SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

Mt. Bipti Vs. Kali Din

Mt. Bipti Vs. Kali Din

SooperKanoon Citation : sooperkanoon.com/475591

Court : Allahabad

Decided On : Aug-07-1950

Reported in : AIR1951All420

Judge : Agarwala and ;P.L. Bhargava, JJ.

Acts : Provincial Small Cause Courts Act, 1887 - Sections 17 and 17(1)

Appeal No. : Civil Revn. No. 558 of 1949

Appellant : Mt. Bipti

Respondent : Kali Din

Advocate for Def. : M.N. Raina, Adv.

Advocate for Pet/Ap. : S.C. Khare, Adv.

Disposition : Application allowed

Judgement :

Agarwala, J.

1. This is an application against an order of the Judge, Small Cause Court, Allahabad, rejecting an application for the setting aside of an ex parte decree,

2. An ex parte decree was passed against the applicant on 20-1-1949. On 4-2-1949 the applicant made an application in which the prayer was as follows:

'It is, therefore, prayed that the Court be pleased, after directing the applicant if it approves of the security bond regarding its sufficiency or otherwise, to restore the case to its original number so that the defendant may contest the claim which is entirely incorrect.'

3. Along with the application the draft of a security bond was filed. On the same date the Court passed the following order: 'Allowed to file security. Ask for plaintiff's objection if any.' Accordingly, on 19-2-1949, the applicant filed a security bond in terms of the draft submitted by him. Notice was then issued upon the application for the setting aside of the ex parte decree to the plaintiff. When the plaintiff appeared he objected to the security bond as also to the application for the setting aside of the ex parte decree on the ground that permission to furnish security in respect of the decretal amount had not been obtained prior to the making of the application for the setting aside of the ex parte decree, and the security bond also had not been filed along with the application for the setting aside of the ex parte decree, as required by Section 17, Provincial Small Cause Courts Act. The lower Court gave effect to the plaintiff's objection and dismissed the application on the sole ground that it was not maintainable. Against this order the applicant has come up in revision to this Court.

4. The contention raised on behalf of the applicant is that although his application for the setting aside of the ex parte decree and for permission to furnish security in respect of the decretal amount was written on one piece of paper, in fact, they were two applications and since he had asked for the permission of the Court to allow him to furnish security as the first prayer in his application and had asked the Court to set aside the ex parte decree only after his first prayer were granted, it should be deemed that he had made the application for direction to furnish security prior to his application for the setting aside of the ex parte decree. His submission further is that although he furnished the security bond on 9-2-1949 it should be deemed that he had substantially complied with the provisions of Section 17, and, that, therefore, his application for the setting aside of the ex parte

decree should have been allowed.

5. Section 17, Provincial Small Cause Courts Act was amended by Act IX [9] of 1935. Before the amendment it stood as follows :

'The procedure prescribed in the Code of Civil Procedure, 1908, shall, save in so far as is otherwise provided by that Code or by this Act, be the procedure followed in a Court of Small Causes in all suits cognizable by it and in all proceedings arising out of such suit.

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

After the amendment the words underlined (here italicised) above have been deleted and in their place the following words have been substituted :

'give such security for the performance of the decree or compliance with the judgment as the Court may, on a previous application made by him in this behalf, have directed.'

6. Both before the amendment as well as after it, the section required one or two things to be done in order that an application for the setting aside of an ex parte decree may be competently made. He must, at the time of presenting his application, either, (i) deposit in Court in cash the amount due from him under the decree or in pursuance of the judgment; or (ii) give security for the performance of the decree or the compliance with the judgment. Before the amendment the security was to be furnished, 'to the satisfaction of the Court--as the Court may direct.' It was not clear when and how the direction of the Court was to be obtained. But since the application for the setting aside of an ex parte decree was to be accompanied with a security to the satisfaction of the Court it is obvious that even before the amendment the direction of the Court was normally to be obtained before the application for the setting aside of the ex parte decree was filed. But

there was a difference of opinion in the interpretation of the clause. The Legislature, therefore, stepped in and amended the section to make it clear that the security to be furnished by an applicant under Section 17 should be in accordance with the directions of the Court on an application made by him prior to the application for the setting aside of an ex parte decree. The section, therefore, as it stands now is not ambiguous in its import. It requires the direction of the Court to be taken upon an application as to the security that has to be furnished before an application for the setting aside of an ex parte decree is made. It also requires, as was required before the amendment, that the security bond directed and approved by the Court should be filed along with the application for the setting aside of an ex parte decree. These then are the two conditions upon the fulfilment of which an applicant is entitled to present an application for the setting aside of an ex parte decree. The limitation for presenting such an application as given in Article 164, Limitation Act is thirty days.

