APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Oldfield, and Mr. Justice Seshagiri Ayyar.

V. M. ASSAN MOHAMED SAHIB (DEFENDANT), PETITIONER,

v.

M. E. RAHIM SAHIB (PLAINTIFF), RESPONDENT.*

1920, January 19, 20, and February 23.

Provincial Small Cause Courts Act (IX of 1887) sec. 17 (1) proviso—Ex parte decree, application to set aside—Whether proviso mandatory or directory—Time within which deposit to be made or security given.

By the Full Bench (SESHAGIRI AYYAR, J., dissenting)—The provisions of section 17 (1), Provincial Small Cause Courts Act, are mandatory.

By the Full Bench—But the deposit of the decretal amount may be made or the security given, within the period prescribed by the law of limitation for applications under the section, namely, thirty days from the date of the ex parte decree, although it did not accompany the application itself.

Jeun Muchi v. *Budhiram Muchi* (1905) I.L.R., 32 Calc., 339, followed.

PETITION under section 25 of Act IX of 1887 and section 107 of the Government of India Act, praying the High Court to revise the order of P. C. LOBO, Subordinate Judge of the Nilgiris, Ootacamund, in Civil Miscellaneous Petition No. 477 of 1918, in Small Cause Suit No. 949 of 1918.

The petitioner applied to set aside the ex parte decree passed against him in Small Cause Suit No. 949 of 1918, on the file of the Subordinate Judge of the Nilgiris, on the ground that he was not served with any summons in the suit. At the time that the petition was filed the decree amount was not paid, nor was any security given. No objection was raised until the evidence and arguments for the petitioner were closed. And though the petitioner requested two hours' time within which to deposit the decree amount, the petition was dismissed on the ground that the provisions of section 17, Provincial Small Cause Courts Act, were not complied with.

* Civil Revision Petition No. 155 of 1919.

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Against this order the petitioner filed this Civil Revision Petition to the High Court.

The petition came on for hearing in the first instance before SADASIVA AYYAR and SPENCER, JJ., who made the following

ORDER OF REFERENCE TO A FULL BENCH.

The question that arises for our determination in this Civil Revision Petition is one upon which there has been considerable difference of opinion, so far as this Court is concerned. It is whether the wording of section 17 of the Provincial Small Cause Courts Act makes it imperative that a party seeking to set aside an ex parte decree of a Small Cause Court should deposit the decree amount in Court, or give security, at the time of presenting his application.

In *Ramasami* v. *Kurisu*(1), a case which went before a Full Bench on another point, the Divisional Bench that heard the Civil Revision Petition held that the provisions of this section were merely directory and not mandatory. In *Chaturvedula Suryanarayana* v. *Chaturvedula Ramamma*(2). MILLER, J., considered this ruling but decided the case before him on another point, namely, that a deposit made after the hearing of the petition was in any case too late and rendered the application liable to be dismissed as barred by limitation.

In *Akula Achiah* v. *Lakshminarasimham*(3), the authority of *Ramasami* v. *Kurisu*(1) was followed with some hesitation, as the learned Judges were unwilling to make a departure from what had been held to be the law in this Presidency, by the practice prevailing for over thirty years.

On the other hand, the Allahabad High Court has held in *Jagan Nath* v. *Chet Ram*(4) and *Chhotey Lal* v. *Lakhmi Chand Magan Lal*(5), that the words of this section are mandatory.

We agree with this view. In our opinion the meaning of the section is clear. When it says that the applicant shall either 'deposit the amount due . . . or give security' as the Court may direct, it does not mean that this shall be done only 'if the Court so directs,' which is the interpretation that the petitioner's vakil wishes us to place on these words. The deposit

(1) (1890) I.L.R., 13 Mad., 178. (2) (1911) I.L.R., 34 Mad., 88.
(3) (1919) 37 M.L.J., 433 (4) (1906) I.L.R., 28 All., 470.
(5) (1916) I.L.R., 38 All., 425.

or the tender of security must also be made 'at the time of presenting the application.' Those words cannot be treated as intended to be devoid of their natural meaning so as to leave it open to the applicant to make the deposit, or tender the security, at that time or at any other time.

