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Court : Allahabad

Decided On : Jan-17-1946

Reported in : AIR1946All425

Appellant : Bhola

Respondent : Mt. Ram Rati

Judgement :

Verma, J.

1. This revision petition originally came up for hearing before our brother Braund and, he having expressed the opinion that the case involved a question of law of sufficient importance to justify its being heard by a Bench, specially as there were decisions which appeared to lay down divergent views, the case has been laid before us. The facts are these: The opposite party, Mt. Ramrati, instituted a suit, No. 1182 of 1942, in the Court of Small Causes at Allahabad against one Bindeshri and his son, Bhola, for the recovery of a certain sum of money which she alleged was due to her on account of the rent of a certain house. The suit came up for hearing on 13th November 1942, and, the defendants being absent, it was decreed ex parte. On 20th April 1944, Bhola, who was defendant 2 in the suit, filed two applications in the Court of Small Causes. In one of these applications, No. 16C on the record, he stated that along with that application he was filing another application praying that the ex parte decree be set aside and that he was

not able to deposit cash security at that time. He accordingly prayed that the Court might permit him to furnish the personal security of one B. Ganga Prasad. In the second application - No. 170 on the record - he prayed that, for the reasons stated in the affidavit filed along with the application, the ex parte decree passed on 13th November 1942 be set aside and the suit be heard afresh. The material statements made in the affidavit were that the summons had not been duly served on him, that he had had no knowledge of the suit and that he had come to know of the ex parte decree on 17th April 1944 when the Court Amin had gone to his house to attach his property in execution of the decree. In the order sheet an order was entered on that date stating that an application for setting aside the ex parte decree had been filed and that it should be put up on 4th May 1944, with an office report. On the margin an entry was made in these words : 'Application for filing security bond.'

2. On 4th May 1944, the Court passed an order directing notice to issue to the opposite party and fixing 21st July 1944. It will be noticed that both these orders were on application No. 170. The application for permission to furnish the personal security of B. Ganga Prasad was put up before the Court on 21st April and the learned Judge ordered that it should be put up with the record. It was not until 8th May 1944, that the matter was put up before him again and he wrote the following order on the application : 'Security of property may be given. Personal security will not be accepted.' Bhola, apparently being able by this time to raise sufficient funds to enable him to furnish cash security, offered, on 12th May 1944, the necessary amount in cash by means of a tender as prescribed by the rules. The tender was accepted and the money was deposited in the Treasury on 16th May 1944. The case came up for hearing on the date fixed, viz., 21st July 1944, and the learned Judge, after hearing the arguments of the parties, reserved judgment. On 24th July 1944, judgment was pronounced and the application praying that the ex parte decree be set aside, i.e., application No. 170 was dismissed on the ground that, the security having been furnished on 12th May 1944, and not at the time of the presenta-tion of the application for setting aside the ex parte decree, No. 170, on 20th April 1944, the applicant must be deemed to have failed to comply with the terms of the proviso to Section 17(1), Provincial Small Cause Courts Act, and that therefore the application could not be entertained although the cash security had

been furnished within the period of limitation prescribed for making such an application. Bhola has filed this revision petition against that order.

3. From the facts stated above certain points emerge which must be noted. They are as follows :

(1) The two applications having been filed on the same day, it is open to the petitioner to contend - particularly in view of the order in which the applications are numbered on the record - that his application for permission to give the security for the performance of the decree instead of depositing the amount shown in the ex parte decree as being due from him (to be hereafter referred to as the application for permission), was a 'previous application' within the meaning of the proviso to Section 17(1) of the Act.

(2) It was no fault of the petitioner that the Court did not at once take into consideration the application for permission and pass orders thereon but kept it pending for a number of days. It is possible that, owing to congestion of work in the Courts below, they are not able to pass orders immediately even on applications which ought to be disposed of at once. The fact remains, however, that litigants presenting such application are not to blame for that. It is probable that litigants, realising that delay is likely to occur consider it safe to file the application for setting aside the ex parte decree also on the same date on which they file the application for permission as they are apprehensive that orders on the application for permission may not be passed until after the expiry of the period of limitation prescribed for presenting the application for setting aside the ex parte decree.