7. An application for obtaining the direction of the Court is not required to be in writing. Therefore, it may be made orally.

8. It is clear to our mind that if an application for the setting aside of an ex parte decree is made without fulfilling the aforesaid two conditions it is not an application under Section 17. The question then is, 'what is to happen to an application for the setting aside of an ex parte decree which is made without the fulfilment of these two conditions?' The Court in such cases has three options. (1) either it may reject the application as being incompetent; or (2) it may return the application to the applicant for presentation after the conditions have been fulfilled; or (3) it may keep the application pending without taking any action upon it so long as the two conditions are not fulfilled and the application is made to conform with the requirements of Section 17.

9. Where the applicant obtains the permission of the Court upon an oral or written application to file a security bond and actually files the security bond he may make an application for the setting aside of the ex parte decree, provided it is within limitation, even though his previous application made without fulfilling these two conditions had been returned or rejected. If, however, the Court does not either

return the application or reject it but keeps it pending till the conditions are fulfilled, the Court intends that the application will be deemed to have been duly presented in accordance with law when the two conditions are complied with. In a case, therefore, in which an application for the setting aside of an ex parte decree has been made without fulfilling the conditions and it has been kept pending by the Court till the two conditions are fulfilled it will be deemed that the application was treated by the Court as having been duly filed and presented on the date on which the two conditions were fulfilled. If the two conditions are fulfilled within the period of limitation, the application even though actually presented in Court before the fulfilment of the two conditions must be held to have substantially complied with the provisions of Section 17. The applicant cannot be in a worse position in such a case than if his application had been rejected or returned to him, and he had filed a fresh application. To require of him to file a fresh application after he had fulfilled the two conditions would be a futile act. The application already kept pending by the Court can be treated as having been presented after the conditions have been fulfilled. In this view of the matter, the application in the present case, although presented on 4-2-1949, would be deemed to have been duly presented on 9-2-1949 when the security bond was filed and since this was done within the period of limitation, it substantially complied with the provisions of Section 17.

10. Learned counsel for the parties have referred to several cases decided by this Court and in Oudh. In our view the majority of the cases follow the principle we have laid down above.

11. In Mohan Lal v. Sohan Lal : AIR1939 All77 an ex parte decree was passed on 27-11-1937. The defendant made an application for the setting aside of the ex parte decree on the same day. He did not deposit any security in cash nor was any security filed. On 16-12-1937, the Court directed the defendant to furnish a personal bond. On 20-12-1937, a security bond was filed which was accepted by the Court. Ultimately the application for the setting aside of the ex parte decree was granted. Mulla J., refused to interfere in revision with the order of the Court below but observed that strictly speaking the mandatory provisions of Section 17 had not been complied with and that the learned Judge of the Small Cause Court had no jurisdiction to entertain the application made on 27-11-1937.

12. In the same volume there is another judgment of the same learned Judge, vide, Murari Lal v. Mohammed Yasin. : AIR1939 All46 . In that Case an ex parte decree was passed on 7-1-1937. On 16-1-1937, the defendant made an application for the setting aside of the ex parte decree. No cash security was deposited along with the application nor was any application made for permission to file a security bond; a security bond was, however, attached to the application. It appears that the Court neither gave any direction in connection with the filing of the security bond nor accepted the security bond which was filed. Notice was issued, however, to the other side and the application was ultimately allowed and the ex parte decree set aside. Mulla J., setting aside the order of the Small Cause Court Judge observed that in that case no direction of the Court to file the security bond had been obtained and the Court had not approved of the security bond.

13. In Qabul Singh v. Jai Prakash : AIR1939 All503 , Thom C. J. had a case in which the defendant had knowledge of the ex parte decree on 28-5-1936. The application for the setting aside of the ex parte decree was made on 29-5-1936. Security, however, was deposited on 2-6-1936 i. e., within thirty days of the date of knowledge. The learned Chief Justice held : 'In law, therefore, it must be taken that the application was presented on June 2.' Then referring to the previous decision of Mulla J. reported in Murari Lal v. Mahomed Yasin : AIR1939 All46 , His Lordship observed:

'In my opinion the interpretation put upon the amended section by the learned Single Judge is too narrow. 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 the 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. In my judgment, provided the application is made and the security is furnished within the thirty days, there is substantial compliance with the provisions of Section 17 as amended.'

