APPELLATE CIVIL

Before C. G. Suri, J.

SATISH KUMAR KOHLI,—*Appellant.*

versus

SMT. KIRAN BALA, ETC.—*Respondents.*

First Appeal From Order No. 32-M of 1970.

July 26, 1971.

Code of Civil Procedure (V of 1908)—Order V, rule 20 and Order IX rule 13—Limitation Act (XXXVI of 1963)—Article 123—Explanation thereto—Whether governs the interpretation of words "duly served" in Order IX rule 13—Person served by substituted service—No defect or irregularity in the service—ex parte decree passed—For setting aside the decree—Such person—Whether must prove "sufficient cause" for being prevented from appearing in Court on the date fixed.

Held, that in order to prevent any miscarriage of justice the Explanation to Article 123 of Limitation Act, 1963, provides that in cases of substituted service the date of the knowledge of the *ex parte* decree would furnish the *terminus a quo* for the running of the limitation period for setting aside an *ex parte* decree. This, however, does not mean that the explanation also governs the interpretation of words "duly served" in Order IX, rule 13 of the Code of Civil Procedure. The question of any harmonious construction of these provisions of the law does not arise because sub-rule (2) of Rule 20 of Order V of the Code which lays down that substituted service shall be as effectual as if it has been made on the defendant personally remains unaffected by the recent changes in the law of limitation. It is obvious that the application of the Explanation was confined by the Legislature to Article 123 with the intention of leaving rule 20(2) of the Code unchanged. The Explanation to Article 123, therefore, is not a guide in the interpretation of the words 'duly served' in Order IX, rule 13 of the Code. Definitions or explanations found in one Act cannot always be a safe guide for the construction of the provisions of another Act or Code, particularly when the Explanation to Article 123 expressly says that it has been enacted only for the purpose of the Article. Hence if the provisions of the Cade have been properly complied within effecting the substituted service of a person and there is no defect or irregularity in observing the requirements of law, the person would be taken to have been 'duly served'. To hold otherwise would render substituted service meaningless in most cases as the defendant could go on evading service and then have the *ex parte* decree set aside as a matter of course as long as he applies within time. He could go on spurning the process of Court thereby delaying the proceedings and after having forced the Court's hands to resort to substituted service make a mockery of that mode of service which has been declared by rule 20(2) to be as effectual as personal service. A person, therefore, who is served by substituted service and applies for setting aside an *ex parte* decree passed against him, he must satisfy the Court that he was prevented by any sufficient cause from appearing when the *ex parte* decree was passed. **(Para 8)**

First Appeal from the Order of the Court of Shri S. S. Dewan, 1st Additional District Judge, Ludhiana, dated 20th April, 1970 dismissing the application with costs.

D. N. AGGARWAL, ADVOCATE WITH B. N. AGGARWAL, ADVOCATE, for the appellant.

JAGAN NATH KAUSHAL, ADVOCATE WITH ASHOK BHAN ADVOCATE, for the respondents.

JUDGMENT

(1) The appellant's wife, Smt. Kiran Bala, respondent, was granted an *ex parte* decree for judicial separation and nullity of marriage on her application under sections 10 and 12 of the Hindu Marriage Act, 1955 (hereinafter briefly referred to as 'the Act') by the Additional District Judge at Ludhiana on 12th June, 1968. The appellant had filed an application under Order IX. rule 13 of the Code of Civil Procedure (hereinafter briefly referred to as 'the Code') on 28th November, 1968, for the setting aside of that *ex parte* decree but this application has been dismissed by an order dated 20th April, 1970, on the grounds, *inter alia,* that the application was time-barred and that there was no sufficient cause for the setting aside of the decree. The husband has come up in appeal against that order.

(2) The parties had been married according to Hindu rites at Ludhiana on 11th September, 1967. The appellant was an Overseer in the Indian Institute of Technology in those days and had been allotted a quarter in the campus at Hauz Khas, New Delhi. One Shri S. K. Mehra was his colleague in the same office and had been allotted a quarter opposite to the quarter of the appellant. His wife Smt. Sarla Mehra was a co-respondent with the appellant in the original proceedings for judicial separation and nullity of marriage.

