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JAMES AND ROWLAND, JJ.

If they fail to make good the deficit within the time allowed, the memorandum of appeal to the District Judge will stand rejected, and the appeal to this Court will stand dismissed.

S. A. K.

Order accordingly.

FULL BENCH.

Before Harries, C.J., Wort, James, Agarwala and Manohar Lall, JJ.

1939.

February, 6.
March, 29.

BRIJ BEHARI LAL

v.

FIRM SRINIVAS RAM KUMAR.*

Code of Civil Procedure, 1908 (Act V of 1908), Order XXI, rule 90(1), proviso (i)(b)—deposit of security, whether must be made within thirty days of the sale—proviso, meaning of—amendment of rule 90, whether is ultra vires the rule-making powers of the High Court.

All that the substituted proviso (*i*)(*b*) to sub-rule (*1*) of Order XXI, rule 90, of the Code of Civil Procedure, 1908, requires is that before the *admission* of an application to set aside the sale the necessary sum of money or security, unless dispensed with, must be deposited. The applicant can then be said to have deposited "with his application" such deposit or security within the meaning of the proviso.

The Limitation Act only requires that the application be made within thirty days of the sale, and there is nothing in the substituted proviso to suggest that the money or other security must be deposited within limitation.

Where, therefore, no deposit accompanies an application to set aside a sale, the Court has no power to reject such application forthwith. On the other hand, it must give the applicant an opportunity to urge that the deposit should be

*Civil Revision no. 649 of 1937, from an order of N. C. Chandra, Esq., Additional District Judge of Shahabad, dated the 17th September, 1937, affirming an order of Maulavi Ali Hasan, Second Munsif, Sasaram, dated he 25th May, 1937.

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dispensed with or to deposit the full or lesser amount or other security before some date fixed for admission. If the orders of the Court are complied with, the application must be admitted and heard on the merits provided that it complies also with proviso *(i)(a)*.

Query: Whether the amendment made by the Patna High Court to Order XXI, rule 90, of the Code of Civil Procedure, 1908, is ultra vires the rule-making powers of the High Court?

O. N. R. M. M. Chettyar Firm v. *The Central Bank of India, Ltd.*(1), referred to.

Application in revision by the judgment-debtor.

The facts of the case material to this report are set out in the judgment of Harries, C.J.

The case was first heard by Wort, J. who referred it to a Division Bench by the following order.

WORT, J.—The only point of substance in this application is that the amended Order XXI, rule 90, making it a condition precedent to deposit 12½ per cent. of the sum realized by the sale is ultra vires of the rule-making authority of the High Court. As there is no appeal from my decision, and as this is a matter of some importance and as the learned Judges of the Rangoon High Court in a similar case have held that such a rule is ultra vires, I propose to refer the case to a Division Bench for decision.

The case then came on for hearing before James and Agarwala, JJ. who ordered as follows:

"We consider that it is desirable that this case should be heard by a larger Bench. Let the case be placed before the Chief Justice for orders."

The application was then put up for hearing before James, Agarwala and Varma, JJ. who referred it to a larger Bench.

On this reference

Mahabir Prasad (with him *T. K. Prasad*), for the petitioner: The Court had no jurisdiction to dismiss the application under Order XXI, rule 90, Code of Civil Procedure, on the ground that the

(1) I. L. R. [1937] Rang. 268, F. B.

security was not furnished within the period of limitation. The application itself was filed within time and there is no provision in the Code which enjoins the petitioner to deposit the requisite sum or furnish security within limitation.

Secondly, the Court in passing the chalan after ninety days in effect extended the time and exempted the petitioner from furnishing security along with the application.

[MANOHAR LALL, J.—Can the Court do it in the absence of the opposite party?]

I submit it can.

[MANOHAR LALL, J.—Under what provision has the Court jurisdiction to do it?]

Under section 148 of the Code of Civil Procedure.

