

APPELLATE CIVIL, FULL BENCH.

Before Sir Owen Beasley, Kt., Chief Justice, Mr. Justice
Ramesam and Mr. Justice King.

KALAPATI PEDA PICHAMMA AND ANOTHER (DEFENDANTS),
PETITIONERS,

1934,
December 13.

v.

CHIRUVELLA PEDAMUNEY YA AND ANOTHER
(PLAINTIFFS), RESPONDENTS.*

Court Fees Act (VII of 1870), Sch. II, art. 6—Surety filing security bond for the performance of a small cause decree—Proper stamp on—Inapplicability of article 15 of the Stamp Act (II of 1899)—Order for payment of stamp duty on same, though made under section 17 of the Provincial Small Causes Courts Act (IX of 1887), was in fact one made under Order IX, rule 13, of the Code of Civil Procedure.

A small cause decree was passed *ex parte* for a certain sum of money. The defendant then put in a petition to set aside the *ex parte* decree and filed along with it a security bond executed by a surety for the performance of the decree. The security bond was not stamped. When the petition came on for hearing before the Court, the District Munsif ordered the petitioner to affix the usual court-fee stamp of eight annas to the security bond, which was the practice of that Court. On a reference to the High Court on account of a difference of opinion between him and the Court-fee Examiner,

held that the proper stamp for the bond was eight annas under article 6 of Schedule II of the Court Fees Act and not one rupee four annas under article 15 of the Stamp Act and that the order, though passed under section 17 of the Provincial Small Causes Courts Act, was really an order passed under Order IX, rule 13, of the Code of Civil Procedure.

CASE stated under article 6 of Schedule II of the Court Fees Act by the Additional District Munsif of Nellore regarding security bond filed in the

* Referred Case No. 11 of 1932.

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PEDAMUNEYYA. application to set aside the *ex parte* decree in
Small Cause Suit No. 56 of 1932.

Kasthuri Seshagiri Rao appeared as *amicus curiae*.

Cur. adv. vult.

JUDGMENT.

RAMESAM J. RAMESAM J.—This matter comes up on reference by the Additional District Munsif of Nellore on account of a difference of opinion between him and the Court-fee Examiner.

The facts out of which this reference arises are these. A small cause decree was passed *ex parte* for Rs. 155-10-0. The defendant then put in a petition to set aside the *ex parte* decree and filed along with it a security bond executed by a surety for the performance of the decree. It looks as if the security bond was not originally stamped at all, but, when the petition came on before the Court, the Court ordered the petitioner to affix the usual court-fee stamp of eight annas to the security bond, which was the practice of that Court. The decree has been set aside and the suit restored.

The Court-fee Examiner now thinks that the stamp to be affixed to the security bond is not an eight annas stamp under article 6 of Schedule II of the Court Fees Act, but a stamp of Re. 1-4-0 under article 15 of the Stamp Act. Now, article 15 of the Stamp Act does not apply if the Court Fees Act applies. So we have first to see whether article 6 of Schedule II of the Court Fees Act applies or not. For the Court Fees Act to apply two conditions must be satisfied; (1) the order setting aside the *ex parte* decree must be an order passed under the Code of Civil Procedure and (2)

the bond must be given in pursuance of an order made by a Court. It is true that the order was passed under section 17 of the Provincial Small Causes Courts Act, but it seems to me that nevertheless it is also an order passed under the Civil Procedure Code. The Civil Procedure Code is a general Act of procedure applicable to the Civil Courts in India. The Provincial Small Causes Courts Act is a kind of supplemental Act indicating the special procedure to be followed in Small Cause Courts which are Civil Courts. Order L of the Code of Civil Procedure gives a list of certain provisions of that Code which are not applicable to Provincial Small Causes Courts. This indicates two things ; first, that the Civil Procedure Code itself governs the procedure of Small Cause Courts to some extent, and secondly, that the provisions not included in the list apply to Small Cause Courts, and one of them is Order IX, rule 13. So, when a Small Cause Court sets aside an *ex parte* decree, it is really under Order IX, rule 13, Civil Procedure Code. Again section 17 of the Provincial Small Causes Courts Act itself makes the procedure under the Civil Procedure Code applicable to Small Cause Courts. Either way we come to the conclusion that the Provincial Small Causes Courts Act is supplemental to the Civil Procedure Code. But it is said by the Court-fee Examiner that this order is under the proviso to section 17 and not under the first part of the section. The proviso does not add to the section but only cuts down the very wide discretion which Courts have under Order IX, rule 13, Civil Procedure Code, in setting aside an *ex parte* decree, and in imposing terms upon the petitioner. Under