(3) The parties had lived together as husband and wife in the quarter in Hauz Khas, New Delhi, for a period of only about two months after the marriage. The appellant was said to have resigned his job and to have vacated his own quarter. It was alleged that thereafter the parties had shifted to the quarter of Shri S. K. Mehra. The respondent claimed to have seen the appellant lying in bed with Mrs. Sarla Mehra and the belief that they were living in adultery was made a ground for judicial separation under section 10(1)(f) of the Act. The annulment of the marriage had been claimed by the wife on grounds of fraud under section 12(1)(c) of the Act. She was

a minor at the time and her father had carried out the marriage negotiations. The appellant was said to have wrongly stated to the respondent's father before the marriage that he was holding the job of S.D.O. in the Central Public Works Department at Delhi and that he was a non-manglik when in fact he was a manglik. A false horoscope is said to have been supplied to the respondent's father in support of the last mentioned misrepesentation. These flimsy grounds for the annulment of the marriage had been accepted as correct by the learned Court of first instance while granting a decree on the grounds, amongst others, of fraud. Anyhow, I am not seized of the case in an appeal or revision against the decree for nullity of marriage or judicial separation and it is not open to me at this stage to go into the adequacy or otherwise of the grounds on which this decree had been granted. The respondent had examined about a dozen witnesses in support of her allegations before she was granted the *ex parte* decree. The grounds on which she had sought judicial separation were legally tenable.

(4) The appellant's co-respondent had put in appearance during the trial and had filed a written statement. She or her counsel had been attending all hearings up to the stage of framing of issues. After the District Judge had transferred the case to an Additional Judge, her counsel had also appeared in the transferee Court and the record shows that the instructions contained in paragraph 6 of chapter 13 of the Punjab High Court Rules and Orders, Volume I, had been duly complied with by the Courts. Shri Aggarwal, the learned counsel for the appellant, has not referred me to any law, rule or authority which made it obligatory on the Court to issue a fresh notice at this stage to the party who had chosen to keep away from Court in spite of the pains already taken to get him served.

(5) Shri Aggarwal does not seriously contest before me the correctness of the process servers' reports dated 14th December, 1967 and 14th February, 1968 which are to the effect that notices about the wife's petition had been tendered to the appellant and that he had refused to accept service. On the last mentioned date, a copy of the notice had been affixed on the outer door of the house in which the appellant was residing at the time. This service was in accordance with the provisions of Order V, rule 17 of the Code. In the original petition filed by the wife, both the respondents were shown to be living in the quarter in Hauz Khas allotted to Shri S. K. Mehra husband of the co-respondent Smt. Sarla Mehra. These reports about

refusal of notices and affixation of the process have been duly proved, amongst others, by the process servers, the attesting witnesses and the respondent's father who is a doctor at Ludhiana. The appellant's co-respondent who had also been served at the same address and her witnesses including her husband had conceded at so many stages in the proceedings that the appellant was living in their quarter in Hauz Khas in those days.

(6) Because the appellant had refused to accept service on two occasions, the Court had ordered substituted service to be effected under Order V, rule 20 of the Code by proclamation to be published in the vernacular daily newspaper 'Tej' of Delhi. A proclamation had been duly published in an issue of this Paper bearing the date 4th April, 1968. The appellant had not cared to appear in the Court at Ludhiana for a number of hearings until the *ex parte* decree was passed against him on 12th June, 1968. The application for the setting aside of this decree was filed by the appellant more than five months after the date of the decree, that is, on 28th November, 1968.

(7) In order to be able to appreciate the contentions raised by the counsel for the parties, we may have before us, for ready reference, the following pertinent provisions or extracts from the Code and the Limitation Act:—

Code

"*Order V, rule* 17—

> Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or ....., the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain .....

Order V, rule 19.—

> Where a summons is returned under rule 17, the Court ..... shall either declare that the summons has been duly served or order such service as it thinks fit.

Order V, rule 20.—

> (1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason, the summons cannot be served in the ordinary

way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.

(2) Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally.

(3) * * * * * *
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Order IX, rule 13.—

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; and 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....."

LIMITATION ACT, 1963.

