

Kanshi Ram *v.* Shmt. Bhagwan Kaur (Mehar Chand, C.J.)

disregard for the mandatory provisions of Order 41, Rule 1 of the Code. We, therefore, uphold the preliminary objections raised by Mr. Mittal and hold that there is no competent appeal before us. The question of condoning delay or extending time for filing such an appeal does not arise. Counsel for the appellants himself conceded that Civil Miscellaneous 477-C of 1959 had been filed on account of some misapprehension, and is certainly not maintainable in the circumstances detailed above. Civil Miscellaneous 477-C of 1959 is, therefore, dismissed.

(7) So far as Regular First appeal 56 of 1959 is concerned, it cannot be dismissed as it is only an appeal which can be dismissed and not a purported appeal. Since we have held that the appeal is incomplete and incompetent, we can only reject the same. If and when the appellants get the decree-sheet of the trial Court drawn up after taking necessary and requisite steps, and then choose to prefer an appeal in a competent Court, if so advised, the question of limitation for filing such an appeal would be gone into and dealt with on merits.

(8) For the foregoing reasons we dismiss Civil Miscellaneous 477-C of 1959, and reject the memorandum of appeal of R.F.A. 56 of 1959, and direct that the court-fee paid by the defendant-appellants on the said memorandum of appeal shall be refunded to them in accordance with law. In the circumstances of the case, the parties are left to bear their own costs of the entire proceedings in this Court.

S. B. CAPOOR, J.—I agree.

R. N. M.

REVISIONAL CIVIL

Before Mehar Singh, C.J.

KANSHI RAM,—Petitioner

versus

SHMT. BHAGWAN KAUR,—Respondent

C. R. 596 of 1967.

November 19, 1968

Civil Procedure Code (V of 1908)—Order 5 Rule 20—Limitation Act (XXXVI of 1963)—Article 123—Explanation to Article 123—Whether abrogates Order 5 rule 20(2)—Party served by substituted service—Ex-parte decree passed—Such party—Whether has to prove absence of due service.

Held, that the provisions of Order 5 rule 20 of the Civil Procedure Code, 1908 and Article 123 of the Limitation Act have to be so read as to avoid any conflict, and it is immediately apparent that the Explanation to Article 123, on its very words, has to be confined to that Article alone and for the purpose of limitation an *ex-parte* decree can be set aside within thirty days from its date, but, where there has been no due service within thirty days from the knowledge of the decree. In the case of substituted service under rule 20 of Order 5 it will not ordinarily be open to the party served under that rule to say that there was no due service, because sub-rule (2) of rule 20 Order 5 says specifically that such substituted service shall be as effectual as personal service. It is the rigour of this sub-rule which the Explanation to Article 123 is meant to meet, but only for the purpose of enabling the person against whom an *ex-parte* decree has been passed to make an application to have the decree set aside. Once he is permitted to make an application for setting aside a decree in spite of service under rule 20 of Order 5, the merit of the matter still remains for him to meet, that is to say it still remains for him to prove that he was not duly served. If he fails in that, then while his application shall have been made within time but he will fail on the merit of his application. So the Explanation to Article 123 does not either abrogate in any way sub-rule (2) of rule 20 of Order 5 or operate as a limitation of any kind of that sub-rule. It is wrong to read Article 123 as something which is either a substitute for sub-rule (2) of rule 20 of Order 5 or a limitation of that sub-rule. (Para 3)

Petition under section 15(5) of the East Punjab Urban Rent Restriction Act, 1949 for revision of the order of Shri Krishan Kumar Garg, Rent Controller, Ferozepore, dated 10th April, 1967, setting aside the ex parte order and directing the respondent to file his written statement in the original application.

K. L. SACHDEVA, ADVOCATE, for the Petitioner.

G. S. DHILLON, ADVOCATE, for the Respondent.

JUDGMENT.

MEHAR SINGH, C.J.—An application was made by the applicant, Kanshi Ram landlord, under section 13 of the East Punjab Urban Rent Restriction Act, 1949 (East Punjab Act 3 of 1949), for eviction of the respondent, Bhagwan Devi tenant, from the demised house. The date of the application was February 11, 1966, and the respondent was summoned for March, 3, 1966. It has been said at the bar from the side of the applicant that the respondent refused service on March 3, 1966. The Rent Controller ordered service on the respondent by affixation of the process on the outside of her house and by proclamation for April 4, 1966, but as it was not found by him sufficient so having regard to rule 20 of Order 5 of the Code of Civil Procedure he ordered service on the respondent by publication in a newspaper. It is said that the publication was duly

Kanshi Ram v. Shmt. Bhagwan Kaur (Mehar Chand, C.J.)

made. The respondent did not appear. So an *ex parte* eviction order was made against her on August 30, 1966. On October 19, 1966, she made an application to the Rent Controller for setting aside the *ex parte* eviction order made against her.

