

ANJANEYALU
v.
SRI VENU-
GOPALA
RICE MILL,
LTD.
—
COUTTS
TROTTER, J.

inam; but I should like to point out that although it may be that he is entitled to grant a leasehold of the property during the period of his enjoyment, it by no means follows that it would not be contrary to public policy that the right he has to create such a leasehold estate should be sold under the orders of Court, because then the result might be attained that the inamdar would have left upon his hands the burden of the service without continuing to enjoy the revenue of the property which was provided to keep him in sufficient comfort to be able to perform the services for which it was granted. I agree that the Appeal must be allowed with costs throughout.

KUMARA-
SWAMI
SASTRI, J.

KUMARASWAMI SASTRI, J.—I agree.

M.H.H.

APPELLATE CIVIL.

*Before Mr. Justice Oldfield and Mr. Justice
Venkatasubba Rao.*

1922,
February 23.

SUDALAIMUTHU KUDUMBAN (DEFENDANT—
PETITIONER), PETITIONER,

v.

ANDI REDDIAR (PLAINTIFF—RESPONDENT), RESPONDENT.*

Civil Procedure Code (Act V of 1908), O. IX, r. 13—Provincial Small Cause Courts Act (IX of 1887), sec. 17 (1), proviso—Small Cause Suit—Ex parte decree—Setting aside of—Application within time—Payment of full amount under sec. 17 (1), proviso, after time limited—Delay, whether can be excused—Limitation Act (IX of 1908)—Rules of High Court.

Order IX, rule 13, Civil Procedure Code, is applicable to suits in Provincial Small Cause Courts, as the order has not

* Civil Revision Petition No. 411 of 1922.

been excluded from application to such Courts by section 7 or Order L of the Code.

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Section 5 of the Limitation Act relating to the power of Court to excuse delay in making applications, which has been extended by a Rule of the High Court to applications under Order IX, rule 13, Civil Procedure Code, applies also to applications to set aside ex parte decrees in Provincial Small Cause Courts.

The payment, required to be made along with the petition to set aside an ex parte decree in a Small Cause Suit under the proviso to section 17 (1) of the Provincial Small Cause Courts Act, is an element required in order to the completeness of the petition, and the delay in making the payment can be excused under section 5 of the Limitation Act, as delay in filing the completed petition.

Assan Mohamed Sahib v. Rahim Sahib (1920) I.L.R., 43 Mad., 579 (F.B.), referred to.

PETITION under sections 25 of Act IX of 1887 and 107 of the Government of India Act praying the High Court to revise the order of C. V. KRISHNASWAMI AYYAR, Acting Subordinate Judge of Tuticorin, in Execution Application No. 448 of 1920 and Interlocutory Application No. 850 of 1920 in Small Cause Suit No. 299 of 1920.

The petitioner, who was a defendant in a suit decreed ex parte, applied to the Court of the Subordinate Judge on its Small Cause side, to set aside the ex parte decree passed against him. He alleged in the petition that he became aware of the suit and the decree only a fortnight before he filed the petition, dated 30th July 1920. The amount paid into Court under section 17 (1) of the Provincial Small Cause Courts Act was not the entire decree amount but was short by annas eight, which was subsequently paid into Court, on objection being taken by the plaintiff, more than thirty days from the date of the filing of the petition. The plaintiff objected that the Court had no jurisdiction to receive the amount after the due date and had no power to excuse the delay in making the payment directed by the Act. The Subordinate

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Judge held that there was no power to excuse the delay in paying the full decree amount and dismissed the petition to set aside the *ex parte* decree. The defendant preferred this Civil Revision Petition.

T. Nallasivam Pillai and *G. R. Sivaramakrishna Ayyar* for petitioner.—The new Civil Procedure Code, Order IX, rule 13, clause 2, applies, and the delay can be excused under Rule (2) passed by the High Court extending section 5, Limitation Act. The Subordinate Judge held that he would excuse the delay in payment of annas eight which was a slip of the clerk of the vakil.

Chidambaram and *Murthandam* for respondent.—The new clause [Order IX, rule 13 (2)] does not apply. Section 17, Provincial Small Cause Courts Act, does not permit the application of any other than section 108 of the old Code of Civil Procedure (Act XIV of 1882). The corresponding Order of the new Code without the new clause alone will be applicable under the General Clauses Act; section 158, Civil Procedure Code cannot make the new clause in Order IX, rule 13, applicable. The extension of section 5, Limitation Act, to petitions under Order IX, rule 13, will not apply to cases of Small Cause Suits. In any event the extension of section 5, Limitation Act, to applications under Order IX, rule 13, will not apply to payment made out of time under the proviso to section 17 (1), Provincial Small Cause Courts Act.