14. In Ram Dayal v. Bhagwan Das : AIR1941 All284 two applications were simultaneously made; one application was for the setting aside of the ex parte decree and another for permission to give security other than cash. The application for permission to file security bond was first entertained and allowed by the Court, the security bond attached to the application being accepted. Thereafter the Court directed notice to be issued on the Second application. It was held that, under the circumstances, the provisions of Section 17 were duly complied with as the application for permission to file a security bond could be regarded as a previous application such as is contemplated by the section.

15. In Jagdamba Prasad v. Ram Das Singh : AIR1943 All288 Mulla J., again affirmed his previous view expressed in two cases reported in Murari Lal v. Mahomed Yasin, : AIR1939 All46 already referred to.

16. In Kirpa Shankar v. Brahmanand : AIR1945 All282 an ex parte decree was passed on 5-8-1943 but the defendant had knowledge of it on 21-9-1943. An application for the setting aside of the ex parte decree was made on 30-9-1913. Along with the application a security bond was filed. The Court accepted the security bond. Later, when the decree-holder appeared, the learned Judge dismissed the application. In revision Sinha J., observed that the previous application required cinder Section 17 need not necessarily be in writing. 'The order of the Court below,' observed his Lordship,

'allowing the surety to file a security bond and accepting the same on one and the same day implies a previous application oral or written by the defendant or the surety and a previous order by the Court. The requirements of Section 17 are, to my mind, effectively complied with if the application for the setting aside of the ex parte decree is accompanied by a cash deposit of the decretal amount or security bond safeguarding the interest of the decree-holder. The Legislature insists upon this provision only as a measure of protecting the decree-holder's interest. A cash deposit of the security bond achieves that purpose and if this condition is fulfilled there is, in my opinion, an effective compliance with the legal condition.'

17. In Bhola v. Mt. Ram Rati : AIR1946 All425 in which an ex parte decree was obtained on 17-4-1944, two applications were made on 20-4-1944. In one of these

applications a prayer for the setting aside of the ex parte decree was made. In the other a prayer was made that the Court might permit the applicant to furnish a personal security bond. On 21-4-1944, the Court ordered that the application for permission to file the security bond be put up with the record on 8-5-1944. The matter was again put up before the learned Judge and he ordered that personal security will not be accepted; security of property may be given. The applicant thereafter did not give any security of property but deposited cash security on 12-5-1944 i. e. within the period of thirty days from the date of the knowledge of the ex parte decree. The Court after review of the various cases, held that:

'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 of Ram Bharose v. Ganga Singh : AIR1931 All727 and in the case of 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.'

In the result the Court allowed the application for the setting aside of the ex parte decree.

18. In Sri Newas v. Durga Prasad, 1947 A. L. J. 204 : (A. I. R. (34) 1947 ALL. 125) two applications were made; one for the setting aside of the ex parte decree and another for permission to file a security bond. On a subsequent date, the security bond was filed but all this was done within limitation. It was held that the provisions of Section 17 had been substantially complied with.

19. In Hira Lal v. Cheda, A. I. R. (85) 1948 Oudh 41: (22 Luck. 291) there were two applications; one for the setting aside of the ex parte decree and another for furnishing security filed on the same day, but the security was actually furnished after the expiry of thirty days i. e. after the period of limitation. It was held that there was no substantial compliance with the provisions of Section 17.

20. A resume of the cases cited above shows that with the exception of Mulla J. all other Judges have taken the same view of Section 17 as we have indicated above. We are unable to agree with the opinion of Mulla J.

21. We, therefore, hold that, where the direction of the Court as to the security to be furnish, ed is taken and the security is furnished within the period of limitation and the application for the setting aside of an ex parte decree is also made within time, the application for the setting aside of an ex parte decree, though made before the direction of the Court is obtained or the security is actually famished, can be treated as having been made when the security bond is filed or the cash is deposited; and in such cases the provisions of Section 17 shall be deemed to have been substantially complied with. Where any of the two necessary conditions required by Section 17, namely, the direction of the Court for the furnishing of security and the actual furnishing of security are done after the expiry of the period of limitation the application for the setting aside of an ex parte decree cannot be considered to be a proper application.

22. In the present case all these things were done within the period of limitation, and as such the application for the setting aside of the ex parte decree, substantially fulfilled the requirements of Section 17.

23. The result, therefore, that we allow this revision, set aside the order of the Court below and hold that the application for the setting aside of the ex parte decree was maintainable. The Court below will now proceed to decide that application on the merits.

24. Parties will bear their own costs in both the Courts.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com