

REVISIONAL CIVIL.

Before Bhandari, C. J.

JAGAN AND OTHERS,—*Defendants-Petitioners*

versus

MAHADEV,—*Plaintiff-Respondent.*

Civil Revision No. 242 of 1955.

1956
Feb. 8th

Limitation Act (IX of 1908)—Section 5—Amendment of Rule 13 of Order IX of Civil Procedure Code, by the High Court, making section 5 of the Limitation Act, applicable to applications under Order IX, Rule 13—Whether amendment can be applied retrospectively.

An *ex-parte* decree was passed on the 23rd February, 1953, and an application for the setting aside of the said decree was made on the 19th June, 1954. *Prima facie* that application was barred by time, but on the 6th December, 1954, this court amended rule 13, order 9 of the Civil Procedure Code and declared that provisions of section 5, Limitation Act, shall apply to applications under sub-rule (1) of the said rule.

Held, that the help of the new rule could not be invoked in the present case as it could not operate retrospectively so as to impair existing and vested rights.

Petition under section 44 of Act 9 of 1919, for revision of the order of Shri Harnam Singh, Senior Sub-Judge, with Enhanced Appellate Powers, Hissar, dated the 12th April, 1955, affirming that of Shri Aftab Singh, Sub-Judge, 3rd Class, Hissar, dated the 3rd January, 1955, dismissing the application.

Application for setting aside the ex-parte decree under Order 9, Rule 13, Civil Procedure Code.

RAJINDER SACHAR, for Petitioner.

P. C. PANDIT, for Respondent.

JUDGMENT

BHANDARI, C. J.—This petition raises the question whether the Courts below were justified in declining to set aside an *ex parte* decree passed on the 23rd February, 1953.

It appears that the plaintiff in this case brought a suit for possession against Jagan and certain other defendants. The service of notice was effected on all the defendants but only one of them, namely Jagan, appeared in Court and filed a written statement. The case was to come up for hearing on the 13th February, 1953 but on the very same day it was transferred to the Court of Mr. Bal Kishan Aggarwal without the knowledge of the defendants. The latter failed to appear in Court on the next hearing and an *ex parte* decree was passed against them on the 23rd February, 1953. Sixteen months later, i.e., on the 19th June, 1954, the defendants applied for the setting aside of the *ex parte* decree on the ground that they came to know of this *ex parte* decree only on the 15th June, 1954. The trial Court came to the conclusion that as the case was transferred to the Court of Mr. Aggarwal without notice to the defendants there was sufficient cause for the absence of Jagan on the 23rd February, 1953 but that, in view of the provisions of Article 164 of the Limitation Act, the application was barred by time. This order was affirmed by the learned Senior Subordinate Judge in appeal. The defendants have now come to this Court in revision.

Article 164 of the Indian Limitation Act declares that an application by a defendant for an order to set aside a decree passed *ex parte* should be presented within a period of thirty days from the date of the decree or where the summons was not duly served, the date when the applicant had knowledge of the decree. The decree in the present case was passed on the 23rd February, 1953 and it is obvious

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that the application for the setting aside of the *ex parte* decree which was presented on the 19th June, 1954 is clearly barred by time. As pointed out in *Sodhi Harnam Singh v. Sodhi Mohinder Singh* (1), the provisions of section 5 of the Limitation Act did not apply to applications under Order IX, rule 13 of the Code of Civil Procedure and the Courts were accordingly precluded from extending the period of limitation under the provisions of this section. On the 6th December, 1954 this Court added a new sub-rule (2) to rule 13 of Order IX of the Code of Civil Procedure, which was in the following terms :—

“(2) The provisions of section 5 of the Indian Limitation Act, 1908, shall apply to applications under sub-rule (1).”

This addition empowers a Court to extend the period of limitation in cases of hardship where an application for the setting aside of an *ex parte* decree cannot be presented within the period prescribed by law.

A question arises whether it is possible to invoke the help of this rule for the purpose of extending the period of limitation in the present case. Mr. Sachar invites my attention to *Lachmeshwar Prasad Shukul and others v. Keshwar Lal Chaudhuri and others* (2), in which it was held that the hearing of an appeal under the procedural law of India is in the nature of a re-hearing and consequently that in moulding the relief to be granted in a case on appeal, the appellate Court is entitled to take into account even facts and events which have come into existence after the decree appealed against. He prays that in view of the provisions of sub-rule (2) of rule 13 of Order IX this Court should extend the period of limitation under the provisions of section 5 of the Limitation Act. I regret it is impossible to accede to this request. It is common ground that the new sub-rule which was

(1) A.I.R. 1954 Punjab 137

(2) A.I.R. 1941 F.C. 5

introduced towards the end of 1954 is a rule of procedure and that in accordance with recognised legal principles, this rule would ordinarily operate retrospectively unless it is likely to impair existing or vested rights. In *Messrs. Gordhan Das Baldev Das v. The Governor-General in Council*, (1) I pointed out that although laws which affect only the procedure and practice of Courts are always retrospective, even a rule of procedure cannot be carried to the point of destroying vested rights. The *ex parte* decree which is sought to be set aside in the present case was passed on the 23rd February, 1953 and an application for the setting aside of the decree could have been presented within a period of thirty days from the said date. In actual fact the application was not presented till the 19th June, 1954. Sub-rule (2) of rule 13 of Order IX came into force on a later date. As the decree-holder had acquired a vested right in the *ex parte* decree obtained by him on the 23rd February, 1953 he cannot be divested of this right by a rule of procedure which came into force on a later date. The mere fact that this Court framed a new rule of procedure on the 6th December, 1954 did not, in my opinion, confer an additional right on the defendants to present their application after the expiry of the period of limitation.

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For these reasons I am of the opinion that when the defendants failed to present an application for the setting aside of the decree within a period of thirty days from the date of the *ex parte* decree, the plaintiff came to acquire a vested right which could not be taken away even by the rule of procedure which was framed by this Court on a later date. The order of the Courts below must therefore be affirmed and the petition dismissed. Having regard, however, to the peculiar circumstances of the case, I would leave the parties to bear their own costs.

(1) (1952) 54 P.L.R. 1