The Court delivered the following JUDGMENT :

This is a petition asking us to revise the order of the Subordinate Judge of Tuticorin, refusing to set aside an *ex parte* decree passed in a Small Cause Suit. The petitioner alleges that he came to know of the decree, which had been passed on 31st March 1920, only about two weeks before he filed his petition, on 30th July

1920. Unfortunately owing, as the lower Court has found, solely to a mistake of his pleader's gumasta, he did not pay with his petition the whole of the decree amount. On the other side objecting that his payment was deficient, he, however, made good the deficiency. But he did so after the time of 30 days from the date of his knowledge of the decree, within which his petition would have been in time. The question then was whether the Court could excuse the delay under section 5 of the Limitation Act. It has refused to do so, and we have been asked to revise its order of refusal.

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The lower Court has dealt with the matter at considerable length, although it is really in our opinion very simple. We do not propose to follow the lower Court through its over elaborate discussion. Shortly, its difficulty was that section 5 has been made applicable by an order of this High Court to petitions under Order IX, rule 13, but it has not been made applicable to payments under the proviso to section 17 (1) of the Provincial Small Cause Courts Act. This, however, can, in our opinion, easily be met. There was, of course, no difficulty under the former Code. Section 17 (1) of the Small Cause Courts Act makes the chapters and the sections of the Code specified in the second schedule thereof the procedure to be followed in Courts of Small Causes in all suits and in all proceedings arising out of such suits, subject, of course, so far as section 108 of the previous Code was concerned, to the proviso already referred to. The Code now in force no doubt does not reproduce the schedule of the former Code ; but that is clearly because the legislature took another course and embodied the contents of the schedule in substantive provisions of the Code itself. For, there is firstly the general application of the Code to all Courts subject to the superintendence of the High Court. There is next, section 7, which

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specifies certain substantive provisions of the Code as not applicable to Small Cause Courts, and Small Cause Order 50, which excepts certain Orders. Neither section 7, however, nor Order 50, excepts Order IX (1). It is, therefore, clear that Order IX will be applicable to the case before us. This is sufficient to displace one argument, which has been suggested, that the section taken with the second schedule of the former Code, and section 158 of the present Code cannot be read as applying the provisions of the present Code, in so far as they differ from those of the former Code. Section 5 of the Limitation Act having been applied to Order IX, it will be none the less applicable to the procedure under that Order, when that procedure takes place in a Court of Small Causes.

It is then, however, argued that the payment required by the proviso to section 17 (1) must be considered as independent of the petition for setting aside a decree passed ex parte and that section 5 cannot be applied to the making of that payment as justifying the Court in excusing the delay in making it. The answer is that the payment is directed only in connexion with the filing of a petition under Order IX, rule 13, and is as much an element required in order to the completeness of such a petition as any other portion of it, for instance the stamp or verification; and this view of the payment referred to in the proviso to section 17 (1) is entirely consistent with the tenor of the judgment of the Full Bench of this Court in *Assan Mohamed Sahib v. Rahim Sahib*(1).

The result is that the order under revision cannot be sustained on the grounds given by the lower Court. The lower Court has already placed on record its opinion that, if discretion to excuse the delay in making the

(1) (1920) I.L.R., 43 Mad., 579 (F.B.).

payment were vested in it, this would be a case, in which that discretion might properly be exercised ; and we see no reason for dissent on that point.

The remaining question is accordingly whether the petitioner did, as he alleges in paragraph 3 of his affidavit, come to know of the passing of the decree against him only about two weeks before his petition was filed. On that point the lower Court has recorded no evidence and there is no finding. We must set aside the lower Court's order and remand the petitions for readmission and disposal in the light of the foregoing after enquiry as to whether the petitioner's statement just referred to is true. Costs to date will be costs in the cause and will be provided for in the order to be passed by the lower Court.

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APPELLATE CIVIL.

*Before Mr. Justice Kumaraswami Sastri and
Mr. Justice Devadoss.*

KUNJAMMAL AND THREE OTHERS (APPELLANTS--
DEFENDANTS), APPELLANTS,

1921,
December 12.

v

RATHINAM PILLAI (PLAINTIFF), RESPONDENT.*

*Indian Easements Act (V of 1882), sec. 15—Right of way
through another's house—Long user presumed to be as of right.*

Where the plaintiff proved that his scavenger was cleaning his privy for the last 30 years and more by passing through the defendants' house,

Held, that the presumption was that the user was of right, and that the plaintiff had acquired a right of way by long user, apart from section 15 of the Easements Act.

* Second Appeal No. 1892 of 1920.