

Khetra Dolai Vs. Mohan Bissoyi

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Court : Orissa

Decided On : Mar-24-1960

Reported in : AIR1961Ori37

Judge : G.C. Das, J.

Acts : [Provincial Small Cause Courts Act, 1887](#) - Sections 17 and 17(1); Code of Civil Procedure (CPC) - Order 9, Rule 13

Appeal No. : Civil Revn. No. 391 of 1958

Appellant : Khetra Dolai

Respondent : Mohan Bissoyi

Advocate for Def. : B.K. Pal, Adv.

Advocate for Pet/Ap. : N.V. Ramadass, Adv.

Disposition : Application dismissed

Judgement :

ORDER

G.C. Das, J.

1. This is a defendant's application directed against an order of the Small Cause Court Judge, Berhampur, rejecting his application under Order 9 Rule 13 of the

Code of Civil Procedure. The learned Judge rejected the application on the ground that the application is not maintainable, since it did not comply with the provisions of Section 17 of the Small Cause Courts Act.

2. Mr. Ramdas, learned counsel on behalf of the petitioner contended that he had complied with the provisions of Section 17 within the period of limitation. In other words his contention is that he had filed a draft security bond within thirty days of the ex parte decree. The proviso to Section 17 says 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 the judgment, or 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.

An identical question came up before this Court in the case of Manu Sadangi v. Baraju Das, Civil Revn. No. 255 of 1958 since reported in Orissa Judicial Decisions p. 604. In that case I took the view that the proviso to Section 17 of the Small Cause Courts Act lays down that an application for an order to set aside a decree passed ex parte or for a review of the judgment shall at the time of presenting his application either deposit in court the amount due from him under the decree or in pursuance of the judgment or 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. This proviso to Section 17 was introduced by Act IX of 1935.

The amendment adopted the view that an applicant applying for a review of judgment or for an order to set aside an ex parte decree must at the time of presenting his application do one of the two things, namely, either deposit in court the amount due under the decree or give such security for performance of the decree as the court may have directed on a previous application made by him in this behalf. If he does not make the previous application, he must put in the decretal amount in full. If he has made the previous application and succeeded in getting an order for security in cash, he can, instead of depositing the decretal amount, furnish the security directed by court. It is no longer open to the court to

extend the time within which the deposit is to be made or the security furnished.

3. In order to appreciate the argument of Mr. Ramdas, certain facts have got to be stated in detail. The ex parte decree for a sum of Rs. 247/-including costs was passed on 25-1-1957. The application under Order 9, Rule 13 was filed on 28-1-57. Before expiry of the 30th day, the applicant filed an application on 11-2-57 for giving him permission to file security or to take the previous security as sufficient. On 13-2-57, the Court ordered that the previous security furnished by the petitioner having been discharged the petitioner was to furnish fresh security and allowed him time till 20-2-57 which was within the period of limitation.

On 20-2-57 a draft-bond for Rs. 200/- executed by a third party Krushna Moharana was filed, and the court ordered it to be put up on 26-2-57. On 26-2-57 the court did not accept the draft bond which was filed by Krushna Moharana but asked the petitioner to file a proper security bond. A fresh bond for Rs. 250/- was filed by the petitioner on 8-3-57, but no affidavit showing that the properties are free from encumbrances were filed by him. Accordingly the court ordered that the petitioner must file such an affidavit by 21-3-57. However, the affidavit was filed on 2-4-57 and the Court ordered the bond to be checked and put up on 9-4-57.

This draft-bond was accepted as sufficient on 16-4-57 and the fresh security bond engrossed on proper stamp paper was filed into court on 7-5-57. The impugned order was passed on 5-11-58. The learned Small Cause Court Judge rejected the application on two grounds : (1) the security bond has not been filed within thirty days of the passing of the ex parte decree; and (2) that the security bond is not a valid security bond in the eye of law. The reason for this was that the purpose for which the security had to be furnished was to ensure the performance of the ex parte decree in case that decree is not set aside, but in the security bond the security had been furnished by the petitioner for the performance of the ultimate decree that might be passed in the event of the ex parte decree being set aside.