(3) The petitioner deposited the necessary amount of money almost immediately after the Court passed its order on the application for permission, and within the period of limitation.

(4) The Court having ordered on the application for setting aside the ex parte decree that notice do issue to the opposite party, it is open to the petitioner to contend that there was no reason for him to suppose that another application for setting aside the ex parte decree should be filed when the money was deposited.

4. The Court below has based its decision on the judgment of our brother Mulla in Jagdamba Prasad v. Ram Das Singh : AIR1943 All288 . In that judgment our brother Mulla referred to four single Judge cases of this Court, apart from certain cases of other Courts, two-having been decided by himself, viz., Narain Das v. Mt. Radha Kuar : AIR1939 All47 and Mohan Lal v. Sohan Lal : AIR1939 All77 , one by Thorn C.J., viz., Qabul Singh v. Jai Prakash : AIR1939 All503 and one by Collister J., viz., Ram Dayal v. Bhagwan Das : AIR1941 All284 . Taking the cases mentioned above in their chronological order, the first case which calls for consideration is that in Narain Das v. Mt. Radha Kuar : AIR1939 All47 Upon an examination of the report of that case, however, we find that it was concerned entirely with the interpretation of Section 5, U.P. Agriculturists' Relief Act, and that no question under Section 17, Provincial Small Cause Courts Act, arose in it. It is possible that the learned Judge intended to refer to the case of Murari Lal v. Mohammad Yasin which is reported at page 46 of the same volume of the All India Reporter : AIR1939 All46 but, through an oversight, mentioned the case of Narain Das v. Mt. Radha Kuar : AIR1939 All47 . We shall, therefore, deal with the case of Murari Lai v. Mohammad Yasin which is also reported in : AIR1939 All46 . The defendant, against whom an ex parte decree had been passed in that case, filed only one application by which he prayed that the ex parte decree be set aside. He did not deposit the necessary amount in cash but attached a security bond to that application. He did not, however, file any application for permission to give security instead of depositing the amount for the recovery of which the ex parte decree had been passed. The lower Court had accepted the security bond and had allowed the application for setting aside the ex parte decree. The plaintiff accordingly came to this Court with a petition for revision. It was upon these facts that the learned Judge held that a defendant in a small cause against whom an ex parte decree had been passed had, under Section 17, either to deposit the amount due from him under the decree or 'to make a previous application to the Court to obtain the Court's direction regarding the filing of adequate security.' He further observed:

If he fails to make a previous application to the Court, he cannot later on ask the Court to show any indulgence to him. It is not within the power of the Court now to entertain an application for an order to set aside an ex parte decree where it is not accompanied by a deposit in the Court of the amount due under the decree from

the applicant and no application has been previously made for obtaining the direction of the Court to file a security bond.

5. The plaintiff's revision petition was allowed. It is thus clear that that case is distinguishable from the case before us. There the defendant had never filed an application asking for permission to give security instead of depositing the amount in cash. The point on which the learned Judge gave his ruling was whether, under the proviso to Section 17 as amended by Act 9[IX] of 1935, a separate previous application, for permission to give security instead of depositing the decretal amount in cash, was necessary.