We therefore refer to a Full Bench the question whether the directions in section 17 of the Provincial Small Cause Courts Act, as to the deposit of the decree amount or the giving of security at the time of presenting an application to set aside an ex parte decree, are mandatory or not.

ON THIS REFERENCE

T. M Krishnaswami Ayyar for the petitioner.—This section was reproduced from section 21 of the prior Act XI of 1865. The difference in language shows that while under the prior Act the provision was mandatory under the present Act it is directory. The reference is in general terms. Even if the provision is held to be mandatory, the obligation will arise only after the direction of the Court. The Court has to direct which of two things the party has to do—deposit the amount or give security. The applicant has to await the direction of the Court. [C.J.—The Court has no discretion: if the applicant deposits the money it must accept it; if he tenders security it must test it.] On the facts, the question arises as to whether the Court has jurisdiction to allow the deposit to be made after the presentation of the petition.

[OLDFIELD, J.—Do you concede that the Court must require a deposit or security, at some time or other?

Yes.]

So far as practice is concerned it has been all one way. See *Chaturvedula Suryanarayana* v. *Chaturvedula Ramamma*(1).

The decisions in Bombay, Allahabad and Calcutta are against my contention. The decisions in Punjab and Oudh are in my favour. The omission of the words of the former Act is a relaxation of the rigour of the old section. I would add the words 'and if he does not do so, he can deposit at any time prior to disposal.' Compare Order XLV, rule 7, Civil Procedure Code. Under the prior Act the application was to be dismissed.

(1) (1911) I.L.R., 34 Mad., 38.

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Those words were omitted in the present Act. There is a similar omission of the words in section 21 of the prior Act XI of 1865 and the present Small Cause Courts Act. The change of language is in my favour. Under section 92 of the Civil Procedure Code it has been held in Madras, that subsequent consent satisfies the provision. See *Ramayyangar* v. *Krishnayyangar*(1), and *Srinivasa Chariar* v. *Raghava Chariar*(2). *Gopal Dei* v. *Kanno Dei*(3) is against that view. Bombay has followed Allahabad, and there is no express decision of the Calcutta High Court on this point. Decisions show that the Court has power to extend time: *Burjore and Bhawani Pershad* v. *Bhajana*(4), *Mohesh Mahto* v. *Sheik Piru*(5), *Rangasayi* v. *Mahalakshmamma*(6).

C. Madhavan Nayar for respondent.—The practice has stood for a number of years and applying the doctrine of *stare decisis* your Lordships will not interfere. The language in section 17 of the present Act is the same as is contained in the two paragraphs of section 21 of Act XI of 1865. *Somabhai* v. *Wadilal*(7) shows what interpretation is to be given to the expression 'at the time of presentation.' *Pate* v. *Pate*(8) lays down the canon of interpretation. See also *Tricomdas Cooverji Bhoja* v. *Gopinath Jiu Thakur*(9). *Akula Achiah* v. *Lakshminarasimham*(10) is also in my favour.

OPINION.

WALLIS, C.J.

WALLIS, C.J.—The corresponding provision in the earlier Small Cause Courts Act XI of 1865 was enacted as a proviso to section 21, which, after enacting that all decrees and orders of the Court should be final and making provision for setting aside ex parte decrees and also for granting new trials in other cases, expressly provided that no such new trial should be granted to a defendant 'unless he shall with his notice of application deposit in Court the amount,' etc. Under this section there was clearly no jurisdiction to grant a new trial unless the proviso had been complied with in terms. Under that Act the procedure in these Courts was governed by rules made by the High Court under