As far as the position in law is concerned, it is well settled, as has been laid down by me in the case referred to above. Mr. Ramdas however sought to argue that the bond which he had filed within the period of limitation should be taken as a valid security bond for the due performance of the ex parte decree. The question is

whether the draft bond which had been filed on 22-2-57 would be taken as a valid security bond upon which the court could act. To begin with this bond was executed by a third person Krushna Chandra Moharana and the bond was for a sum of Rs. 200/- whereas the decretal dues were for Rs. 247/- inclusive of the costs. Naturally the court rejected that and asked the petitioner to file a proper security bond by his order dated 26-2-57 and the fair security bond was filed on 7-5-57 much beyond the period of limitation.

Mr. Ramdas wanted to argue that since the court did not pass the order within the period of limitation when he filed the draft security bond on 20-2-57, the petitioner should not be penalised for the laches of the court. I cannot accede to this argument of Mr. Ramdas. The security bond that was filed on 20-2-57 could not be taken to be a valid security bond on which the Court could act. The only security bond that had been filed on 7-5-57 is the bond on which the court could act, but that had been filed much beyond the period of limitation. Mr. Ramdas wanted to rely upon two cases of the Andhra Pradesh High Court and the Madras High Court.

In the case in *P, Satyanarayana v. V. Rama-brahman*, 1960-1 Andh WR 24: (AIR 1960 Andh Pra 230) a Full Bench of the Andhra High Court took the view that 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. The test is whether the security which the party placed in the hands of the court and which the court ultimately accepted was sufficient to enforce the obligation upon him.

Therefore, the filing in time of the draft bond, if accepted by the court after scrutiny would be sufficient compliance with the requirements of the proviso to Section 17 of the Provincial Small Cause Courts Act. Where, therefore, security is tendered within 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 to Section 17. The words 'give such security' in the proviso to Section 17 may be construed to mean 'tender such security'.

A similar view was taken by the Madras High Court in the case of *In re: Chinnathambi Asari*, 1958-2 Mad LJ 594. A learned Single Judge in that case held

that where at the time of filing an application for setting aside an ex parte decree, the defendant files a draft security bond giving a list of immovable properties offered as security, and after the security is tested and found sufficient, the defendant executes a fair bond and files it in court in accordance with the direction of the Court within the time limited by the proviso to Section 17(1) of the Provincial Small Cause Courts Act, and it is accepted by the Court, it must be held that the security has been given in time and that the requirements of Section 17(1) proviso, have been satisfied.

The circumstance that the bond is registered only subsequently, after the period of 30 days from the date of knowledge of the decree, does not affect the matter, as the bond, when registered, would take effect and date back to the date of execution. I am not here in this case concerned with the fact of registration or dating it back to the date of execution. Hence, I would reserve my opinion on that point. It has been stated at the Bar that there is divergence of opinion on this point between the opinions of the Madras High Court and the other High Courts in India. Since it is not necessary to be decided in this case, I express no opinion on it.

4. With regard to the second reason adopted by the Small Cause Court Judge that the security is not a valid security in the eye of law, Mr. Pal sought to rely upon a decision of the Calcutta High Court reported in *Pulin Chandra v. Khetra Mohan*, AIR 1939 Cal. 748. In that a learned single Judge of the Calcutta High Court has held that the purpose for which security has to be furnished is to ensure the performance of the ex parte decree in case that decree is not set aside. The security to be furnished is not for the performance of the ultimate decree that might be passed in the event of the ex parte decree being set aside. Edgley, J. while coming to this decision had relied upon a decision of the Bombay High Court in *Maganlal Pitamberdas v. Dahyabhai Chhaganlal*, AIR 1938 Bom 448.

5. Thus, the fact that stands out in this case is that a valid security bond on which the court could act was not filed within a period of thirty days from the date of the ex parte decree. That being the position, the subsequent filing of the security bond with the permission of the court or having it accepted by the court would not enable the petitioner to comply with the provisions of Section 17 of the Small

Cause Courts Act. Accordingly, I find that the provisions contained in the proviso to Section 17 have not been complied with and the Small Cause Court Judge has taken the right view in the matter.

In the result, this application is dismissed with costs.

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