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**(1967) 07 AHC CK 0008**  
**In the Allahabad High Court**  
**Case No : F.A.F.O. No. 299 of 1960**

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| Lallamal Hardeo Dass Cotton Spinning Co. | APPELLANT  |
| Vs                                       |            |
| Sukh Dial Ram Bilas and Others           | RESPONDENT |

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**Date of Decision :** 13-07-1967

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90

**Citation :** (1967) 37 AWR 617

**Hon'ble Judges :** S.K. Verma, J;Rajeshwari Prasad, J;R.S. Pathak, J

**Bench :** Full Bench

**Advocate :** K.C. Saxena and P.C. Gupta, for the Appellant; R.R. Agarwal, Ambika Pd. and V.K. Burman, for the Respondent

**Final Decision :** Allowed

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## Judgement

R.S. Pathak, J.—This is a judgment-debtor's appeal against an order of the learned Civil Judge, Aligarh, dismissing his application for setting aside an execution sale.

2. In execution of a decree against the Appellant, the executing court auctioned the Appellant's immoveable property on 6-5-1958. On 28-5-1958 the Appellant filed an application Under Order 21, Rule 90 of the CPC for setting aside the sale. The decree-holder Respondent filed a reply on 26-7-1958 opposing the application and thereafter a similar reply was filed by the auction purchaser Respondent. On 8-11-1958 the application Under Order 21, Rule 90 was dismissed in default, but was restored on 6-2-1960. On 27-4-1960 the Appellant applied for permission to file a report and a map in support of his application. Permission was granted on 30-4-1960. About the same time, he applied for permission to make a deposit or furnish security as required by Clause (b) of the Proviso to Sub-rule (1) of Rule 90. The learned Civil Judge made an order on 23-7-1960 declining to grant permission on the ground that the Appellant had not made any deposit nor moved the Court for fixing its amount at the time when he filed the application Under Order 21, Rule 90 and more than two years

had elapsed since then. By the same order, the learned Civil Judge rejected the application Under Order 21, Rule 90 as not maintainable. The instant appeal has been preferred against the order.

3. The appeal came on for hearing originally before a Division Bench consisting of Jagdish Sahai and W. Broome, JJ. Being of the opinion that a conflict existed between the decisions of this Court on the point, they have referred the case to a larger Bench. That is how the case comes before us.

4. Order 21, Rule 90 was amended by this Court with effect from 1-6-1957. The amended provision reads:

Rule 90(1).--Where any immoveable property has been sold in execution of a decree, the decree-holder, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it:

Provided that no application to set aside a sale shall be entertained--

(a) upon any ground which could have been taken by the Applicant on or before the date on which the sale proclamation was drawn up; and

(b) unless the Applicant deposits such amount not exceeding twelve and half per cent of the sum realised by the sale or furnishes such security as the Court may, in its discretion, fix except when the Court for reasons to be recorded dispenses with the requirements of this clause:

Provided further that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied, that the Applicant has sustained substantial injury by reason of such irregularity or fraud.

(2) Where such application is rejected the Court may award such costs to the decree holder or the auction-purchaser or both as it may deem fit and such costs shall be the first charge upon the security referred to in Clause (b) of the proviso, if any.

In their construction of Clause (b) of the Proviso the decisions of this Court have shown considerable divergence. In *Bawan Ram v. Kunj Behari Lal* 1960 AWR 434 a learned Single Judge held that the requirements of Clause (b) must be satisfied either at the time when the application for setting aside the sale is filed or in any event before the expiry of the period of limitation for making such application. There was no power in the Court, he pointed out, to extend the period of limitation for filing the application and therefore if compliance with Clause (b) was not made within that period the application had to be rejected as invalid.

In the next case, *Dhoom Chand Jain v. Chaman Lal Gupta* 1962 AWR 585 Desai, C.J. and Dwivedi, J. observed that no duty lay upon the Court to fix the amount of deposit or of security of its own accord but pointed out that although it could not refuse to take an application even though not backed by a deposit or security

it could not judicially consider it and while it was expected that the Court would ordinarily give an opportunity to the Applicant to comply with Clause (b) it would reject the application if there was no compliance.

This was followed by the view expressed by Mukerji and Uniyal, JJ. in *Kundan Lal v. Jagan Nath Sharma* 1962 AWR 500 where disagreeing with the statement of the law in *Bawan Ram's* case (supra) they held that compliance with Clause (b) may be made at any time before the application Under Order 21, Rule 90 comes on before the Court for decision on merits.

