Supreme Court of India
Sri Lal Sah And Ors. vs Gulabchand Sah (Dead) By Lrs. And ... on 6 January, 1993
Equivalent citations: 1993 (41) BLJR 539, JT 1993 (1) SC 90, 1993 (1) SCALE 29, (1993) 1 SCC 557
Bench: S Pandian, S Agrawal
JUDGMENT

1. Heard learned Counsel. Special leave granted.

2. This appeal arises out of a suit for partition filed by the appellants herein in the court of Sub-Judge, Purnea, in the year 1969. Gulabchand Sah, respondent No. 1 herein, was defendant No. 2 in the said suit, and after his death his legal representatives have been brought on record as respondents Nos. 1 (a) to (j). Mohan Lal Sah, respondent No. 2 herein, was defendant No. 3 in that suit. On April 25, 1969, a compromise petition was filed on behalf of respondent No. 1 and the appellant No. 1, but no orders were passed on it because the suit was being contested by the other defendants. No interest was, however, taken by respondent No. 1 in the said proceedings after filing the said compromise petition. An injunction was granted by the trial court in the suit whereby the defendants were restrained from making any construction on some of the plots. The said injunction was vacated by the appellate court insofar as respondent No. 2 was concerned and the appellants went in revision against the said order to the High Court. The said revision was dismissed by the High Court on April 24, 1973 on an agreement between the parties that respondent No. 2 will not make any further construction. After receipt of the record of the suit from the High Court, the trial court on February 26, 1977 directed that requisites be filed for issuance of registered letter and by order dated March 2, 1977 it was further directed that lawyers appearing for parties be informed. On March 25, 1977, when the suit was taken up for hearing, neither respondent Nos. 1 and 2 nor their advocates were present and an ex-parte preliminary decree was passed. On July 20, 1981, two separate applications were filed by respondent No. 1 and respondent No. 2 for setting aside the said ex-parte preliminary decree. The said applications were contested by the appellants and after recording evidence of the parties, the trial court, by separate orders dated April 18, 1983, dismissed both the applications. Appeals filed against these orders were dismissed by a common judgment dated May 23, 1985 by the District Judge, Purnea. Separate revision petitions were filed by respondent No. 2 and respondent No. 1 against the said order of the District Judge. Civil Revision No. 965 of 1985 filed by respondent No. 2 was dismissed by order of the High Court (B.P. Jha A.C.J.) dated August 10, 1987. Civil Revision No. 851 of 1985 filed by respondent No. 1 was, however, allowed by a division bench of the High Court by order dated May 4, 1992. Feeling aggrieved by the said order of the High Court dated May 4, 1992. the appellants have filed this appeal.

3. Shri Ranjit Kumar, the learned Counsel appearing on behalf of the appellants, has urged that the trial court as well as the appellate court have found that respondent No. 1 was net prevented by sufficient cause from appearing before the court when the case was called for hearing on March 25, 1977 and further that the application for setting aside the ex-parte decree was hopelessly barred by limitation and that the High Court was not justified in interfering with the said order in exercise of its revisional jurisdiction under Section 115 CPC. In this context, the learned Counsel has pointed out that in similar circumstances, the High Court, by its earlier order dated August 10, 1987, had

dismissed the revision petition filed by respondent No. 2. Shri Hari Lal Agarwal, the learned senior counsel appearing for respondents Nos. 1(a) to (j), has, however, submitted that there is a distinction between the case of respondent No. 2 and that of respondent No. 1 in the matter of setting aside the ex-parte decree inasmuch as while in the case of respondent No. 2 notice had been given to Shri K.K. Niyogi, Advocate appearing for respondent No. 2 in the trial court, no such notice was given to Shri Anil Ranjan Mitra, Advocate appearing for respondent No. 1 in the trial court, and since no notice was given to counsel for respondent No. 1, the High Court was justified in setting aside the ex-part decree.

