
(1949) 11 CAL CK 0030
In the Calcutta High Court
Case No : Civil Rule No. 629 of 1949

Mrityunjoy Ganguly

APPELLANT

Vs

Bholanath Ganguly

RESPONDENT

Date of Decision : 16-11-1949

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13
Provincial Small Cause Courts Act, 1887 — Section 17

Citation : AIR 1951 Cal 455 : (1951) 1 ILR (Cal) 213

Hon'ble Judges : R.P. Mookerjee, J;K.C. Chunder, J

Bench : Division Bench

Advocate : Shambhu Nath Banerjee, for the Appellant; Sudhir K. Acharjya, for the Respondent

Judgement

R.P. Mookerjee, J.—The only point raised in this petn. for revn. is whether u/s 17, Provincial Small Cause Cts. Act, as it now stands, after the amendment under Act, IX [9] of 1935, it is competent for the Ct. of Small Causes to accept security for the performance of the decree as may be filed not along with the original appln. for setting aside the ex parte decree under Order 9, Rule 13, C. P. C. but done subsequently.

2. The ex parte decree in this case was passed on 25-6-1948. The deft. opposite party made an appln. on 26-7-1948, alleging that he had no knowledge of the ex parte decree before 22-7-1948. He accordingly prayed for the restoration of the suit with a prayer for accepting, security for the due performance of the order as the Ct. may pass thereafter. The learned Small Cause Ct. Judge, however, directed the deposit of the decretal amount in cash on or before 13-8-1948. The prayer for permission to file a security bond was renewed on this date. This prayer was allowed. The petnr. was permitted to furnish security by 20-8-1948. The security was duly filed & accepted by the Ct.

3. The objections raised by the decree-holder to the appln. under Order 9, Rule 13, C. P. C. were of a two-fold nature. It was contended that the deft. had

knowledge of the decree having been passed long before the date alleged by him & that the security to be furnished as under the proviso to Section 17, Provincial Small Cause Cts. Act had not been so done along with the appln. & accordingly the Cts. had no jurisdiction to allow such deposit to be made on 20-8-1948.

4. On a consideration of the evidence adduced the learned Munsiff found that the deft. had no knowledge of the decree before. 22-7-1948. As regards the deposit of the security reliance was placed on the provisions as contained in that proviso & on the circumstances that an appln. shall

"at the time of presenting his appln. either deposit in the Ct. the amount due from him under the decree, or give such security for the performance of the decree or compliance with the judgment as the Ct. may, on a previous appln. made by him in this behalf, have directed."

The appln. for permission to furnish security must according to the petnr. before us be filed previous to the appln. under Order 9, Rule 13, C. P. C. The learned Munsiff overruled this contention. This is the only point which has been taken before us in this revn.

5. It appears in the present case that the date of knowledge of the passing of the decree having been found 22-7-1948 the security as furnished & accepted on 20-8-1948 was before the expiry of 30 days from the date of knowledge.

6. When the direction of the Ct. to deposit the security is not obtained before the appln. under Order 9, Rule 13, C. P. C., is filed & when security is not deposited along with the appln. for setting aside the ex parte decree but some days later, as in this case the appln. is to be taken to have been presented when the security was deposited.

7. Before the amendment introduced in the proviso in 1935 requiring the previous permission of the Ct. to deposit the security the consistent view had been that if an appln. u/s 17 is filed without security & is subsequently completed within the time prescribed by the Law of Limitation for making the appln. by the deposit of the decretal amount of security the appct. has a right to be heard on merits *Jenu Muchi v. Budhiram Muchi* 32 Cal. 339 : (I L. L. J. 43). The proviso required even before 1935 that at the time of presenting the appln. for setting aside the ex parte decree the deposit was to be made or the security furnished "at the time of presenting his appln." It is, however, to be considered whether the addition of the words requiring the previous permission of the Ct. to furnish the security has in any way altered the position. In our view it is not. If the appln. is made within time & the security is also furnished within time it will be manifestly unjust to the appct. if he is punished for being diligent in making appln. soon after he comes to know of the ex parte decree & later on furnished the security & that also within the time prescribed by law. Even if the appln. filed without security is withdrawn by the appct. & he makes a fresh appln. together with the deposit subsequently within the due date there cannot be any question, that that would be a sufficient compliance with the terms of the proviso even if it

were very strictly construed. Even if the extreme view were taken all that could have been suggested was that in the present case if another appln. had been filed on 20-8-1948 on which date the security was furnished after obtaining permission of the Ct. on 26-7-1948 there could not have been any objection whatsoever.

8. The section now requires permission of the Ct. to be obtained before a deposit is made; this does not stand in the way of applying the same test as & under the section stood before 1935.

9. This view finds support from Ghinoo Chaudhuri Vs. Ramjapu Singh, , Qabul Singh Vs. Jai Prakash, , Tarachand Hirachand Porwal Vs. Durappa Tavanappa Patravali, , Mohan Lal v. Muniram Nandlal A. I. R. 1946 Lah. 62 : (222 I. C. 8).

10. The security having been deposited within 30 days from the date of knowledge for the same was not furnished along with the appln. under Order 9, Rule 13, C. P. C. must be taken to be a sufficient compliance of the provisions contained in the proviso to Sub-section (1) of Section 17, Provincial Small Cause Courts Act., This Rule is accordingly discharged & there will be no order as to costs.