

REVISIONAL CIVIL.

*Before Sir Shah Muhammad Sulaiman, Acting Chief Justice,
and Mr. Justice Smith.*

1931
May, 7.

ABDUL WAHID (APPLICANT) *v.* TRIBHUWAN DAS AND
OTHERS (OPPOSITE PARTIES).*

*Civil Procedure Code, order XXI, rule 89—General Rules
(Civil) for subordinate courts, chapter XVII, rule 15—
Application for setting aside sale—Poundage fee not affix-
ed—Power to extend time for payment—Jurisdiction—
Revision.*

A judgment-debtor applied under order XXI, rule 89, of the Civil Procedure Code for setting aside an auction sale and made the deposits required by that rule. Rule 15 of chapter XVII of the General Rules (Civil) for subordinate courts, framed by the High Court in the exercise of its powers under section 122 of the Civil Procedure Code, required a poundage fee to be paid by stamps affixed to the application for setting aside the sale; the High Court, however, had not amended order XXI, rule 89, by including a poundage fee among the sums required to be deposited thereby. The judgment-debtor had not paid the poundage fee along with his application, but subsequently, when his attention was drawn to the omission, he prayed for time to deposit the poundage fee. The lower courts rejected the prayer and dismissed his application, holding that inasmuch as the poundage fee had not been paid along with the application within thirty days of the sale, the court had no jurisdiction to grant any extension of time and had no jurisdiction to entertain the application for setting aside the sale, as the condition of making the requisite deposits within time had not been fulfilled. *Held*, in revision, that the requirements of the provisions of order XXI, rule 89, were literally complied with and the application came within the operation of rule 92(2); that the mere fact that rule 15 of chapter XVII of the General Rules framed by the High Court was imperative would not necessarily involve the conclusion that a breach of that rule would oust the jurisdiction of the subordinate court; that the failure to affix the stamps, in payment of the poundage fee, to the application for setting aside the sale was nothing more than a mere irregularity and would

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not prevent the court from entertaining the application under order XXI, rule 89, if all the conditions required by that rule were complied with; and that in refusing to entertain the application the lower court had failed to exercise a jurisdiction vested in it by law.

Mr. *Mukhtar Ahmad* (with him Messrs. *Iqbal Ahmad* and *Mansur Alam*), for the applicant.

Messrs. *S. K. Dar* and *Gopi Nath Kunzru*, for the opposite parties.

SULAIMAN, A. C. J., and SMITH, J.:—This is a judgment-debtor's application in revision from an order of the District Judge affirming the order of the Small Cause Court Judge, who declined to entertain an application under order XXI, rule 89. After the sale had taken place the judgment-debtor deposited within the period allowed by law the amount specified in the proclamation of sale as well as a sum equal to 5 per cent. of the purchase money, as required by order XXI, rule 89, and applied for the sale to be set aside. He did not at that stage pay the poundage fee. The Munsarim reported that the poundage fee ought to have been paid at the time the application was filed. On the very day that this office report was made the applicant applied asking for time to deposit the poundage fee.

The learned Judge remarked: "I am sorry it does not lie within my jurisdiction to grant any extension under order XXI, rule 89. Any deficiency in the deposited amount necessarily involves a rejection of the objection. The application is rejected accordingly." There is no doubt that the Small Cause Court Judge thought that inasmuch as the poundage fee had not been paid along with the application within thirty days, he had no jurisdiction to grant any extension of time, and he had no option but to reject the application. This was a failure to exercise jurisdiction, in case he really had jurisdiction to extend the time.

An appeal was preferred to the District Judge, who considered the applicability of rule 15, chapter XVII of the General Rules (Civil), made by this High Court for

regulating the procedure in the subordinate courts. He began with the remark,—“Admittedly if it is held that it must be paid along with the two other sums mentioned in order XXI, rule 89, no time can be allowed.” He concluded that the rule was imperative and that the poundage must be paid up in time, and it was contrary to common sense that a judgment-debtor should get an indulgence without first paying the Government dues. He “accordingly agreed with the view of the Small Cause Court Judge.” We think that the proper interpretation of the judgment of the learned Judge is that he came to the conclusion that the deposit of the poundage fee within the period of thirty days was a condition precedent to the hearing of the application, and that if that condition was not complied with, the first court had no jurisdiction to entertain it. If his view of the law was not correct, it would amount to a failure to exercise jurisdiction by the first court.

Of course, in most cases a failure to exercise jurisdiction is based on an erroneous view of the law that the court has no jurisdiction. The mere fact that the failure proceeds on an error of law would not take the case out of section 115(b) of the Civil Procedure Code.

Order XXI, rule 89, requires the deposit of only two sums, (1) the amount specified in the proclamation of sale and (2) a sum equal to five per cent. of the purchase money. Rule 89 does not in terms require the payment of any poundage fee. Rule 92, sub-rule (2), provides that where in the case of an application under rule 89 the deposit required by that rule is made within thirty days from the date of the sale, the court shall make an order setting aside the sale. It would therefore appear that rule 89 and rule 92 were literally complied with. The High Court had power to amend rule 89, and to add a third item like poundage fee in it. It has, however, not done this so far.

The High Court in the exercise of its powers under section 122 has made certain rules for the guidance of the

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procedure in the subordinate civil courts. Rule 15 of chapter XVII requires that a poundage fee "shall be paid by stamps affixed to the application to set aside the sale." The rule is no doubt imperative, and although it does not say in so many words that the fee cannot be paid after the expiry of thirty days, this is implied by the requirement that the stamps should be affixed to the application itself. But the mere fact that the rule is imperative would not necessarily involve the conclusion that a breach of that rule would oust the jurisdiction of the subordinate court and make it helpless in the matter. Under section 122 the High Court can only regulate the procedure of the subordinate courts, and cannot take away their jurisdiction. There are many imperative provisions in the Civil Procedure Code, non-compliance with which has been held in numerous cases to amount merely to an irregularity. The failure to affix the stamps to the application for setting aside the sale would also be nothing more than a mere irregularity, and would not prevent the court from entertaining an application under rule 89, if all the conditions required by that rule are complied with. Had the courts below refused the application in the exercise of their discretion on the ground that this was not a fit case for showing indulgence, the position would have been different. They have declined to exercise jurisdiction on the supposed ground that none existed. This was clearly a failure to exercise jurisdiction.

We accordingly allow this application and setting aside the orders of the courts below, send the case back to the first court through the lower appellate court for disposing of the application on the merits according to law. The costs will abide the event.