(1) (1887) I.L.R., 10 Mad., 185.
(2) (1900) I.L.R., 23 Mad., 28.
(3) (1904) I.L.R., 26 All., 162.
(4) (1884) I.L.R., 10 Calc., 557 (P.C.).
(5) (1877) I.L.R., 2 Calc., 470 (F.B.).
(6) (1891) I.L.R., 14 Mad., 391.
(7) (1907) 9 Bom. L.R., 883.
(8) [1915] A.C., 1100.
(9) (1917) I.L.R., 44 Calc., 759.
(10) (1919) 37 M.L.J., 433.

section 46, but by section 5 of the Code of Civil Procedure of 1877, the sections of the Code set out in the Second Schedule were applied to Small Cause Courts, so far as applicable. The sections so applied included the sections dealing with applications to set aside ex parte decrees and applications for review, and it was therefore only natural that the proviso now in question should appear in the present Act as a proviso to section 17, which again expressly provided that Small Cause Courts should follow the procedure prescribed in the chapters and sections of the Code of Civil Procedure specified in the Second Schedule. This re-arrangement necessitated some alteration in the language of the proviso, but that alteration in my opinion affords no ground for attributing to the legislature an intention to modify the clearly mandatory nature of the earlier enactment, more especially as the new proviso is expressed in terms which are *prima facie* mandatory, and have been so construed by the other High Courts. There are, no doubt, some English decisions in which the Courts have found indications in the particular enactments that provisions in form mandatory were only intended to be directory, but having regard to the history of the section there is in my opinion no room for any such conclusion here. In *Ramasami* v. *Kurisu*(1), PARKER, J., no doubt stated that he was disposed to hold that section 17 was merely directory and not mandatory and went on to observe :—

"The Court did require the costs to be deposited before the review was heard, and this, I think, is the intention of the section."

With all respect, this appears to me to be importing into the section a new mandatory provision not to be found there. It does not appear from the report in that case whether the time prescribed in the Limitation Act for making an application under section 17 had expired when the costs were deposited. In *Jeun Muchi* v. *Budhiram Muchi*(2), where the application was made without making a deposit or giving security, it was held by BRETT AND MOOKERJEE, JJ., that, if the requirements of the section were complied with within the period prescribed for such applications in the Limitation Act, it might be treated as sufficient, as no objection could have been taken if a fresh application had been presented when security was deposited. I

(1) (1890) I.L.R., 13 Mad., 178. (2) (1905) I.L.R., 32 Calc., 339.

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think that this interpretation of the requirements of the section may well be followed, having regard to the practice which has prevailed in this Presidency, and would answer accordingly that the provision in question is mandatory, but is sufficiently complied with by satisfying the requirements of the section before the time prescribed for such applications in the Limitation Act has elapsed.

OLDFIELD, J. OLDFIELD, J.—I entirely agree, and add only that the interpretation we are adopting is consistent with the object of the Provincial Small Cause Courts Act, the provision of a simple procedure for the cheap and expeditious disposal of petty claims.

SESHAGIRI AYYAR, J. SESHAGIRI AYYAR, J.—After the very full discussion which this case has received, I am confirmed in the view I took in *Akula Achiah* v. *Lakshminarasimham*(1), that there is no necessity for bringing our decision into line with the decisions of the other High Courts, except with *Jeun Muchi* v. *Budhiram Muchi*(2).

On the question whether the language of section 17 of the Provincial Small Cause Courts Act is only directory, there can be difference of opinion. The position is this. Before the enactment of Act IX of 1887, the procedure for the trial of Small Cause Suits and the procedure for the trial of regular suits were regulated by distinct legislative enactments. By the Madras Civil Courts Act III of 1873, section 28, power was conferred upon the Local Government to invest District Munsifs and Subordinate Judges with Small Cause Court jurisdiction in regard to suits of a particular description. My impression is, that until the enactment of this provision, there were separate Small Cause Courts in defined centres, and the regular tribunals of the presidency were not invested with Small Cause powers. Then came the Civil Procedure Code of 1877. It was intended to regulate the procedure not only in the regular Courts but also in the Small Cause Courts. The Civil Procedure Code of 1882 recognized this principle, and also provided for the repeal of some of the provisions of the Small Cause Courts Act of 1865. When the present Small Cause Courts Act was re-enacted,

