

REVISIONAL CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge

MAHABIR (PLAINTIFF-APPLICANT) *v.* SHEO SARAN AND
ANOTHER (DEFENDANTS OPPOSITE-PARTY)*

1936
July, 15

*Provincial Small Causes Courts Act (IX of 1887), section 17—
Limitation Act (IX of 1908), Article 164—Application to
set aside ex parte decree—Applicant filing security bond—
Court considering security insufficient—Second security bond
filed after expiry of limitation—Applicant, if entitled to have
his application heard.*

Where an applicant for an order to set aside a decree passed *ex parte* files a security bond within the period of limitation, but the Court considering the security insufficient orders the applicant to file another security bond which the applicant does, the second security bond, though executed and filed after the expiry of 30 days' period of limitation prescribed by Article 164 of the Indian Limitation Act, should be treated as a part of the same transaction, so that the application is not barred, and the applicant has a right to have his application heard on merits. *Narain v. Rudan* (1), referred to. *Azmat Ullah Khan v. Ahmad Ali* (2), and *Kiran Koomar Banerji v. Baij Nath* (3), relied on.

Mr. P. N. Chaudhri, for the applicant.

Mr. Moti Lal Saksena, for the opposite-party.

SRIVASTAVA, C.J.:—This is an application under section 25 of the Provincial Small Cause Courts Act against an order of the learned Subordinate Judge of Sultanpur made in the exercise of his Small Cause Court jurisdiction.

The facts of the case are that an *ex parte* decree was passed against the defendants-opposite parties on the 30th of May, 1934. An attachment of the defendants' property was made in execution of the said decree on the 29th of September, 1935. The defendants alleging that they had no previous information of the decree and

*Section 25 Application No. 17 of 1936, against the decree of Babu Avadh Behari Lal, Subordinate Judge of Sultanpur (sitting as Judge, Small Cause Court), dated the 18th of January, 1936.

(1) (1929) I.L.R., 5 Luck., 294. (2) (1925) I.L.R., 47 All., 728.
(3) (1928) I.L.R., 51 All., 402.

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became aware of it for the first time when the attachment was made, made an application on the 3rd of October, 1935, for getting the *ex parte* decree set aside. In the application they made an offer to give the necessary security. When the application was put up before the Court on the 9th of October, the Court ordered the applicant to "file security to the extent of the decretal amount in the form of a registered deed and on the strength of the immovable property within a week". In compliance with this order a security bond was filed on the 16th of October, 1935, which was sent to the Deputy Commissioner, Sultanpur, for verification. The report made by the office of the Deputy Commissioner was to the effect that the surety owned a 1/12th share in the village whereas he had hypothecated a 1/9th share which he could not do and the security was therefore insufficient. When this report was laid before the Court on the 16th of November, 1935, the Court ordered the defendants to file a copy of the khewat of the village in which the hypothecated share was situate or to file another security bond within a week. On the 23rd of November, 1935, the defendants filed another security bond executed by the same surety hypothecating a 1/9th share in the same village. This security bond was also sent to the Deputy Commissioner for verification. The Deputy Commissioner reported it to be sufficient and it was accepted by the Court.

The only contention urged in support of this application is that the second security bond dated the 23rd of November, 1935, having been executed and filed after limitation for the making of the application for setting aside the *ex parte* decree had expired the application was not maintainable. It is argued that the provisions of section 17 of the Small Cause Courts Act are mandatory and no security bond could be accepted after the expiry of thirty days period of limitation prescribed by article 164 of the Indian Limitation Act for an application for

an order to set aside a decree passed *ex parte*. It was held by this Court in *Narain v. Rudan* (1) that if an application under section 17 for setting aside an *ex parte* decree is filed without security and is subsequently completed within the time prescribed by the law of limitation for making the application, by the deposit of decretal amount or filing of security, the applicant has a right to have his application heard on the merits. This view is supported by decisions of other High Courts also and the correctness of it has not been disputed before me. It is therefore admitted that although the application was accompanied with a cash deposit or with a security bond yet the Court having permitted the applicant to file a security bond and the bond having been executed and filed within the period of limitation prescribed by article 164 of the Indian Limitation Act, no fault can be found with the security bond, dated the 16th of October, 1935. The whole argument is that after the expiry of the period of limitation referred to above the Court could not accept another security and allow a fresh security bond to be filed. In *Azmat Ullah Khan v. Ahmad Ali* (2) a judgment-debtor applied under section 17 of the Provincial Small Cause Courts Act for a re-hearing and offered as security a bond hypothecating the property of probably much greater value than the decree, though owing to an error in calculation, he estimated the decree at a smaller amount; the bond was sent down for verification but in the meantime, though after the time limited, the judgment-debtor deposited the whole amount of the decree in cash. It was held that the judgment-debtor's action in depositing the amount in cash later should be treated as part of the same transaction as had gone before and not as a belated attempt to file security at a date when he was not permitted to file it. In *Kiran Koomar Banerji v. Baij Nath* (3), which was a similar case, the

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judgment-debtor deposited a fixed deposit receipt but without any security bond hypothecating its amount and it was accepted by the Court as sufficient. On an objection raised by the decree-holder it was held that no adequate security had been furnished, but inasmuch as the security was accepted by the Court and by reason of that acceptance the judgment-debtor was misled and was deprived of an opportunity to make good the security before the limitation expired, it should not be said in this case that he had failed to furnish security to the satisfaction of the Court, and he should be given a fresh opportunity to deposit adequate security. In the present case a security bond was filed within the period of limitation. There was a mistake in the extent of the share owned by the surety which formed the subject of hypothecation. He purported to hypothecate a larger share than what was possessed by him. The bond was at any rate good for the smaller share which he really owned. The subsequent report of the Deputy Commissioner shows that the share actually owned by the surety afforded ample security for the amount of the decree. In the circumstances the report about the security being insufficient was hardly correct. It should also be noted that the Court ordered the defendants either to file a copy of the khewat or to file a fresh security bond. The defendants adopted the latter alternative. Taking these circumstances into consideration I am of opinion that the second bond dated the 23rd of November, 1935, should be treated as a part of the same transaction. It would clearly be an injustice to allow the defendants to suffer on account of the error in the first bond about the description of the property. In any case interference in revision under section 25 of the Small Cause Courts Act being in the discretion of the Court, I do not think this a fit case in which I should exercise the discretion in favour of the plaintiff-applicant.

I accordingly dismiss the application with costs.

Application dismissed.