The next case, in order of time is *Dullo v. Devi Charan* 1962 AWR 697. This decision was rendered by Srivastava and Katju, JJ. They adopted the view that although it was not imperative that the deposit should be made or the security should be furnished before or simultaneously with the making of the application Under Order 21, Rule 90 it was necessary that that should be done before the expiry of the period of limitation for making the application. It appears from the judgment that the attention of the learned Judges was not invited to the decisions in *Dhoom Chand Jain's* case (supra) and *Kundan Lal's* case (supra).

In *Haji Rahim Bux and Sons and Others Vs. Firm Samiullah and Sons*, , the controversy was considered in separate but concurring judgments by Desai, C.J. and Singh, J. They declared that the question of fixing the amount or the security would arise only after the application Under Order 21, Rule 90 was presented to it, that the period within which compliance should be effected was not the period of limitation for making the application Under Order 21, Rule 90 but such period as was fixed by the Court in that behalf and that such compliance must be had before the application was considered on merits.

The same view was taken by Asthana, J. in *Mahavir Singh and Another Vs. Gauri Shankar and Others*, and he described the observations to the contrary in *Dullo's* case (supra) as obiter.

Finally, we reach the decision in *Smt. Jaggi v. Ram Autar* 1965 ALJ 1135, where *Bishambhar Dayal and Seth*, JJ. reiterated the position that an application Under Order 21, Rule 90 could be entertained if the amount was deposited or the security furnished before the final hearing and disposal of the application.

5. The Bench, which has referred this case, has also adverted to *Commissioner of Income Tax, Bombay City I Vs. Filmistan Ltd.*, , where the Supreme Court held that upon the words of the proviso to Section 30(1) of the Income Tax Act, 1922, that "no appeal shall lie" against an order of penalty for failure to pay the tax demanded unless the tax has been paid, the appeal would be held to be properly filed only on the day on which the tax was paid.

6. The Appellant contends that the word "entertain" in Clause (b) refers to the stage when evidence has been let in and the application is taken up for oral argument. The case of the Respondents is that the application is "entertained" when it is received by the Court and that compliance with Clause (b) must be

effected at the time when the application is filed in Court or at the latest before the expiry of the period of limitation for filing the application. The truth, as so often appears in contentious litigation, lies somewhere between these two extreme positions.

7. Order 21, Rule 90 contemplates an application to the Court for setting aside the sale of immoveable property in execution of a decree. But no such application can be entertained by the Court (a) upon any; ground which was available to the Applicant or before the date on which the sale proclamation was drawn up and (b) unless the Applicant deposits an amount or furnishes such security as the Court may fix, except when the Court dispenses with the requirements of the clause. The Proviso contains two clauses, each of which affects the jurisdiction of the Court to entertain the application. Whereas Clause (a) is a provision of limitation carving out the grounds upon which the application shall not be entertained and therefore referring to the content of the application, Clause (b) speaks of certain conditions to be fulfilled by the Applicant before the application can be entertained. The subject of the two clauses is wholly dissimilar, although converging to a common purpose. One deals with what is involved inside the application, the other with matters outside its substance. In addition, there is a further plane in which the construction of Clause (b) is involved. That concerns its relationship in time. What is the period within which the Applicant must comply with Clause (b) to enable the Court to entertain his application? It is this question which has excited controversy and the answers to which have so far ranged over a wide spectrum.

8. The clause declares that no application shall be entertained unless the Applicant complies with Clause (b). When is an application "entertained"? Murray's New English Dictionary defines "entertain" to mean "to admit to consideration (an opinion, argument, request, proposal, etc); to receive (an idea) into the mind."

9. The Respondents say that Clause (b) obliges the Applicant to comply with its requirements at the time when the application is filed and that is what the use of the word "entertain" points to. They rely on the observations of the Supreme Court in *The Samarth Transport Co. (P) Ltd. Vs. The Regional Transport Authority, Nagpur and Others*, that the word "entertain" may mean "to receive on file or keep on file". Now the Supreme Court had before it a very different provision, namely Section 68-F of the Motor Vehicles Act, 1930. That provision, as the Supreme Court specifically pointed out, did not connote any time but only described the scope of the duty under it. It also observed that the meaning given to it was one necessitated by the context in which the provision occurred. The Supreme Court held that when the Regional Transport Authority came to know that there was an approved Scheme under the Act and to give effect to it an application for renewal of a permit could not be entertained, the Authority could decline to receive such application on the file and if an application had already been received, to refuse to keep it on the file. "It can only mean that the

Authority cannot dispose of the application on merits but can reject it as not maintainable." It is difficult to see how these observations can be of any assistance to the Respondents before us.