(1) (1919) 37 M.L.J., 433. (2) (1905) I.L.R., 32 Calc., 389.

provisions were introduced into it which while confirming the right of a small cause suitor to have his case tried according to the procedure prescribed in the Civil Procedure Code, imposed limitations upon the exercise of some of the powers. Section 17 is an instance of this kind. In granting applications for setting aside ex parte decrees, the Small Cause Courts Act, section 17, imposes a limitation upon the right of the suitor. Whereas, under the ordinary law, what the Courts have to be satisfied is that the party has not been duly served and that he had no opportunity of defending the suit, under the Small Cause Courts Act, in addition to satisfying these requirements, the defendant is required to deposit the amount of the decree. Therefore section 17 should be read not as conferring a new jurisdiction subject to certain conditions, but, as limiting the exercise of jurisdiction by imposing conditions. This aspect of the history of legislation is essential for finding out whether section 17 is directory or mandatory. Mr. Krishnaswami Ayyar referred to section 46 of the Small Cause Courts Act of 1865, and drew our attention to the fact that the language in the present Small Cause Courts Act is materially different. I think there is force in this contention. The language of section 17 suggests *ex facie* that the deposit of the decree amount should precede the application for setting aside the ex parte decree; but there are no words in the section that, if the deposit is not made, the application should not be received. That seems to be one of the criteria for construing a statutory provision to be mandatory; I do not say that that is the sole criterion. This view gathers strength from the decision of the Judicial Committee to which Mr. Krishnaswami Ayyar drew our attention, namely, *Burjore and Bhawani Pershad* v. *Bhajana*(1). Their Lordships accepted the view taken in *In the matter of the petition of Soorjmukhi Koer*(2), that the absence of a provision for the dismissal of a suit or application for failure to comply with a condition is a circumstance tending to show that the provision is permissive, and not mandatory. Even more significant is the decision of the Judicial Committee under the Pensions Act: *Muhammad Azmat Ali Khan* v. *Lalli Begum*(3).

(1) (1884) I.L.R., 10 Calc., 557 (P.C.). (2) (1877) I.L.R., 2 Calc., 272.
(3) (1882) I.L.R., 8 Calc., 422 (P.C.).

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In that Act, sections 4 and 6 read together make the institution of a suit in the Civil Courts dependent upon the production of a certificate from the Collector; and yet the Judicial Committee held that the production of a certificate during the course of the trial would be sufficient, thereby indicating that the sections are only directory. This view has been followed in Madras and the other High Courts. See *Bepin* v. *Abdul*(1), *Ganpat Rao* v. *Anand Rao*(2) and *Ganpat Rao* v. *Anant Rao*(3).

A third class of cases was referred to by me in my judgment in *Akula Achiah* v. *Lakshminarasimhan*(4). In *Ramayyangar* v. *Krishnayyangar*(5) and in *Srinivasa Chariar* v. *Raghava Chariar*(6), it was held that section 92 of the Civil Procedure Code, which, on a plain reading of it, indicates that the sanction of the Collector or the Advocate-General is a condition precedent to the institution of a suit, was satisfied by the production of the sanction during the course of the suit. I cannot say that the language of section 17 of the Small Cause Courts Act is more imperative than sections 4 and 6 of the Pensions Act, or section 92 of the Code of Civil Procedure. Therefore, the principle which underlies the decisions in these latter Acts are equally applicable to the construction of section 17 of the Small Cause Courts Act.