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the proviso the petitioner should either deposit the decree amount or give security. No other alternative, such as, that no condition need be imposed at all, is allowed.

I am therefore clearly of opinion that the order passed is an order under the Civil Procedure Code.

On account of the somewhat inconsistent and therefore obscure language of section 17 of the Provincial Small Causes Courts Act there is some difficulty as to the exact procedure to be followed by a petitioner. This obscurity has been caused by the words

“ shall, at the time of presenting his application, either deposit in Court . . . as the Court may direct.”

The section contemplates some direction of the Court and the petitioner obeying that direction. The earlier part says that the petitioner shall deposit money or give security *at the time of presenting the application*. There is an apparent difficulty in obeying both these directions. This obscurity has been noticed by most Courts which deal with this section and deserves being cleared up by the Legislature. Most Courts have attempted a practical solution. It is unnecessary to discuss this matter at great length in this case, but it seems to me that, when a party applies to set aside an *ex parte* decree, it may be regarded as consisting of two parts; first, a preliminary application to get a direction of the Court with a view to get the *ex parte* decree set aside, and secondly, after obeying the direction of the Court, the actual application to set aside the *ex parte* decree. The second part follows only after obeying the directions of the Court.

Looked at in this way the party first applies. Where he deposits money, there is no further difficulty ; but where he is unable to do so, he seeks the direction of the Court. The Court may now direct the party either to deposit money or to give security in some form. He should now obey the direction, and when the matter again comes up before the Court it is then we have the actual application to set aside the decree, and it may be said that he has either deposited money or given security with the application. However, in whatever form the Court's direction is obtained and complied with, the bond would be in pursuance of an order made by Court within the meaning of article 6 of Schedule II of the Court Fees Act.

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I have indicated the general construction of the article without reference to the particular facts of this case. In this particular case it would appear that the Court actually asked the petitioner to supply a court-fee stamp of eight annas. That would certainly be an order of the Court. Even in cases where the petitioner tenders a security along with the very first application without a previous order of the Court, if the Court orders notice on it to the opposite party and passes final orders setting aside the *ex parte* decree having found sufficient cause, it amounts to an order of Court. The acceptance by the Court of a bond previously furnished is equivalent to an order of the Court followed by compliance with it.

In my opinion, therefore, article 6 of Schedule II of the Court Fees Act applies to the case, and the bond should be stamped with an eight annas stamp.

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So far, I have arrived at the conclusion without referring to any decision. My conclusion is in accordance with the Full Bench decision, *Re The District Munsif of Tiruwallur*(1), where it was held that a bond given in pursuance of rules made under the Code should be deemed to be given in pursuance of an order made by the Court. The conclusion in *Amirthammal v. Ramalinga Goundan*(2) is also similar so far as the Court Fees Act is concerned. The question of the application of article 40 of the Stamp Act does not arise in the present case. The conclusion in *Reference from the Munsif, Habiganj, Re*(3) is also similar. But no question now arises with reference to article 57 of the Stamp Act. There is a circular of the Madras High Court (P. Dis. 265 of 1929, dated 23rd March 1929) which practically adopts the above conclusion. This must have been overlooked by the Court-fee Examiner.

I answer the reference accordingly.

BEASLEY C.J.—I agree.

KING J.—I agree.

G.R.

(1) (1911) I.L.R. 37 Mad. 17 (F.B.). (2) (1920) I.L.R. 43 Mad. 363 (F.B.).
 (3) (1925) I.L.R. 53 Calc. 101 (F.B.).