(The Schedule)

Description of application.	*Period of limitation*	*Time from which period begins to run.*
(*Article* 123)		
"To set aside a decree passed *ex parte* or to rehear 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 shall not be deemed to be due service."	Thirty days.	The date of the decree or where the summons or notice was not duly served when the applicant had knowledge of the decree.

(8) Shri Aggarwal canvasses two propositions of law before me, first that the summons in this case were not 'duly served' within the meaning of Order IX, rule 13 of the Code and that in view of the phraseology employed, it was not necessary for the appellant to allege or prove any sufficient cause for his non-appearance on the dates of hearing in Court. Secondly that there was no due service of the notices in the case and that the *terminus a quo* for the running of period of limitation of 30 days prescribed in Article 123 is the date on which appellant had knowledge of the decree. The last submission is based on the explanation to Article 123 and as long as the appellant could prove that he had filed the application within 30 days of his coming to know of the passing of the decree he cannot be non-suited on the ground that his application was time barred. There is, therefore, no quarrel with the last submission made by Shri Aggarwal. He would, however, like this explanation to guide us in the interpretation of the words 'duly served' occurring in Order IX, rule 13 of the Code. The opening clause of the explanation, however, suggests that it has been enacted only for the purposes of Article 123 of the Limitation Act. No such explanation was to be found in the corresponding Article 164 of the old Limitation Act No. 5 of 1908. The explanation may appear to have been inserted in the new Limitation Act as it was felt that in some cases the party filing a suit or appeal, etc., colluded with the process servers or postmen to get fictitious reports about evasion or refusal of the process by the defendant or respondent and that very often orders for substituted service followed such fictitious or collusive reports in routine or as a matter of course. In order to prevent any miscarriage of justice, the explanation provided that in cases of substituted service the date of the knowledge of the decree should furnish the *terminus a quo* for the running of the limitation period. There is, however, no authority in support of Shri Aggarwal's argument that this explanation would also govern the interpretation of the words 'duly served' in Order IX, rule 13. The argument that Article 123 and Order IX, rule 13 deal with the same matter and that the two provisions must receive a harmonious construction might have carried some weight had it not been for the fact that sub-rule (2) of rule 20 of Order V which lays down that substituted service shall be as effectual as if it had been made on the defendant personally remains unaffected by the recent changes in the law of limitation. It is obvious that the application of the explanation was confined by the Legislature to Article 123 with the intention of leaving rule 20(2) unchanged. Definitions or explanations found in one Act cannot always be a safe guide for the construction of the provisions of another Act or Code and this would be more

so when an explanation expressly says that it has been enacted only for the purposes of a particular article or section. There is no controversy over the interpretation of the words 'served' or 'service' when used in respect of a process issued by a Court and the words 'due' or 'duly' which have not been defined in the Code or the Limitation Act must receive ordinary dictionary meaning while we are interpreting the provisions of the Code. The words 'duly served' in Order IX, rule 13 must, therefore, receive their ordinary dictionary meaning. According to Webster's International Dictionary 'duly' means in a due or proper or regular manner. According to Black's Law Dictionary, 'duly' means in a due or proper form or manner or according to legal requirements or according to law in both form and substance. So if we find, as I do in the present case, that the provisions of the Code have been properly complied with in effecting the appellant's service and there are no defects or irregularities in observing the requirements of law, the appellant would be taken to have been 'duly served' with notices in this case. To hold otherwise would render substituted service meaningless in most cases as the defendant could go on evading service and then have the *ex parte* decree set aside as a matter of course as long as he applied within time. He could go on spurning the process of Court thereby delaying the proceedings and after having forced the Court's hands to resort to substituted service make a mockery of that mode of service which has been declared by rule 20(2) to be as effectual as personal service. This would make it necessary for the appellant to satisfy the Court that he was prevented by any sufficient cause from appearing when the suit was called on various hearings. The evidence about any such sufficient cause for non-appearance which could satisfy the Court is conspicuous by its absence in the present case. The appellant had, therefore, failed to make out a good case for the setting aside of the *ex parte* decree. The appellant's male vanity had led him to ignore the imputations of adultery when his co-respondent living in the same house at Delhi had been stung deep enough to take up the defence of the case by putting in appearance on a number of hearings in a Court situated hundreds of miles away.