In Maxwell on "Interpretation of Statutes," it is stated in one place that the conditions relating to the giving of recognizances or to trials in suits should ordinarily be regarded as mandatory. But a reference to *Rendall* v. *Blair*(7) will show that this statement is subject to many exceptions. In that case, the question was whether, if the consent of the Charity Commissioners was not obtained prior to the institution of an action, the action failed. Justice KAY in the first Court held that it was a fatal objection. The learned Judge says:

"Another objection is this: if I allow the action to stand over in order that leave may be obtained, the writ, which was issued more than a year ago, must be treated as a writ issued *nunc pro tunc* and amendment must be allowed to the effect that the action was commenced after that leave obtained. I think that would be wrong.

(1) (1916) 24 C.L.J., 446.
(2) (1906) I.L.R., 28 All., 104.
(3) (1910) I.L.R., 32 All., 148 (P.C.).
(4) (1919) 37 M.L.J., 433.
(5) (1887) I.L.R., 10 Mad., 185.
(6) (1900) I.L.R., 23 Mad., 28.
(7) (1890) 45 Ch. D., 139.

It would, I think, be entirely against the object and purpose of this section to allow the action to stand over for leave to be obtained."

In Appeal, all the Lord Justices agreed that time should be given for obtaining the consent. Lord Justice BOWEN said :

"whether, supposing the consent of the Commissioner was necessary, it would be right to dismiss the action altogether. . . . It does not seem to me that the proper course, if an action appears to the learned Judge at the hearing to be an action which falls within section 17, would be to dismiss it altogether; on the contrary, I think you ought to allow it to stand over to see if the consent of the Commissioners can be obtained."

Then the learned Judge examines the language of the statute, which is in these terms:

"Before any suit, petition, or other proceeding for obtaining any relief, etc., relating to any charity, shall be commenced, presented or taken, there shall be transmitted notice in writing to the board . . . and the said board, if upon a consideration of the circumstances they think fit, may, by an order or certificate direct any suit, petition or proceeding be next presented, etc., ... and save as herein otherwise provided no suit, petition or other proceeding shall be entertained or proceeded with by the Court except upon and in conformity with the order or certificate of the said board."

On this language Lord Justice BOWEN says :

"This section is not framed in the way in which sections are framed when it is intended that some preliminary steps should be taken before the action is maintainable at all. On the contrary, both from the way in which it is framed, from the omission of the usual words, and also from the presence of words which seem to me to indicate that the absence of the consent of the Commissioners is only a bar to the Courts dealing with the action, and not a bar to the original institution of the suit."

This decision in my opinion, which was concurred in on this point by Lord Justices FRY and COTTON, furnishes a clue for the construction of the section we are dealing with. I am not therefore prepared to say that the section is mandatory.

However that may be, in *Jeun Muchi* v. *Budhiram Muchi*(1), it is laid down that, even though the original application may not be accompanied by a deposit, once the application

(1) (1905) I.L.R., 32 Calc., 339.

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is on record, a deposit subsequently received within the time limited by law, would validate the application. This seems to be a very salutary rule. The later deposit would attract to itself the earlier application, and the application itself may be regarded as having been made on the date of the deposit. While this view would still make it permissible to the suitor to come into Court with an application unaccompanied by a deposit, it would also compel him to pay the money within the time limited by law. As against this view, there is the answer suggested by Mr. Krishnaswami Ayyar that, whenever a deposit is made before the conclusion of the trial, it should date back to the date of the original application. In support of this view, there is the analogy of the practice in this and the other Courts by which deficient Court fees paid subsequent to the date of filing of the appeal and the filing of necessary papers which did not accompany the memorandum of appeal have been regarded as enabling the party to claim that the additional payment and the later production of documents should date back to the presentation of the appeal. In such cases the office fixes a time within which the deficiency or the omission should be set right. If this is done, the delay is excused in the Admission Court.

My answer to the question is that the provision of section 17 of the Small Cause Courts Act will be complied with, if the deposit required by that section is made within the period of limitation, although it did not accompany the application for setting aside the ex parte decree.

M.H.H.