[CHIEF JUSTICE—Section 148 applies to a case where any period of time is prescribed by the Code and not where it is fixed by the Limitation Act.]

My next submission is that the amendment made by the High Court to rule 90 of Order XXI is ultra vires. (Refers to section 122 of the Code which gives powers to the rule-making Committee in this behalf.)

The alteration and addition must relate to the regulation of procedure of the High Court and the Subordinate Courts: it cannot go beyond this so as to take away a common law right of a litigant.

[CHIEF JUSTICE—Why cannot the Court, in order to regulate the procedure, amend the rule which only lays down a procedure for setting aside an execution sale?]

But an amendment which imposes a restriction on the rights of a party goes beyond the matter of procedure.

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[CHIEF JUSTICE—But every rule of procedure places some sort of obstacle. We have powers to put restrictions on a rule of procedure.]

The amendment takes away the right given by rule 90 in a limited sense. The Court cannot say that it will not *admit* the application unless security is furnished as a condition precedent. It may, in the exercise of jurisdiction, impose certain terms but it cannot refuse to entertain the application.

I rely on the Full Bench decision in *O. N. R. M. M. Chettyar Firm* v. *The Central Bank of India, Ltd.*(1). As the amended rule purports to shut out the applicant, it goes beyond the matter of procedure.

[CHIEF JUSTICE—There are plenty of rules of procedure which prevent an application from being admitted or heard unless they are first complied with. The party may be deprived of its right without being heard in such cases.]

The objectionable words in the amended rule are "no application.....shall be admitted". They completely shut out the petitioner.

[JAMES, J.—For all practical purposes the application is admitted and the petitioner is heard on the question of security.]

But this was not done in the present case.

[MANOHAR LALL, J.—There are several rules in the various Orders which are not merely rules of procedure, but substantive rights are vested by these rules.]

Yes, and they cannot be altered; only rules of procedure can be amended.

[MANOHAR LALL, J.—A rule requiring a party to file an affidavit along with an application is a rule of procedure.]

Yes.

(1) I. L. R. [1937] Rang. 268, F. B.

[CHIEF JUSTICE—Therefore if certain rules direct that you have to do something or you have to make the application in a certain manner or with certain formalities or along with certain sum, they must all be rules of procedure.]

But the amendment must not completely take away a litigant's right.

Sir Sultan Ahmed (with him *B. N. Rai*), for the opposite party. If rule 90 is a rule governing procedure, the High Court has powers to amend it. There was no right in rule 90 which has been taken away by the amendment. If the applicant had a right to be heard, he has still such a right. Your Lordships can annul the rule altogether.

[MANJHAR LALL, J.—How can that be done? The rule gives a statutory right to apply to have the sale set aside.]

But if it is only a rule of procedure, it can be done.

[CHIEF JUSTICE—Speaking for myself, I think it is a rule of procedure.]

The fact that the amended rule deprives somebody of his rights does not make it any the less a rule of procedure.

[CHIEF JUSTICE—And it makes no difference if the obstacle is placed before or after the admission.]

Yes. The rule in the Rangoon High Court required a deposit of the whole amount leaving no discretion in the Court. Therefore the Full Bench decision has no application here.

The rule, properly interpreted, implies that the application for setting aside a sale must be filed either along with the security or with an application for dispensing with the security.

[CHIEF JUSTICE—The words "shall not be admitted" only mean that the Court will not proceed

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to hear the application unless the security is furnished. The Limitation Act does not contemplate "admission" of an application.]

[MANOHAR LALL, J.—Proviso (*i*)(*a*) regarding the applicant's disability to impugn the sale upon a ground which he could have taken before the sale, will clarify the situation. This cannot be determined unless the Court hears the matter before admission.]

But I submit that it was necessary for the applicant to make an application for dispensing with, or fixing the amount of, the security within the period of limitation.

If this be not the correct interpretation then the other question does not arise.

Mahabir Prasad, in reply.

