MISCELLANEOUS CIVIL

Before Man Mohan Singh Gujral, J.

SMT. HAR KAUR,—*Petitioner.*

versus

GURMIT SINGH AND OTHERS,—*Respondents.*

Civil Miscellaneous No. 4179-C of 1974.

IN

Regular Second Appeal No. 1560 of 1963.

February 6, 1975.

Limitation Act (XXXVI of 1963)—Article 123—Expression "Service of Notice" occurring therein—Whether implies notice of the date of the actual hearing of an appeal.

Held, that under Article 123 of the Limitation Act, 1963, in the case of appeal the time would start running from the date when the applicant had knowledge of the decree if notice was not duly served. The expression "Service of notice" in the Article implies notice of the date on which the appeal is to be disposed of or heard and not merely notice regarding institution of the appeal.

Application under order 41, Rule 21 read with section 151 of C.P.C. praying that the ex parte order, made on 22nd March, 1974, be set aside and the appeal be ordered to be heard afresh.

K. L. Sachdeva, Advocate, *for the petitioners.*

G. R. Majithia, Advocate, *for the respondent.*

JUDGMENT

M. S. GUJRAL, J.—This is an application under order 41, Rule 21, read with section 151 of the Civil Procedure Code whereby a prayer is made that the *ex parte* order, dated the 22nd March, 1974, in Regular Second Appeal No. 1560 of 1963 be set aside and the appeal be set down for hearing afresh. It may be stated at the outset that when the appeal was called for hearing nobody appeared on behalf of the respondents with the result that it was decided in their absence and was partly allowed.

2. Notice of this application was issued to the counsel for the opposite party. Mr. K. L. Sachdeva appearing on their behalf has strenously opposed this application. The only ground on which the application is opposed is that it is time-barred. In order to appreciate the respective contentions of the parties in this respect, reference will have to be made to articles 164 and 169 of the First Schedule to the Limitation Act, 1908, and article 123 of the Schedule to the Limitation Act, 1963. For facility of reference the relevant provisions are set down below:

Description of application	Period of Limitation	Time from which period begins to run
164. By a defendant for an order to set aside a decree passed *ex parte*	Thirty days	The date of the decree or where the summons was not duly served when the applicant has knowledge of the decree
169. For the re-hearing of an appeal heard *ex parte*	Thirty days	The date of the decree in appeal or, where notice of the appeal was not duly served, when the applicant has knowledge of the decree.
123. To set aside a decree passed *ex parte* or to rehear an appeal decreed or heard *ex parte*	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.
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."		

The application in this case was filed after more than three months from the date of the decree and would, therefore, be clearly time-barred under article 123 if the starting point of limitation is the date of the decree. The case of the petitioners, however, is that they learnt about this decision only on the 11th July and then they filed this application on the 15th July, 1974, and as the time was to start running from the date of the knowledge of the decision the application was within limitation.

3. At this stage it would be necessary to notice a few facts regarding the service of notice regarding the appeal. The respondents were first served for a *farzi* date for the 19th October, 1963. As the respondents were not represented by any counsel, actual date notices were sent for the 28th May, 1973, which were served on all except respondent No. 4. The case subsequently came up before M. L. Verma, J., who on the 6th December, 1973, ordered that fresh actual date notices be issued to all the respondents for the 7th January, 1974. The appellant's learned counsel was directed to file correct addresses of the respondents particularly of Harkewal Singh. These notices were not served on any of the respondents. This fact not having been brought out at the hearing of the appeal, the appeal was decided on the 22nd March, 1974.

4. The argument raised on behalf of the respondents is that notice of appeal having been once duly served, the starting point of limitation under article 123 would be the date on which the first notice was served. Support for this argument is sought from *Sodhi Harnam Singh* v. *Sodhi Mohinder Singh* (1), wherein while interpreting article 164 of the Limitation Act it was held that the expression "summons" referred to the summons issued in the first instance and not to notices issued to parties subsequently whether such notices were necessary under the law or not. In this case a suit was transferred from the court of the Subordinate Judge, Ferozepore to that of Subordinate Judge, Muktsar, under section 24 of the Civil Procedure Code and the parties were directed to appear at Muktsar on the 18th March, 1950. On that date the defendant did not put in appearance and the case was heard *ex parte*. An application for setting aside the *ex parte* decree was moved after more than thirty days of the date of the decree and was dismissed on the