6. The material facts in Mohan Lal v. Sohan Lal : AIR1939 All77 were as follows: The suit was heard in part on 26th November 1937 and the defendant was present on that date. The hearing of the suit was again taken up the next day, that is, on 27th November 1937. The defendant and his counsel were absent when the case was taken up on the latter date and the Court, after recording some evidence adduced by the plaintiff, passed an ex parte decree. On that very day, immediately after the ex parte decree had been passed, the defendant appeared and made an application purporting to be under Section 151, Civil P.C., and praying for an order setting aside the ex parte decree. The decretal amount was not deposited and no application for permission to give security was filed. The Court treated this application as one under Order 9, Rule 13 of the Code and called upon the defendant to explain why he had failed to comply with the provisions of Section 17, Provincial Small Cause Courts Act. The matter came up for hearing on 16th December 1937, and the Court directed the defendant to furnish a personal bond. The defendant filed such a bond and the learned Judge of the Court of Small Causes accepted it on 20th December 1937. The case was then taken up on 23rd December and on that date the Court granted the defendant's application and set aside the ex parte decree. The plaintiff thereupon came up to this Court with an application for revision. Upon the facts mentioned above, our brother Mulla held that the provisions of Section 17, Small Cause Courts Act, had not been complied with and that the Court below had no jurisdiction to entertain the application filed by the defendant on 27th November 1937, but declined to entertain the application for revision and to interfere with the order of the Court below on the ground that no

substantial injustice had resulted from the order complained of. Here also, it will be noticed, the point was that no application for permission to furnish security instead of depositing the decretal amount in cash had been filed by the defendant. Thus the case is of no assistance to the plaintiff opposite party before us beyond possibly the fact that it was observed in the course of the judgment that the provisions of Section 17 were mandatory.

7. In Qabul Singh v. Jai Prakash : AIR1939 All503 the defendant's application, filed on 29th May 1936, for the setting aside of the ex parte decree had been dismissed by the Court of Small Causes on the ground that it had not been presented within the period prescribed for such an application by the Limitation Act. The Court had proceeded on the assumption that the thirty days must in all circumstances run from the date of the decree and had failed to pay any attention to the words 'or, where the summons was not duly served, when the applicant has knowledge of the decree' in Article 164, Limitation Act. The defendant had filed an affidavit in which he had alleged that he had had no knowledge of the decree until the day previous to the day on which he had presented his application, that is, until 28th May 1936. The Court of Small Causes had not considered the affidavit at all. The defendant deposited security on 2nd June 1936. The nature of the security, which is stated in the judgment to have been deposited, does not appear from the report. The learned Chief Justice held that, in view of the statement made in the defendant's affidavit and in view of what was laid down in Article 164, Limitation Act (both of which the Court below had failed to notice), the application had been presented within time. He further held that, the security having been deposited on 2nd June 1936, the application praying that the ex parte decree be set aside must in law be taken to have been presented on that date, that is, on 2nd June 1936. As there was the sworn statement of the defendant that he had come to know of the decree on 28th May 1936, the application was held to have been presented well within time. The defendant's petition in revision was accordingly allowed and the case was remanded for a fresh trial of the suit on the merits. Sometime after the judgment had been dictated by the learned Chief Justice, his attention was drawn to the judgment of our brother Mulla in : AIR1939 All46 . The learned Chief Justice expressed the opinion that the interpretation placed by our brother Mulla on Section 17, Provincial Small Cause Courts Act, as amended by Act 9[ix] of 1935,

was too narrow. He further made these observations:

Prior to the amendment there appeared to have been some doubt as to whether it was within the competency of the Court to extend the time within which the complete application for setting aside of an ex parte decree might be made; in other words as to whether the Court could entertain an application for the setting aside of an ex parte decree where the security was, in fact, furnished after the lapse of thirty days from the date of the decree or the date of knowledge of the decree.

8. He finally expressed his own opinion as to the true interpretation of Section 17 in these words:

In my judgment, provided the application is made and the security is furnished within thirty days there is substantial compliance with the provisions of Section 17 as amended.

