

Gopaldas Vs. Buddhsaram

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Court : Madhya Pradesh

Decided On : Jun-27-1979

Reported in : AIR1980MP123; 1980MPLJ258

Judge : A.R. Navkar, J.

Acts : [Provincial Small Cause Courts Act, 1887](#) - Sections 17; [Code of Civil Procedure \(CPC\) , 1908](#) - Order 9, Rule 13

Appeal No. : Civil Revn. No. 591 of 1975

Appellant : Gopaldas

Respondent : Buddhsaram

Advocate for Def. : B.M. Agarwal, Adv.

Advocate for Pet/Ap. : G.P. Agarwal, Adv.

Disposition : Petition allowed

Judgement :

ORDER

A.R. Navkar, J.

1. This is a revision petition under Section 25 of the Provincial Small Cause Courts Act (hereinafter referred to as the Act) against the order dated 22-8-1975, passed

by the Civil Judge, Class I, Shivpuri in Miscellaneous Civil Case No. 3/74, dismissing the application of the defendant/petitioner for setting aside the ex parte decree.

2, The plaintiff/non-petitioner obtained an ex parte decree against the defendant/petitioner on 26-7-1974 in Small Cause Suit No. 785 of 1972. The defendant/petitioner moved an application under Order 9, Rule 13 of the Code of Civil Procedure for setting aside the said ex parte decree. The ground taken for setting aside the decree was that his uncle was ailing on that date and he had to go to Lashkar to see him in the hospital. Along with that application, the petitioner/defendant filed a security bond for the due performance of the decree, but it remained unverified. The trial Court registered the application as Miscellaneous Case No. 3 of 1974 and ordered issuance of notice to the plaintiff/non-petitioner.

3. The plaintiff/non-petitioner resisted the said application on the ground that there was no sufficient cause. From 3-12-1974 to 6-8-1975, different dates were given by the trial Court for recording the evidence. On 22-8-1975, on the application of the plaintiff/ non-petitioner the trial Court held that as the defendant/petitioner has not taken permission from the Court to file the security, therefore, the application under Order 9, Rule 13, Civil P. C. is not according to law and, therefore, it dismissed the application. Against that, the present revision is directed.

4. The two submissions which are made before me are that the application under Order 9, Rule 13, Civil P. C. is not proper because the defendant/petitioner has not complied with the provisions of Section 17 of the Act, that is to say that he has not deposited the decretal amount in cash along with the application, but instead he has filed the security. But, for filing the security he has not taken permission from the court and as such, the application not being according to the provisions of Section 17 of the Act, the order of the trial Court is correct. The second submission before me is that the security given is not verified within thirty days and now the Court has no jurisdiction to verify the same after the period of thirty days is over and as such that security is of no consequence and that will not amount to compliance of the provisions of Section 17 of the Act. These are the objections

taken by the learned counsel appearing for the non-petitioner in this case.

5. To this, the reply of the learned counsel, appearing for the petitioner, is that taking into consideration all the facts of the case, it will amount that impliedly the Court gave permission to the petitioner to file the security. Secondly, he submitted that it was the duty of the Court to verify the security as soon as it was filed. He can only file the security, but cannot make the Court to verify it within thirty days. As he is not responsible for verification of the security, he should not suffer because of the delay caused by the Court itself. Next, he submitted that the permission contemplated under Section 17 of the Act to file security can also be an oral one. Lastly, he submitted that this is a procedural matter and the security to be given is for the benefit of the decree-holder. That being the case, a very strict view of Section 17 of the Act should not have been taken by the trial Court and after taking a liberal view, the Court should have held that application is according to law and that the petitioner has complied with the provisions under Section 17 of the Act are mandatory is held in *Brinda-wan Prasad v. Dashrath* (1966 Jab LJ 78) : (AIR 1966 MP 211) (sic). Therefore, the question before me is whether the petitioner has complied with the provisions under Section 17 of the Act. Section 17 of the Act reads as under:--

'17. Application of the Code of Civil Procedure. -

(1) 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 suits :--

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 the Court the amount due from him under the decree or in pursuance of judgment, or give such security for the performance of the decree or compliance with the judgment as the Court may, on previous application made by him in this behalf, have directed. (2) Where a person has become liable as surety under the proviso to the Sub-section (1), the security may be realized in manner provided by Section 145 of the Code of Civil Procedure, 1908.'

There is no dispute that the application and the security filed is within limitation. There is also no dispute that taking into consideration the application and the security, the Court ordered the parties to produce evidence. In such circumstances, I am of the view that the trial Court was wrong in taking a very strict view of Section 17 of the Act. There is no dispute also that there can be an oral permission for filing security and looking to the circumstances of the case, I feel that it should be held that the trial Court impliedly gave permission to file security to the petitioner instead of depositing the amount. The similar point came before this Court in *Chintesa v. Lakhnibai* (1960 MPLJ (Notes) 4), and in that case, it was held as under :--

'The defendant moved a petition, under Order 9, Rule 13, Civil Procedure Code for setting aside an ex parte decree, along with a security bond as required by Section 17 of the Provincial Small Cause Courts Act. The plaintiff contended that the security bond was without the prior permission of the Court. The trial Court accepting the plaintiff's contention, dismissed the petition.

Held, that the trial Court took a very highly technical view of the matter. Although Section 17 requires that furnishing of the security bond should be with prior permission of the Court, yet that permission can be oral and so long as the bond is filed within the period of limitation, the requirements of law would be deemed to have been complied with.'

I am in full agreement with the above proposition. Therefore, the objection that no written permission was taken in the trial Court before filing the security has no force and I reject it. 6. The second objection is regarding the verification of the security. The submission is that the security should have been verified within thirty days and after thirty days, the Court has no jurisdiction to verify the security. Section 17 of the Act lays down that the petitioner should 'give such security'. The meaning of this expression was considered by a Full Bench of the Andhra Pradesh High Court in *Satyanarayana v. Ramabrahman* (AIR 1960 Andh Pra 230). It was held in that case as under:--

'An unregistered security bond is sufficient compliance with the law. provided the delay in getting it registered is not due to any fault of the applicant himself. Where

security is tendered within the time and proves, even though tested after the time, eventually to be sufficient, the applicant must be deemed to have complied with the requirements of the proviso. The words 'give such security' may be construed to mean 'tender such security'. AIR 1956 Mad 422 and AIR 1933 Pat 279, Rel. on.'

The question that then arises is that if such a security is found to be insufficient or defective, what should be the fate of the application under Order 9, Rule 13, Civil P. C., presented for setting aside the ex parte decree. This aspect along with the aspect which is mentioned above was considered in *Dukhia Ganju v. Ramchandra*, (AIR 1968 Pat 271). The order is delivered by Hon. Untwalia, J., in which he has approved the proposition of law laid down in *Satyanarayana v. Ramabrahman* (AIR 1960 Andh Pra 230) (FB) and in *Rajeshwari Prasad Singh v. Brahamanand Lal* (AIR 1933 Pat 279), and he has held as under:--

'.....The question of sufficiency of security or the registration of the security bond may take time and this may be completed later. In that event, he takes the risk and his application for setting aside of ex parte decree is liable to be thrown out if the security is found insufficient on that ground alone.'

Therefore, relying on these two rulings, I hold that their failure to furnish the security itself was sufficient compliance of the provisions of Section 17 of the Act, and it can be verified even after thirty days.

7. Therefore, the result is that the revision is allowed, the order of the trial Court is set aside and the case is sent back to it for disposal according to law in the light of the observations made above. Parties to bear their own costs.