(2) The Rent Controller by his order of April 10, 1967, allowed the application of the respondent saying that although service on her had been effected by publication of the proclamation according to Order 5, rule 20 of the Code of Civil Procedure, but in view of the Explanation to Article 123 of the Limitation Act, 1963, substituted service under Order 5, rule 20 is not to be deemed to be due service. So the Rent Controller was of the opinion that the respondent was never served and he set aside the eviction order made against her. This is a revision application by the applicant, the landlord, against that order.

(3) The argument urged by the learned counsel for the applicant is that although an order of eviction is not a decree, but the Rent Controller has the power to adopt a known procedure in a matter like this and he, therefore, proceeded to consider the respondent's application for setting aside the *ex parte* ejection order against her in the wake of the provisions for setting aside *ex parte* decrees in the Code of Civil Procedure. So he referred himself to Article 123 of the Limitation Act, 1963, which Article provides a limitation of thirty days 'to set aside a decree passed *ex parte* or to rehear an appeal decreed or heard *ex parte*,' and the starting point of limitation given is 'the date of the decree or, where the summons or notice was not duly served, when the applicant had knowledge of the decree'. The Explanation to this Article says 'For the purpose of this article, substituted service under rule 20 of Order 5, of the Code of Civil Procedure, 1908, shall not be deemed to be due service'. The Rent Controller took the Explanation into consideration and was of the opinion that there was no due service on the respondent. So he set aside the eviction order made against her. The learned counsel points out that the Explanation starts with the words 'For the purpose of this article,' and contends that this Explanation only applies where Article 123 of the Limitation Act, 1963, applies and not to any other case. He refers to sub-rule (2) of rule 20 of Order 5, which says that 'Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally', and contends that once substituted service under rule 20 of Order 5 is made, it is as effective as service personally and non-appearance in spite of such service would justify an *ex parte* order

against the party so served and it will not be open to the party to say that it was not duly served, because sub-rule (2) of rule 20 of Order 5 says specifically that such service is equivalent to personal service on the party concerned. If the approach of the Rent Controller was accepted, sub-rule (2) of rule 20 of Order 5 will be rendered nugatory by reason of the Explanation to Article 123 of Limitation Act, 1963. The two provisions have to be so read as to avoid any conflict, and it is immediately apparent that the Explanation to Article 123, on its very words, has to be confined to that Article alone and for the purpose of limitation an *ex parte* decree can be set aside within thirty days from its date, but, where there has been no due service, within thirty days from the knowledge of the decree. In the case of substituted service under rule 20 of Order 5 it would not ordinarily be open to the party served under that rule to say that there was no due service, because sub-rule (2) of rule 20 of Order 5 says specifically that such substituted service shall be as effectual as personal service. It is the rigour of this sub-rule which the Explanation to Article 123 is meant to meet, but only for the purpose of enabling the person against whom an *ex parte* decree has been passed to make an application to have the decree set aside. Once he is permitted to make an application for setting aside a decree in spite of service under rule 20 of Order 5, the merit of the matter still remains for him to meet, that is to say it still remains for him to prove that he was not duly served. If he fails in that, then while his application shall have been made within time but he would fail on the merit of his application. So the Explanation to Article 123 does not either abrogate in any way sub-rule (2) of rule 20 of Order 5 or operate as a limitation of any kind of that sub-rule. The Rent Controller was, therefore, wrong in reading the Explanation to Article 123 as something which is either a substitute for sub-rule (2) of rule 20 of Order 5 or operates as a limitation of that sub-rule. On this approach the order of the Rent Controller cannot be maintained.

(4) In consequence the order of the Rent Controller is set aside and the case is remitted back to him for the application of the respondent to have the *ex parte* eviction order set aside tried and disposed of on merits. There is no order in regard to costs in this application.

(5) The parties, through their counsel, are directed to appear before the Rent Controller on December 9, 1968.

R. N. M.