10. Reference has also been made to Choudhary Hariram and Others Vs. Pooran Singh, where construing Section 110-F of the Motor Vehicles Act, 1939, the High Court of Madhya Pradesh took the word "entertain" to mean "to receive and take into consideration." But the language of Section 100-F necessitates a connotation prohibiting the reception of the claim at the inception of the proceeding and as will be presently shown, the considerations coming into play in the construction of Clause (b) before us indicate a different context.

11. The Respondents placed great reliance upon *Commissioner of Income Tax v. Filmistan Ltd.* (supra). It is pertinent to note that the Supreme Court was not called upon to consider the implications of the word "entertain" in that case. The language employed in the proviso to Section 30(1) of the Indian Income Tax Act, 1922, affords no analogy to Clause (b) of the proviso to Order 21, Rule 90. That "no appeal shall lie" was construed by the Supreme Court to mean that no memorandum of appeal can be presented. And what is significant and marks an important difference from the case before us, is that in respect of Section 30(1) the filing of the appeal is conditioned by a requirement which the Appellant can fulfil without reference to the appellate authority. Upon the same considerations, the decision of the High Court of Andhra Pradesh in *Rajah of Rajah Velugoti Sarvanga Kumara Krishna Yachindra Bahadur Varu, Rajah of Venkatagiri Vs. Commr. of Income Tax*, which was also concerned with the proviso to Section 30(1) of the Indian Income Tax Act, 1922, can be of little value to the understanding of the problem before us.

12. The Proviso to Sub-rule (1) of Rule 90 does not contain any specific provision as to the period during which the Applicant must comply with Clause (b). But a period definite in point of time must necessarily be envisaged in order to terminate the proceedings and bring the execution to that reasonably early conclusion which is the aim and purpose of the legislation and the ambition of the decree" holder. In the absence of specific provision in that behalf, it is necessary to spell it out from the context in which Clause (b) stands and the object with which it has been enacted.

13. A person desiring to avail of the remedy provided by Order 21, Rule 90 must invoke the jurisdiction of the Court by making an application. Clause (b) prohibits the Court from entertaining the application unless the Applicant either deposits an amount or furnishes security, except when the Court dispenses with the requirements of the clause. The amount to be deposited or the security to be furnished is fixed by the Court. At the time of filing the application, it is not possible for the Applicant to know what is the amount to be deposited or the security to be furnished and indeed, whether the requirements of the clause will be dispensed with by the Court. There is no obligation upon him to deposit any amount or to furnish any security until there is an order of the Court in that

behalf fixing the amount of the deposit. The clause does not fix the amount of the deposit. It is the Court which must fix that amount. The clause merely specifies the maximum of the amount to be fixed by the Court. If the Applicant were to deposit any amount, even if it was twelve and half per cent of the sum realised by the sale, he would not be complying with the clause at all. The deposit must be pursuant to an order of the Court made under the clause. Moreover, to contemplate that the Applicant should deposit twelve and a half per cent of the sum realised by the sale or furnish security at the time of filing the application may result in imposing serious hardship and indeed drive him to irreparable loss. There may well be a case where patently the sale should be set aside and where it is beyond the means of the Applicant to comply with Clause (b). In such a case the Court could dispense with the requirements of the clause. When the Court is authorised to dispense with the requirements of the clause or, if it does not do so to fix the amount of the deposit or the security, it can arrive at its determination only upon an application presented before it. It must have material before it for the purpose of making that order. All this necessarily envisages a stage in the proceeding after the application has been filed.

14. Where the Legislature requires that a person should do something at the time of applying to the Court in order that the application should be a proper application, it gives clear indication to that effect. Section 7-B(7) of the UP (Temp.) Control of Rent and Eviction Act, 1947, entitles a tenant to file an objection in reply to a notice calling upon him to pay arrears of rent and the proviso declares that--

The tenant shall not be permitted to file any objection, unless he has deposited in Court the amount mentioned in the notice or furnishes security to the satisfaction of the Court.

Then there is Section 17(1) of the Provincial Small Cause Courts Act, the Proviso to which runs--

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 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.

These are examples plain enough. They point to the legislative practice adopted whenever it is envisaged that a condition must be fulfilled by the Applicant at the time of filing his application.