S. A. K.

Cur. adv. vult.

HARRIES, C.J.—This is a petition for revision of an order of the learned District Judge of Shahabad affirming an order of the learned Munsif of Sasaram dismissing the petitioner's application to set aside a certain auction sale which was held on the 4th of August, 1936.

The petition came in the first place before Wort, J. who referred it to a larger Bench. James and Agarwala, JJ., being of opinion that the points involved were of considerable importance, referred the matter for the constitution of a larger Bench. Accordingly the petition was heard by this Full Bench of five Judges.

The application to set aside the sale, which is dated the 2nd of September, 1936, was made by Brij Behari Lal who was a person entitled to share in a rateable distribution of the sale proceeds and was an application under Order XXI, rule 90, of the Code of Civil Procedure. The application was registered in

the court of the learned Munsif as a miscellaneous case, and notices were served on the opposite party. On the 14th of October, 1936, the petitioner Brij Behari Lal deposited in court a sum amounting to 12½ per cent. of the sale proceeds, and on the 25th of May, 1937, the application came on for hearing before the learned Munsif. The opposite parties took a preliminary objection that as no sum was deposited with the application to set aside the sale as required by the rule within thirty days from the date of the sale the application was barred by time. The learned Munsif upheld this preliminary objection and on appeal the learned District Judge affirmed the decision of the Court below and dismissed the application.

It has been contended before this Court that in dismissing the application the Courts below were clearly wrong and that this is a case in which revision lies.

As I have stated, the application to set aside the sale was one under Order XXI, rule 90, of the Code of Civil Procedure. This rule has been amended by this Court, and the amended rule, under which the application was made, is in these terms :—

" (1) Where any immoveable property has been sold in execution of a decree, the decree-holder, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it :

(*i*) Provided that no application to set aside a sale shall be admitted unless—

(*a*) it discloses a ground which could not have been put forward by the applicant before the sale was concluded, and

(*b*) the applicant deposits with his application such amount not exceeding 12½ per cent. of the sum realised by the sale or such other security as the Court may in its discretion fix, unless the Court, for reasons to be recorded, dispenses with the deposit.

(*ii*) Provided further that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

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(2) In case the application is unsuccessful the costs of the opposite party shall be a first charge upon the deposit referred to in proviso (i) (b), if any."

The present provisos have been substituted by this Court for the original proviso to the rule.

It will be seen that by reason of proviso (*i*)(*b*) no application to set aside a sale is to be admitted unless the applicant deposits with his application, such an amount not exceeding 12½ per cent. of the proceeds of the sale or such other security as the Court in its discretion may fix unless the Court dispenses with the deposit altogether. In the present case the petitioner deposited neither a sum of money nor gave any security nor did he on or before making the application apply to the Court to dispense with the deposit. On the 10th of October, 1936, however, the petitioner applied to the Court to accept a deposit of 12½ per cent. of the sum realised by the sale, and upon this application the Court made an order to issue a chalan. On the 14th of October, 1936, the sum was actually deposited in Court.

An application to set aside a sale must be made within thirty days from the date of the sale: *see* Limitation Act, 1908, schedule I, article 166. The sale took place on the 4th of August, 1936, and as the application to set aside the sale was made on the 2nd of September, 1936, it was within thirty days of the sale. The deposit, however, was not made until the 14th of October, 1936, which was long after the expiry of the period of thirty days from the date of sale.

It was urged by the opposite parties in the Courts below that where the deposit had not been dispensed with by the Court an application accompanied by no deposit was no application at all within amended Order XXI, rule 90, and that the defect in the application could not be cured by a deposit made on the 14th of October, 1936, because an application on that date was clearly barred by limitation. As I have stated, the Courts below accepted this contention and dismissed the application.