(1) 1954 P.L.R. 50

ground that it was time-barred. In appeal a Single Juge of this court came to the conclusion that the expression "summons" did not only include notices issued to the parties subsequently but also notices sent by the Court to which a suit is transferred. As these notices had never been sent by the Subordinate Judge, Muktsar to the parties it was held by the learned Single Judge that the application was in time. In Letters Patent appeal the question of law was examined and on the basis of the following observations of Bhide, J., in *Sham Sunder Khushi Ram* v. *Devi Ditta Mal* (2), it was concluded that the wording of article 164 refers to summons issued in the first instance and not to notices issued to parties subsequently whether such notices were necessary under law or not:

> "To me also this seems to be the correct interpretation. The intention apparently is to give an extended period of limitation in cases where the defendant has not knowledge at all of the suit. But when he has knowledge of the suit, the mere fact he did not get the due notice of a subsequent hearing can hardly be considered to be a ground for extension of the period. The words 'the summons' are significant..... If the intention was to allow an extended period in any case where a notice of the date of hearing is not duly served during the course of the suit, the wording would have been, I think, different. In this case the suit was no doubt transferred to another Court, but such a transfer has not the effect of starting the proceedings de novo. The suit is merely continued from the stage it had reached in the first Court. Following the interpretation accepted in the two rulings cited above, I hold that the learned Subordinate Judge had no jurisdiction to set aside the decree merely on the ground that the notice after the transfer was not duly served".

The same view followed in *Dharam Pal* v. *Gajjan Singh and others* (3), and *Badri Narayan Sharma* v. *Panchayat Samiti, Dhariawad* (4), and it was held that in article 123 the expression "the summons" refers to summons for the first hearing and if that has been duly served, the period will commence from the date of the decree, regardless of whether the notice for further hearing by the transferee Court was duly served or not.

(2) A.I.R. 1932 Lahore 539.

(3) 1970 P.L.R. 776.

(4) A.I.R. 1973 Rajasthan 29.

5. While challenging the applicability of the ratio of the above decisions it was pointed out on behalf of the applicant that all those cases related to suits and were, therefore, not relevant so far as the question of Limitation in relation to the hearing or disposal of an appeal was concerned. Continuing the argument it was urged that in case of appeal the expression "notice of appeal" implies notice of the date on which an appeal is disposed of and not *farzi* notice regarding filing of the appeal and for this contention support is sought from *Thakar Nil Chand* v. *Thakar Hamal Chand and another* (5), and *Bachcha* v. *Kameshwar Prasad Singh and another* (6). In the first of these cases in an appeal which was pending before the District Judge, Hoshiarpur, the counsel for the parties were directed to appear for argument in the case at Dharamsala on the 20th July, 1937. The petitioner's counsel reported that he had not been engaged for appearance at Dharamsala. Proceeding on the basis that the pleader was bound to appear the learned District Judge decided the appeal and also dismissed the application for setting aside the *ex parte* decree as it was filed after more than thirty days of the date of the decree. In appeal against this order, it was contended that the petitioner had notice of the appeal as he had been served with notice of the filing of the appeal and that the absence of notice of the adjourned hearing was of no consequence. While rejecting this contention it was held as follows:—

> "As regards the first argument of the learned counsel for the respondents, it must be said that the language of Art. 169 is not very happy and its interpretation is not free from difficulty as I have remarked in AIR 1933 Lah. 882. It would be unfair to expect a party to attend the Court on a date of which no due notice has been given and I am inclined to think that the expression "notice of appeal" should be taken to mean notice (actual or constructive) of the date on which the appeal is disposed of. Any other interpretation would lead to obvious injustice. If, for instance, a Court adjourns an appeal sine die for some reason and later on takes it up in the absence of a party who had no notice of the date of hearing and then decides it against him that party cannot be expected to know the

(5) A.I.R. 1940 Lahore 49.
(6) A.I.R. 1963 All. 311.

result of the appeal. It would be obviously unjust to dismiss the petition of such party for setting aside the *ex parte* order merely on the ground that it was not presented within 30 days. The mere fact that the party had been originally served with notice of the appeal would seem to be wholly immaterial in such circumstances and cannot be considered to be any justification for the *ex parte* decision. AIR 1933 Lah. 882 had reference to the special rules of this Court and was decided on its own facts."

In *Bachha's* case the same view was taken and it was ruled that the words "notice of the appeal in article 169 imply the notice of the day fixed for hearing and disposal of the appeal and not merely notice to the respondent that an appeal has been filed. In this case the entire case—law on the subject was examined and the observations of Phide, J., in *Sham Sunder Khushi Raj* v. *Devi Ditta Mal* (2), were cited with approval.