15. Reference may also be made to the corresponding proviso introduced in Sub-rule (1) of Order 21, Rule 90 by the Patna High Court which, as it read before 1942, provided:

Provided that no application to set aside the sale shall be admitted unless,

(a).....

(b) the Applicant deposits with his application such amount not exceeding twelve and half per cent of the sum realised by the sale or such other security as the Court may, in its discretion fix, unless the Court, for reasons to be recorded, dispenses with the deposit.

A Full Bench of that Court considered the provision in *Brij Behari Lal Vs. Firm Srinivas Ram Kumar and Others*, Per Harries, C.J., at p. 251 and upon a consideration of the "extra ordinary results" which would ensue if the provision was construed to require the Applicant to comply with the clause at the time of filing the application, held that compliance with the clause could be affected at any time before the application came on for admission. It is apparent that the construction of the clause was prompted by the necessity of giving a reasonable interpretation in order to make the provision workable.

16. In construing a statutory provision, the Court must give to the provision a meaning which promotes the smooth working of the statute and must avoid a construction which tends to defeat the object for which it has been framed. It must also bear in mind that the Legislature does not expect a party, upon whom the statute imposes a duty, to do the impossible. A realistic appreciation of situations and circumstances proceeding from, the proposed construction must always be before the Court.

17. The Respondents urge that in any event after the application has been presented it is incumbent on the Applicant to make another application requesting the Court to fix the amount to be deposited or the security to be furnished or to make an order dispensing with the requirements of Clause (b). The Court, it is said, cannot make an order Under Clause (b) unless the Applicant has placed relevant material before it. It is said that in order to avail of the remedy provided by Order 21, Rule 90 the Applicant must do all that is necessary to perfect his application and the application is an imperfect one so long as there is no compliance with clause (b). It is also pointed out that unless an application is made to the Court for making an order Under Clause (b) the Court cannot of its Own motion assume jurisdiction. In the instant case, jurisdiction was assumed by the Court when the Applicant made an application Under Order 21, Rule 90 for setting aside the sale. The question whether it was necessary for him to make a further application inviting the Court to make an order Under Clause (b) must be determined by reference to the provisions of that clause. There is nothing in the language of Clause (b) which imposes a duty upon the Applicant to make such application. Clause (b) casts a duty upon the Court to make an order fixing the amount to be deposited or the security to be furnished or dispensing with the requirements of the clause. The Applicant, by making the application for setting aside the sale, has set in motion the judicial process. Before the Court can entertain the application, it must strike off the fetters imposed by the Proviso upon the exercise of its jurisdiction. When there is no obligation upon the Applicant to make an application to the Court for an order

Under Clause (b), clearly a duty lies with the Court to take proceedings enabling it to make that order. The Court is a vital and necessary institution in a progressive social order. In the administration of the legal process under a democratic constitutional system, though functioning within the limits of the law it has positive functions to perform. It is true that the Court will not invite the parties to seek an adjudication of their rights by it and that it is necessary for a party to expressly move the Court in that behalf. But it is not inconceivable that upon its jurisdiction being invoked by a party a situation may arise where the Court must take the initiative in order that conditions be created for ensuring a continuity in the exercise of that jurisdiction, specially when the law places no obligation upon the party invoking its jurisdiction to do so.

18. In this view of the matter, when there is no obligation upon the Applicant to apply to the Court for an order Under Clause (b), no question can arise as to whether the Applicant must approach the Court for that purpose within the period of limitation prescribed for making the application for setting aside the sale.

19 Therefore, after the application for setting aside the sale has been presented it is for the Court to take appropriate steps enabling it to make an order Under Clause (b).

20. When should the Court do so? The contention of the Appellant is that compliance with Clause (b) is contemplated at the stage after evidence has been let in and the application is taken up for consideration on its merits. The Appellant urges that Clause (a) and (b) of the Proviso are governed by the same opening words of the Proviso, "Provided that no application to set aside a sale shall be entertained--and, therefore, necessarily refer to the same point of time. And inasmuch as the provisions of clause.

(a) will be considered only when the application is taken up for consideration after evidence has been admitted, when the Court will examine the grounds upon which the application is based, so also it is at that stage that the Court will take steps for making an order Under Clause (b). The submission rests on a fallacy. As has been pointed out earlier in this judgment, the subject of the two clauses is not the same in nature and while the Court may consider the provisions of Clause (a) at any stage, compliance with clause.