9. Ram Dayal v. Bhagwan Das : AIR1941 All284 was a case in which the defendant, against whom an ex parte decree had been passed on 2nd January 1940, filed two applications one praying that the ex parte decree be set aside and. another for permission to give security other than cash. The order on the latter application appeared in the order sheet first and the one on the former application was entered after it. The latter application was allowed and the Court accepted the security bond which the applicant offered, and on the former application the order was that notice be issued. The date on which these various orders were passed do not appear from the report. The defendant, on 13th April 1940, for some unknown reason, offered to deposit the decretal amount in cash and, the Court having allowed him to do so, the amount was deposited on 18th April 1940. The fact of this deposit, however, was obviously irrelevant for the purposes of the case. On 20th April 1940, the Court of Small Causes allowed the defendant's application for setting aside the ex parte decree, and the plaintiff filed in this Court a petition in revision against that order. The plea taken was that the provisions of Section 17, Small Cause Courts Act, had not been complied with and that therefore the Courts below had no jurisdiction to entertain the application for setting aside the ex parte decree. The argument put forward on behalf of the plaintiff petitioner was that,

although the defendant had filed a separate application for permission to give security other than cash, that application and the application for setting aside the ex parte decree having been filed at the same time, there was no 'previous application' within the meaning of the section, and reliance was placed upon the judgment of our brother Mulla in : AIR1939 All46 .

10. Collister J. held that that case was distinguishable from the one before him on the ground that in that case there was no application at all for permission to furnish security other than cash, whereas in the case before him there was such an application. He also held that, on the facts of the case before him particularly in view of the fact that the entry of the order on the application for permission to give security other than cash occupied in the order sheet an earlier position than the one of the order on the application for setting aside the ex parte decree - it could 'fairly be assumed that the intention of the applicant, when preferring the two applications, was that the application for per. mission to file a security bond and obtain the Court's permission should first be taken up by the Court,' and that from that point of view it could, in the learned Judge's opinion, 'reasonably be regarded as a 'previous application' such as is contemplated by the section.' The learned Judge accordingly came to the conclusion that the provisions of the section had been complied with. The plaintiff's petition for revision was, therefore, dismissed. The ground on which the case in : AIR1939 All46 was distinguished is noteworthy.

11. We come now to the case on which the Court below has relied, namely, the case in Jagadamba Prasad v. Ram Das Singh : AIR1943 All288 . It may be stated at once that the main point about that case which arrests attention is that the defendant against whom an ex parte decree had been passed, had filed only one application and that application was for having the ex parte decree set aside. It is true that in that application the defendant had added a prayer for permission to give security instead of depositing the decretal amount in cash. The fact, however, remains that only one application had been filed, with the result that there was no application which could be described as a 'previous application' within the meaning of the proviso to the section. Our learned brother thus had before him the same question as the one he had decided in the cases in : AIR1939 All46 and Mohan Lal v. Sohan Lal : AIR1939 All77 and decided it in the same way as he had those

two cases. It is noteworthy that he distinguished the case in Ram Dayal v. Bhagwan Das : AIR1941 All284 on the ground that in that case two applications had been filed, whereas in the case before him only one application had been filed. The case in Jagadamba Prasad v. Ram Das Singh : AIR1943 All288 is, therefore, clearly distinguishable from the one before us, for, as has already been stated, in the present case two applications were filed by the defendant. It has not been shown to us by the plaintiff-opposite-party's counsel in the present case that there could be any valid reason for holding that the application for permission was not a 'previous application.'

12. We do not propose to refer in any detail to the cases decided in other High Courts to which our attention has been drawn. We may, however, refer to the judgment of the learned Chief Justice of the Bombay High Court in Tarachand Hirachand v. Durappa Tavanappa ('43) 30 A.I.R. 1943 Bom. 237, which perhaps goes further than any other case in interpreting Section 17 in favour of a defendant applying for the setting aside of an ex parte decree passed against him by a Court of Small Causes, and to the judgment of King J. in Kanna kurup v. Raman Nayar ('43) 30 A.I.R. 1943 Mad. 51 in which, the learned Judge refers to two earlier decisions of the Madras Court, viz., Ramkrishna Nadar v. Thirumalai : AIR1936 Mad24 and Uthuman Pillai v. Muhammad Uauf ('39) 26 A.I.R. 1939 Mad. 316. It appears to us that, although the Full Bench case in Ram Bharose v. Ganga Singh : AIR1931 All727 was decided before the proviso to Section 17(1), Provincial Small Cause Courts Act, was amended by Act 9[IX] of 1935, it is of assistance even now. In order to make this clear, it is necessary to quote the proviso as it originally stood and as it stands after amendment. Before the amendment the material portion of the proviso read as follows:

Provided that an applicant for an order to set aside a decree passed ex parte...shall, at the time of presenting his application, either deposit in the Court the amount due from him under the decree..., or give (security to the satisfaction of the Court for the performance of the decree..., as the Court may direct).

13. By the amendment, the words within brackets were removed and, for them, the following words were substituted:

Such security for the performance of the decree...as the Court may on a previous application made by him in this behalf have directed.

14. It will be noticed that the requirement that the decretal amount be deposited or security be given by the applicant at the time of presenting his application was there even before the amendment. The reason for the amendment was this. Before the amendment, the proviso required an applicant to do one of two things at the time of presenting his application, namely either to deposit in Court the decretal amount in cash, or to give security to the satisfaction of the Court 'as the Court may direct.' The words which we have put within inverted commas gave rise to considerable argument and divergence of judicial opinion. An instance of such divergence is to be found in the judgments of the learned Judges, who decided the case in Jhabboo Misir v. Hawaldar Tewari : AIR1929 All840 So far as this Court is concerned, the matter was set at rest by the Full Bench case in Ram Bharose v. Ganga Singh : AIR1931 All727 .

15. Without entering into the details of the discussions that used to arise it may be observed that the proviso, as it stood before the amendment, on its plain language, laid down that an applicant for the setting aside of an ex parte decree had to obtain the direction of the Court as to whether he must deposit the decretal amount in cash or he could furnish security and, after obtaining the Court's direction, had to deposit the amount in cash or to furnish the security - whichever the Court directed him to do - at the time of presenting his application. In case the Court permitted the applicant to furnish security instead of depositing the decree money in cash the security had to be to the satisfaction of the Court. It was not quite clear how the direction of the Court had to be obtained. What has been done by the amendment is this that it has been laid down that, if an applicant wishes to furnish security instead of depositing the amount in cash, he has first to file an application for permission to do so and has then, at the time of presenting his application for setting aside the ex parte decree, to furnish such security as the Court may direct.

16. That the amendment cannot meet all contingencies and all situations that might arise is obvious. To take an extreme case, suppose a defendant in a small

cause against whom an ex parte decree has been passed, files, in pursuance of the terms of the proviso, as it now stands, an application for permission to furnish security on the very day on which the limitation prescribed by Article 164, Limitation Act, begins to run and waits for the orders of the Court before filing his application for setting aside the ex parte decree. Suppose, further, that the Court omits to pass any orders on the application for permission for thirty days and the applicant, finding himself in a difficult position, files the application for setting aside the ex parte decree on the last day of limitation, either with a security bond (which, let us suppose, is good and sufficient in every respect) or, taking the view that he must await the orders of the Court, without a security bond. What is to happen in cases of this nature? It seems obvious, therefore, that too literal an interpretation of the proviso will not be possible in every case. The intention of the Legislature is, however, quite clear and it is the duty of the Courts to administer the law in accordance with that intention in the light of the fact of each case. That intention is that an application for setting aside an ex parte decree passed by a Court of Small Causes besides being required to be filed within limitation shall not be treated as a competent application until the applicant has either deposited the decretal amount in Court or has furnished such security for the performance of the decree as the Court may direct, and that such direction must be obtained by means of an application which has not been filed subsequently to the filing of the application for setting aside the ex parte decree. A difficulty will arise in a case of the nature mentioned above that is, where the Court delays passing orders on the application for permission until after the expiry of the period of limitation prescribed by Article 164, Limitation Act, and the applicant files the application for setting aside the decree within the period of limitation but without either depositing the decretal amount or furnishing security within that period. It can be contended by the applicant that he was prevented from depositing the amount or furnishing security by the delay made by the Court in passing orders on the application for permission and that he should not be prejudiced thereby. No such question, however, arises in the case before us and we do not, therefore, consider it necessary to express any opinion thereon.