4. Under Article 123 of the Limitation Act, 1963, a period of 30 days is prescribed for an application to set aside a decree passed ex-parte. The starting point for computing the said period of limitation is the date of decree or where the summons or notice was not duly served, when the applicant had knowledge of the decree. In the present case, respondent No. 1 has invoked the latter part of Article 123 and has claimed that the period of limitation should be computed from the date of knowledge of the decree for the reason that the notice about the date of hearing after the receipt of the record from the High Court had not been served on him or his counsel. The case of respondent No. 1 is that he came to know of the ex-parte preliminary decree for the first time on July 20, 1981 and that he submitted the application for setting aside the ex-parte decree on the same day and, therefore, there was no delay in the filing of the said application. This fact has been disputed by the appellants. Before the trial court, they adduced evidence of Narain Sah, OPW-2. Sri Lal Sah, OPW-3. Narain Sah, OPW-2 has deposed that Sri Lal Sah, appellant No. 1, had talked to Respondents Nos. 1 and 2 at Darwaza of respondents No. 1 at Rajiganj about the ex-parte decree in August, 1977 in his presence and that respondent Nos. 1 and 2 had told appellant No. 1 that they would settle the whole thing later on. The said witness is a close neighbour of both (he parties. Lal Sah, OPW-3 has stated that he had himself informed respondents Nos. 1 and 2 about the said ex-parte decree and there was also a meeting between him and them. The Sub-Judge, Purnea, in his order dated April 18, 1983, has accepted the testimony of both these witnesses. It may be mentioned here that evidence to the same effect had been adduced by the appellants while opposing the application for setting aside the ex-parte decree filed by respondent No. 2 wherein also the said evidence had been accepted by the Sub-Judge by his order April 18, 1983. The District Judge, in appeal, did not consider it necessary to refer to the said evidence because he was of the view that the period of limitation had to be computed under the first part of Article 123, namely from the date of decree and not from the date of knowledge. The High Court, while dismissing the revision petition of respondent No. 2, by its order dated August 10, 1987, observed: "It is clear from the finding of the trial court that in 1977, the petitioner and the other defendants had knowledge about the ex-parte decree". In the impugned judgment, the division bench of the High Court has proceeded on the basis that the delay in filing of the application under Order 9, Rule 13 CPC ought to have been condoned by the trial court, even though there was no application for condonation of delay, since respondent No. 1 claims that he had no knowledge of the decree till June 21, 1981 and he learnt about the same on June 22, 1981 and the same could be a ground for condonation of delay in filing the application under Order 9, Rule 13 CPC. In accepting the claim of respondent No. 1 that he had no knowledge of the decree till June 22, 1981 the High Court has failed to take note of the evidence that was adduced by the appellants before the trial court as well as the observations mentioned above in the earlier order of the High Court dated August 10, 1987. The evidence adduced by the appellants which has been accepted by

the trial court establishes that respondent No. 1 had knowledge of the decree in August, 1977 itself and it negatives the claim of respondent No. 1 that he had no knowledge of the decree till June 22, 1981. Since this was the only circumstance which persuaded the High Court to condone the delay in filing of the application under Order 9, Rule 13 CPC the order of the High Court condoning the delay in filing of the said application cannot be upheld and the application under Order 9, Rule 13 CPC must be held to have been rightly dismissed as barred by limitation by the trial court and the appellate court. Moreover in the instant case after submission of the compromise petition on April 25, 1969, respondent No. 1 did not take any steps in the suit before the trial court during the period from 1969 to 1974. In this regard, the trial court has observed:

It is the definite testimony of the petitioner's son (A.W. 3) that no pairvi was made from the side of his father in that suit after filing of the said compromise petition. It is also his testimony 15 that after the filing of the said compromise petition he or his father did not find out as to what the position in regard to the progress in T.S. 10/69 was.

5. The trial court has further found:

These facts clearly show that the petitioner applicant, after getting full knowledge of the plaint in T.S. 10/69 neglected pairvi in that suit for a very long period without any sufficient cause.... The record of T.S. 10/69 shows that the defendants left pairvi altogether in the said suit on 3.9.74.

6. Similarly, the District Judge, while referring to respondent No. 1, has held:

This defendant appeared for the first time to file the compromise petition and thereafter, he never appeared in court to inquire about the fate of that compromise petition.

7. Keeping in view the aforesaid conduct of respondent No. 1, it is not possible to hold that the ex-parte decree, if allowed to stand, would occasion a failure of justice or cause irreparable injury to respondent No. 1. The High Court was, therefore, not justified in interfering with the orders passed by the courts below in exercise of its revisional jurisdiction under Section 115 CPC.

8. The appeal is, therefore, allowed, the order of the Patna High Court dated May 4, 1992 in Civil Revision Petition No. 851 of 1985 is set aside and the said civil revision petition filed by respondent No. 1 is dismissed. There will be no orders as to costs.