

Article the decree  
passed ex parte but  
also



**ASSIGN  
BUSTER**

Article 123 applies not only to set aside the decree passed ex parte but also rehear an appeal decreed or heard ex parte. According to Order IX Rule 13 of Civil Procedure Code the Court can entertain an application by a defendant to set aside a decree passed against him ex parte. Though the Article 123 governs only suits, it is made applicable to application by reason of Section 141 of the Civil Procedure Code. The Art.

123 is not restricted to an application to set aside the ex parte decree passed in a suit. If an order is passed ex parte and has the force of a decree, then an application to set it aside will also be governed by the Art. 123. An application to set aside an ex parte final decree is governed by the Art. 123. The provisions of Order IX Rule 13 of the Civil Procedure Code would be applicable to a probate proceeding to recall an ex parte order granting probate of a Will. For setting aside an ex parte decree by the High Court original side Order IX, Rule 13 of the Civil Procedure Code is attracted by Art. 123 of the Limitation Act.

In *M. Narasimha Reddy v. Begari Samuel*, [AIR 2003 NOC 357 (AP)], it has been held that the substituted service under Order V, Rule 20 of the Civil Procedure Code should not be deemed to be due service for the purpose of the Article 123.

It is observed that the Explanation to Art. 123 is a specific provision which is mandatory in nature, but, in exceptional circumstances or if the Court feels basing on facts and circumstances of the case including the conduct of the party to draw an inference regarding service, then the presumption can be held to be rebutted, however, it is a rare phenomenon and such inference of

due service cannot be drawn in normal circumstances. It is also pointed out that an inference of due service may be drawn in the facts and circumstances of the case where it appears that the defendant is deliberately pleading ignorance of the knowledge of the proceeding and trying to take advantage of the Explanation to Art. 123 of the Limitation Act, 1963 and that in such a case the Court can call upon the parties for adduce evidence in its discretion which shall be exercised sparingly. In regard to an application for setting aside an ex parte decree in a suit, the starting point of limitation runs from the date of decree where the summons have been duly served but where the summons was not served then from the time the applicant had the knowledge of the decree. Similarly, the limitation for filing an application of the appeal decreed ex parte, the limitation would start from the date when the ex parte decree is passed where there was a service of the notice of the appeal.

The expression “ knowledge of the decree” means something more than a mere knowledge that a decree has been passed in some suit in some Court against the applicant. It means that the applicant must have knowledge not merely that a decree has been passed against him, ex parte by some Court against him, but that a particular decree has been passed against him in a particular Court for a particular sum as relief.