17. The facts of the present case are clear and do not present any difficulty. As has already been stated, the petitioner filed both the applications on the same day

and there is no reason to suppose that the application for permission was not a 'previous application,' or to put it in the language employed by Collister J. in Ram Dayal v. Bhagawan Das : AIR1941 All284 there are circumstances on the basis of which it may fairly be assumed that the intention of the petitioner, when preferring the two applications, was that the application for permission should first be taken up by the Court. The Court did not pass orders for some days but, fortunately for the petitioner, it did dispose of the application sometime before the limitation for the application to set aside the decree was to expire. We then have the facts that the petitioner, instead of furnishing the security directed by the Court, deposited the decretal amount in cash and that he did so well within limitation. Therefore, the utmost that can be said against the petitioner is that his application for setting aside the ex parte decree was not a competent or complete application until the date on which he tendered the decretal amount in Court, as was held in the Full Bench case in Ram Bharose v. Ganga Singh : AIR1931 All727 and in Qabul Singh v. Jai Prakash : AIR1939 All503 ; but it must be held that by that date he had fully complied with the proviso to Section 17(1), Small Cause Courts Act. That having taken place within limitation, there is nothing against the petitioner. There is also the further fact in the present case that the Court had ordered notice to issue on the application to set aside the decree.

18. We note that in Qabul Singh v. Jai Prakash : AIR1939 All503 the learned Chief Justice did not accept the contention that under the proviso to Section 17(1), as it now stands, it is necessary for the applicant to file two applications and that the application for permission to furnish security, instead of depositing the decretal amount in cash, has to be a 'previous application.' As no such point arises in the case before us, we do not consider it necessary to express any opinion on it. We should also like to make it clear that we must not be taken to be committed to the view that where the two applications, one for permission to furnish security other than cash and the other for setting aside the decree, are presented at the same time, the determination of the question whether the application for permission to furnish security was a 'previous application' depends entirely on the positions in the order sheet occupied by the orders on the applications as was the case in Ram Dayal v. Bhagwan Das : AIR1941 All284 or on the numbers put by the office of the Court on the two applications (as is the case here). In Ram Dayal v.

Bhagwan Das : AIR1941 All284 the positions of the two orders were favourable to the petitioner and Collister J. did not think it necessary to consider what would happen if the Reader of the Court had chosen to enter the order on the application for setting aside the decree first. Similarly, in the present case the numbers put by the office of the Court below are sufficient for our purpose and we do not consider it necessary to say what our decision would have been if the applications had been numbered in the reverse order.

19. There has been some discussion as to whether the provisions of Section 17(1), Provincial Small Cause Courts Act, are mandatory. In our judgment, no such question really arises. The provisions of a statute must always be held to be mandatory unless the statute leaves a discretion to the Court. There can be no question that an applicant for the setting aside of an ex parte decree in small cause has to comply with the proviso to Section 17(1), Provincial Small Cause Courts Act. The only question that arises is whether, on the facts of each particular case, the applicant has substantially complied with the requirements of the proviso. If the language of a section in a statute is such that a litigant, for no fault of his own, may, in certain circumstance, be unable to comply with the strict letter of the section, the Courts can only require him to comply with the spirit of the section and to act in a manner which is in accordance with the intention of the Legislature. For the reasons given above, we allow this petition in revision, set aside the order of the Court below and grant the petitioner's application for setting aside the ex parte decree that was passed against him on 13th November 1942. The said decree is set aside and the case is sent back to the Court below with the direction that it shall proceed to try the suit in accordance with law. The petitioner will get his costs of these proceedings in both the Courts.