear in the court and then the court has ordered for substituted service.

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But after munadi effected in the village also, the defendant failed to appear in court as per Ex.R1, Ex.R2 is the report of Ram Mehar, process server who got effected the munadi. No doubt Nand Lal Chjowkidar has denied his thumb impression but it carried no help to the defendant in view of the statement of RW-1 Ram Mehar, process server. There is no report on the file that the summons does not bear the thumb impression of Nand Lal Chowkidar. Statement of PW2 Nand Lal is self contradictory as he has pleaded that he has no knowledge that the process server has affixed the copy of summons on the house of Subhas. He has also stated that he has no knowledge that about ten years back court officials brought this summon to him. He has shown his ignorance about the pendency of the case. He has also shown his ignorance about the munadi effected by him twelve years back. He has even not been able to tell that he was shown as a witness. There is no reason to disbelieve the statement of Ram Mehar, process server with regard to the report of refusal of Subhas, appellant RW-2 Dilbag Rai Jain has also proved that the summon were duly executed upon the defendant who refused to accept the same. So there is no illegality or irregularity in thie service of summons. Rather the learned trial court has given double opportunity not only after the refusal by the defendant to appear in the court but as well as by getting the defendant served through munadi. Since the defendant intentionally did not appear in the court so the learned trial court has rightly passed the *ex parte* judgment and decree dated 19.2.86.

13. Admittedly the decree under challenge was passed in the year 1986 while the present application for setting aside the *ex parte* judgment and decree was filed on 6.2.97 i.e. almost after eleven years of passing of the impugned decree. So far as the delay in filing the application is concerned, no doubt the defendant has tried to prove that he came to know recently about the decision of the case but this version is not tanable when PW1 Ram Mehar, process served has categorically stated that about 1-1/2 years back he alongwith his brother, went to Dharam Singh and Dharam Singh

A told them that they have got no concern with the plot in question and that he would not set aside the decree. He has also stated that he has told his relatives that 10/11 days prior filing this application. This clearly shows that the defendant was well aware of the decree in question and he can file the present application
B within one month of the passing of the decree. He is to explain each days delay. So it can be safely eld that the application is time barred. Thus, the findings of the learned trial court recorded under issue No.1 and 2 are hereby affirmed and these issues are decided against the appellant-defendant and in favour of the respondents-
C plaintiffs.

5. The Revision Application filed thereagainst by the first respondent herein was allowed by the High Court. The High Court in the impugned judgment opined that the appellant had played fraud on the Court as neither the summons were properly served, nor the publication was made in the
D newspapers. Order V Rule 19A of the Code of Civil Procedure, which, according to the High Court, could have been taken recourse to, had also not been resorted to. Adverse comments were also made by the High Court in regard to the application for mutation filed by the appellant only
E after 10 years, i.e., in the year 1996.

6. The approach of the High Court, in our opinion, was not correct. There exists a presumption that the official act has been done in ordinary course of business. Admittedly, an *ex parte* decree was passed. Defendant for getting it set aside was required to establish that either no
F summons was served on him or he had sufficient cause for remaining absent on the date fixed for hearing the suit *ex parte*.

7. Article 123 of the Limitation Act, 1963 provides for 30 days time for filing such an application. The said provision reads thus :

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

8. 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 Code of Civil Procedure 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.

9. In terms of Section 3 of the Limitation Act, 1963, no court shall have jurisdiction to entertain any suit or application if the same has been filed after expiry of the period of limitation. The High Court could not have ignored the said jurisdictional fact.

10. For the reasons aforementioned, the impugned judgment cannot be sustained. It is set aside accordingly. The appeal is allowed with costs. The counsel's fee assessed at Rs.10,000/- (Rupees ten thousand only).

K.K.T. Appeal allowed.