(b) is fixed by virtue of contextual considerations to a definite point of time. Moreover, to accept the contention of the Appellant would be to permit an Applicant to defeat the object behind the enactment of Clause (b). The object of Clause (b) is, among other things, to safeguard the interest of the decree-holder and the auction purchaser who may incur costs in opposing the application. That is clear from Sub-rule (2) which provides that upon rejection of the application, the Court may award costs to them and such costs shall be the first charge upon the security referred to in Clause (b) of the Proviso. That would necessarily imply that compliance with Clause (b) should be effected before the application has

proceeded to the stage of trial and indeed, before the decree holder or the auction purchaser have suffered costs in taking proceedings to resist the application on the issues raised by it. In order that the purpose of Sub-rule (2) should be achieved and the deposit made or the security furnished Under Clause (b) should protect the decree holder and the auction purchaser against a frivolous or vexatious application, that is the stage before which the Applicant must comply with Clause (b). There could conceivably be a case when a judgment debtor or other Applicant, whose application has proceeded well on its way to trial, realises the weight of the material brought on the record against the application and anticipating its failure, ceases to prosecute it and decides not to comply with Clause (b). In that event, a decree-holder or auction purchaser who has already suffered heavy expenses in opposing the application, will be deprived of the protection otherwise assured to him if compliance with the clause had been effected.

21. Upon the aforesaid considerations, it is clear that when the Proviso declares that the application shall not be entertained unless the Applicant complies with Clause (b), it refers to the point of time when the application is taken up by the Court for judicial consideration in order to act upon it and in a proper case, to require the Respondents to show cause against the application being allowed on the grounds contained in it. Before that stage is reached the Applicant must comply with the order made by the Court Under Clause (b).

22. In my judgment, upon an application being filed Under Order 21, Rule 90 the Court must call upon the Applicant to establish whether the requirements of Clause (b) should be dispensed with and if not, what according to him, should be the amount of deposit to be made or the security to be furnished. It should appoint a date upon which the Applicant can produce evidence on the basis of which he claims either that the requirements of the clause should be dispensed with or, according to him, what should be the amount to be deposited or the security to be furnished. That date need not fall within the period of limitation prescribed for an application Under Order 21, Rule 90. Before making the order Under Clause (b) the Court should afford an opportunity to the parties in the execution proceeding who may be affected by such order to be heard in the matter. Where the Court decides not to dispense with the requirement of Clause (b), it will make an order fixing the amount to be deposited by the Applicant or the security to be furnished by him and will specify a period within which compliance must be made by the Applicant. Upon the making of that order the Applicant is under a duty to comply with it and if he does not, his application for setting aside the sale is liable to be dismissed.

23. An objection was raised by the Respondents to the maintainability of this appeal. It was urged that no appeal lies against the order of the learned Civil Judge because it does not amount to an order refusing to set aside the sale. An order rejecting an application for setting aside a sale, even if the application is rejected on the ground that the requirements of Clause (b) of the Proviso have

not been satisfied, is nevertheless an order refusing to set aside the sale. In *Marudamuthu Mudaliar Vs. N.K. Venkatrama Aiyar, Varadachariar, J.* held that even if the application was rejected before it could be admitted the order of rejection was an order refusing to set aside the sale and an appeal lies Under Order 43, Rule 1(j). In *Ram Pratap Mandal and Another Vs. Triloknath*, an order dismissing an application for setting aside a sale Under Order 21, Rule 90 for want of prosecution was held by the Patna High Court to fall within Order 43, Rule (1)(j) and was, therefore, appealable and it was pointed out that there was no difference for the purposes of Order 43, Rule (1)(j) between dismissing the application for want of prosecution and dismissing it on merits. In *Sheikh Mastan v. Gubha Atchayya and Ors.* AIR 1959 AP 6671 the High Court of Andhra Pradesh held that an order dismissing an application made Under Order 21, Rule 90 on the ground of failure to deposit an amount equal to that mentioned in the warrant of sale as directed by the Court under the Proviso to that Rule amounted to a refusal to set aside the sale within the meaning of Order 43, Rule (1)(j) It does appear that an appeal lies against the order of the learned Civil Judge. But it is not necessary to express any final opinion in this behalf because the Appellant has prayed that the appeal may be converted into a revision application and he has made good the deficiency in the court fee. There is no dispute that if an appeal does not lie a revision application will lie against the order of the learned Civil Judge.

24. The appeal is allowed. The order of the learned Civil Judge is set aside and he is directed to dispose of the Appellant's application for setting aside the sale in accordance with law and in the light of the observations set out in this judgment. The Appellant is entitled to his costs.