

(1942) 10 BOM CK 0007

In the Bombay High Court

Case No : Civil Revision Application No. 238 of 1942

Tarachand Hirachand Porwal

APPELLANT

Vs

Durappa Tavanappa Patravali

RESPONDENT

Date of Decision : 09-10-1942

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13
Limitation Act, 1908 — Article 164
Provincial Small Cause Courts Act, 1887 — Section 17

Citation : AIR 1943 Bom 237 : (1943) 45 BOMLR 470

Hon'ble Judges : John Beaumont, J

Bench : Single Bench

Judgement

John Beaumont, Kt., C.J.—This is an application in revision against an order made by the First Class Subordinate Judge of Belgaum. In my opinion, the application must succeed.

2. The suit was heard, as a small cause suit, and on September 12, 1941, an ex parte decree was passed against the present appellant, who was absent. The summons had apparently been served by substituted service, and although it may have been good service in law, one knows from experience that substituted service is not always effective in practice. However, I will assume that it was served,. On October 10 the applicant returned to Belgaum and then became aware, for the first time as he says, of what had happened, and on October 11 he made an application to set aside the ex parte decree under Order IX, Rule 13, Civil Procedure Code, but did not make the deposit required u/s 17 of the Provincial Small Causes Courts Act, 1887. The October 11 was a Saturday, and the thirty days allowed by Article 164 of the Indian Limitation Act, 1908, expired on October 12, which was a Sunday So that an application made on the 13th would be within time. On the 13th the applicant applied to the Court for a stay of a darkhast to enforce the decree which had been issued by the plaintiff on October 2, and on that; application there was lodged in Court a sum of Rs. 450, (the decree being for Rs. 400) and the applicant asked the Court to treat that

sum as a deposit u/s 17 of the Provincial Small Causes Courts Act. Section 17 contains a proviso 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 that behalf, have directed. So that under the proviso he must either lodge in Court the amount due from him under the decree or give security for the amount as fixed by the Court on a previous application. Prior to 1935 the last part of the proviso enabled the security to the satisfaction of the Court to be given at the time when the application to set aside was made, and not on a previous application; but in 1935 that part of the proviso was amended, presumably in order to give the Court a proper opportunity of considering the sum to be lodged.

3. Now, this Court held in Haji Ahmed Haji Ibrahim Vs. Abdulhussein Tayaballi, following decisions of other High Courts, that in order to comply with the first part of the proviso it is not essential, as the language prima facie suggests, that the deposit should be made at the time of making the application to set aside the decree; it is sufficient if the deposit is made within the time allowed by law for setting aside the decree. The Court, in adopting that construction, came to the conclusion that to give literal effect to the terms of the first part of the proviso, and insist that the payment into Court must be made with the application, and not afterwards, would work injustice, since it would really be penalising the applicant for having made his application before he was bound to do so under the Indian Limitation Act. The Court also pointed out certain practical difficulties which would arise if the deposit had to be contemporaneous with the application, and it is true that those suggested difficulties do not arise under the section as amended.

4. The learned First Class Subordinate Judge dismissed the application, and considered that Ahmed v. Abdulhussein (supra) had no application after the amendment to Section 17 made in 1935, and for that view he relied on a decision of the Lahore High Court in Mahommad Ramzan Khan v. Khubi Khan ILR (1937) Lah. 728 The Court in that case held that the amendment to Section 17 in 1935 had made the whole section clear, and removed the ambiguity which was supposed to have existed under the latter part of the old section, and apparently the Court considered that the decisions upon the first part of the proviso were no longer good law. I am not prepared to accept that view. No doubt, some of the difficulties which appealed to the Court in Ahmed's case have been removed by the amendment, but the main ground for the decision remains. The decisions upon the first part of the proviso, under which the amount of the decree has to be deposited, must have been known to the Legislature in 1935, and if the Legislature had been dissatisfied with the result of those decisions it would, I think, have altered the language of the first part of the proviso, and directed that the deposit should be made with the application and not later. Ahmed's case is

binding upon me, and I do not think that I should be justified in treating it as overruled. The effect of the decision is to treat the requirement for making the deposit at the time of presenting the application as directory, rather than mandatory. That seems to me the right view, and I propose to follow it.

5. The learned First Class Subordinate Judge also held that the deposit had not been made in relation to an application to set aside the ex parte decree, but was made on the application to stay. No doubt it was made on the application to stay, but on the same day an application was made to treat it as a deposit u/s 17, and, in my view, it ought to have been so treated. Supposing that the amount of the decree had been paid in at the time of the application to set aside the decree, and subsequently there had been an application for stay of execution, on which normally the Court would require security to be given, it is obvious that the Court would not have required any further security, because" the whole amount of the decree had been paid in already. A double payment of the amount of the decree cannot be insisted upon, and I think that the payment of the Rs. 450 must be treated as made in relation to the application u/s 17, and, as it was paid within the time allowed, I think it was a good payment, and that the learned Judge ought to have dealt with the application to set aside on merits.

6. I, therefore, allow the application with costs, and remand the case to the trial Court to be heard on merits.