6. Faced with the view taken in the above authorities, the respondents' learned counsel drew my attention to the difference in the language of article 169 which was interpreted in the above two authorities and the language of article 123 which is applicable to the present case. In the Limitation Act of 1908 there were separate articles regarding suit and appeal. Whereas in article 164 which related to suits the starting point of limitation was the date of knowledge where the summons was not duly served, in the case of appeals the starting point of limitation was knowledge of the decree where notice of appeal was not duly served. In the Limitation Act, 1963, with which we are concerned, articles 164 and 169 have been consolidated into article 123 with the result that so far as appeal is concerned, the starting point of limitation would be knowledge of decree when "notice was not duly served." The words "of the appeal" are missing in article 123. A question, therefore, arises whether this has made any difference to the interpretation to be placed on article 123 and whether the observations which were made in relation to article 169 were still attracted or not.

7. Under article 123 of the Limitation Act, 1963, in the case of appeal the time would start running from the date when the applicant had knowledge of the decree if notice was not duly served. The

(2) A.I.R. 1932 Lahore 539 (*ibid.*)

expression "notice" occurring in this article would have relation to the date of hearing of the appeal and not merely to the date of filing of the appeal. I am of the considered view that the omission of the words "of the appeal" from article 123 of the Limitation Act, 1963, is of no consequence and has only been made as the words "of the appeal" occurring in article 169 of the Limitation Act, 1908, were redundant. When read in the context of the words "to rehear an appeal" the word "notice" could only imply notice of the day fixed for hearing the appeal. In coming to this conclusion, I am influenced by the reasoning adopted in *Bachcha's* case. In arriving at the conclusion that the words "notice of appeal" should be taken to mean notice (actual or constructive) of the date on which an appeal is disposed of, regard was had to the scheme of the Civil Procedure Code in so far as it related to the procedure in respect of suits and the procedure provided for hearing of the appeals. The following observations in this respect may be read with advantage:—

> "The words in Article 169 "where notice of the appeal was not duly served" when read along with Rule 12 and 14 of O.XLI to which they obviously intended to refer back, lend themselves to the only reasonable construction as meaning the day fixed for hearing and disposal of the appeal and not merely notice to the respondent that an appeal had been filed. If any other meaning was to be given to these words it would lead to absurd results and it would place an undue burden, apart from the wastage of public time and money, on the parties or their counsel to an appeal to go to the appellate court at least once in every 30 days to ascertain whether any date had been fixed for the hearing of the appeal, otherwise they would run the risk of the appeal being decided *ex parte* against them, and what is worse their application for a rehearing of the appeal decided *ex parte* stood to be dismissed as being barred by limitation notwithstanding that they had never received notice of the day fixed for hearing of the appeal as required by the mandatory provisions of O. XLI Rule 12 and 14 of the C.P.C."

In view of what has been stated above. I hold that under article 123 of the Limitation Act, 1963, the expression "service of notice" implies notice of the date on which the appeal is to be disposed of or heard and not merely notice regarding institution of the appeal

Taking this view of the matter, I find the application to be within time, it not being disputed that the notices issued in obedience to the orders of M. L. Verma, J., were not served on the respondents and the period of limitation in this case would, therefore, run from the date of knowledge of the decision of the appeal. The applicants' case is that they only came to know on the 11th July, 1974, and they filed the application within a few days. This contention of the applicants has not been contested. The application is consequently allowed and the order dated the 22nd March, 1974, is set aside and it is directed that the appeal be set down for re-hearing. The parties will bear their own costs in this application.

B.S.G.

FULL BENCH.

Before A. D. Koshal, S. S. Sandhawalia and Prem Chand Jain, JJ.

CHATTAR SINGH, ETC.—*Petitioners.*

versus

THE STATE OF PUNJAB AND OTHERS,—*Respondents.*

Civil Writ No. 4527 of 1975.

November 20, 1975.

Punjab Food and Supplies Department (State Service Class III) Rules (1968)—Rule 9(X)—Appointment to higher post by selection or promotion—Statutory Service Rules not providing a written test for—Prescription of such test by executive instructions—Whether valid—Use of word "promotion" in Rule 9(X) (ii) and of word "selection" in Rule 9(X) (iii)—Whether of any legal significance.

Held, that where the statutory Service Rules do not provide for a written test for the purpose of appointment to a higher post either by promotion or selection, such a test cannot be indirectly imposed by the devious method of introducing it through executive instructions. The prescription of written test by executive instructions obviously not only adds or alters the statutory requirements but is derogatory or contradictory thereto. The introduction of a written test by virtue of executive instructions tantamounts to altering or adding to the rule and is not warranted by law and is therefore, invalid.