(9) Even if for the sake of arguments only I were to accept Shri Aggarwal's submission, it would be necessary for the appellant to prove that he had applied in time for the setting aside of the *ex parte* decree. If the statute were to start running from the appellant's knowledge, the onus was on the appellant to prove when and how he had received information about the passing of the decree. This has

been so held in *Sohan Lal* v. *Poonam Chand* (1), a ruling cited by Shri Aggarwal. Once the appellant had been fixed with the knowledge of the filing of the proceedings, it is too much to accept that he had no knowledge about the passing of the decree for a period of more than four months. Once a party has come to know of a pending case, he is supposed to keep himself informed about the progress of the proceedings from date to date. The service effected by affixation under rule 17 could have been treated by the Court as due service under rule 19 of Order V of the Code and if *ex parte* proceedings had been taken on that service there was no question of the application of the explanation under Article 123 and the time would have started running from the date of passing of the decree and not from the date of the knowledge of the decree. It was only by way of abundant caution that the court had directed substituted service under Order V, rule 20 of the Code.

(10) The appellant's case was that he had received knowledge about the passing of the decree from some summons sent to his mother in a suit for damages filed by the respondent after she had secured this *ex parte* decree for judicial separation and annulment of marriage. The appellant was also a defendant in that suit for damages along with his mother and we have no reason to believe that at about the same time summons in that case had not been sent to the appellant direct. The lower Court has discussed this evidence and has come to the finding that the papers alleged to have been sent by the mother should also have reached the appellant more than a month before the filing of the application under Order IX, rule 13. The suit for damages had been instituted by the respondent on 3rd October, 1968. The appellant's mother had been personally served with summons of that case in her village on 17th October, 1968,—*vide* the process server's report, copy Exhibit R.W. 6/1. Her signatures appeared at Exhibit R. W. 6-1/A. According to her statement made in Court, she had sent these papers to the appellant at Delhi by registered post the next day. In normal course of events, the postal journey should not have taken more than 2 or 3 days and the registered cover, if sent at all, should have reached the appellant on or before 20th October, 1968. The application for the setting aside of the *ex parte* decree was filed in Court on 28th November, 1969, that is to say more than a week after the expiry of limitation even if we compute the period from this date of appellant's alleged knowledge of the decree. The dates of the postal journey could have been better

(1) A.I.R. 1961 Rajasthan 32.

proved by summoning the records of the Postal Department or by producing the registered cover with dates of franking of the postage stamps and cover etc. The absence of all this evidence leads us to doubt whether any such papers had at all been sent to the appellant by his mother. It has been argued by Shri Aggarwal on the basis of *Sohan Lal's case* (1) (supra) that some vague information about the passing of some sort of decree would not be enough. In the present case, the appellant had all the necessary particulars about the case and the Court from the notices and other papers affixed at his place of residence. These particulars could also have been supplied to the appellant by his co-respondent who was living in the same house. The husband of the lady had been examined in Court and had stated that he had secured the documents pertaining to the case from the District Courts at Delhi and that thereafter he had a talk about it with the appellant. A husband would naturally have something to say to a person who had brought such infamy to his wife and for having repaid them in this manner for the shelter giving in the house. The appellant, therefore, fails to satisfy me that he had any sufficient cause for his non-appearance on so many dates of hearing or that he had applied within time.

(11) The appeal fails and is hereby dismissed with costs which shall include the conditional costs remaining unpaid in compliance with the Court's order dated 8th March, 1971.

N. K. S.

INCOME-TAX REFERENCT

Before D. K. Mahajan and H. R. Sodhi, JJ.

THE COMMISSIONER OF INCOME-TAX, PUNJAB, J.&K. AND CHANDIGARH, PATIALA,—*Applicant.*

versus

THE ORIENTAL CARPET MANUFACTURERS (INDIA) PRIVATE LTD., AMRITSAR,—*Respondent.*

Income tax Reference No. 2 of 1971.
July 27, 1971.

Income-tax Act (XI of 1922)—Section 10(2)(xv)—Company not doing business of its own but deriving income from dividends received from its