Counsel for the petitioner has contended before us that the application to set aside the sale in this case was within time and should have been decided on the merits. Alternatively he has contended that the amendment made by this Court to Order XXI, rule 90, of the Code of Civil Procedure requiring a deposit is ultra vires the rule-making power of the Court, and therefore, void. If proviso (*i*)(*b*) which is part of the amendment made by this Court is void, then clearly the application was within time as the rule as it originally stood required no deposit to be made with the application.

In the first place, I shall deal with the contention that the present application complied with the provisions of amended Order XXI, rule 90, of the Code of Civil Procedure, and was within limitation. At the outset it must be observed that the substituted proviso (*i*) to sub-rule (*1*) of Order XXI, rule 90, of the Code of Civil Procedure, places conditions not upon the presentation of an application to set aside a sale but upon its admission. The words of the substituted proviso are—

"Provided that no application to set aside a sale shall be *admitted* unless....."

Admission of the application presumably means the stage when the Court decides to issue notice upon such application to the opposite parties concerned. By the terms of the substituted proviso such application cannot be admitted unless the provisions of sub-clauses (*a*) and (*b*) of proviso (*i*) are complied with. In my view this substituted proviso contemplates that after an application to set aside a sale has been presented an inquiry must be made by the Court, because the proviso directs that (*a*) no such application shall be admitted unless it discloses a ground which could not have been put forward by the applicant before the sale and (*b*) the application must be accompanied with a deposit of 12½ per cent. or such less sum or other security as the Court may

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direct, unless, for reasons to be recorded, the Court has dispensed with security. It appears to me that an application cannot, therefore, be admitted until some inquiry, no matter how perfunctory, has been made by the Court. If a deposit of 12½ per cent. has been made at the time of presentation of the application, the Court must admit the application provided proviso (*i*)(*a*) has been complied with. If, on the other hand, the application has not been accompanied by any deposit, must the Court refuse forthwith to admit it and accordingly reject it, or should the Court direct, unless it dispenses with the security altogether, a deposit to be made or security to be given before a date fixed for admission? In my view the Court must follow this latter course.

Substituted proviso (*i*) (*b*) requires that no application shall be admitted unless the applicant *deposits with his application* such amount not exceeding 12½ per cent. of the proceeds of the sale or such other security as the Court may fix unless the Court dispenses altogether with any such deposit. Do the words unless

"the applicant deposits with his application such amount....."

mean that the applicant must deposit the amount at the time he makes his application or do they mean that at some stage or another, unless the Court dispenses with the deposit, a sum must be deposited with the application which has already been made?

The learned District Judge appears to have thought that proviso (*i*) (*b*) is very similar to the provisions of the proviso to the amended section 17(*1*) of the Provincial Small Cause Courts Act. That proviso is in these terms:—

"Provided that an applicant for an order to set aside a decree passed ex parte, or for a review of judgment, shall, at the time of presenting his application, either deposit in the Court the amount due from him under the decree or in pursuance of the judgment, or give such security for the performance of the decree or compliance with the judgment as the Court may, on a previous application made by him in this behalf, have directed."

By the terms of this proviso it is clear that the deposit must be made at the time the application is presented, because it is expressly stated that such must be the case. Further, it is expressly provided that if the applicant wishes to give security instead of depositing money a previous application must be made to the Court in this behalf and the applicant must deposit such security as the Court directs when presenting his application. It is to be observed that no such express words appear in the substituted proviso (*i*) (*b*) to Order XXI, rule 90, of the Code of Civil Procedure. It has been contended that the wording of this substituted proviso (*i*) (*b*) contemplates a deposit of 12½ per cent. of the sale proceeds with the application unless the Court has directed on a previous application that a deposit be dispensed with or that a smaller deposit or some other security be given. The terms of the substituted proviso, however, do not make it clear that an application to dispense with the deposit or for leave to deposit less than 12½ per cent. of the sale proceeds or to give some other security must be made before the application to set aside the sale is made. It must be inferred, if such contention be sound, that the words

"unless the applicant deposits with his application such amount, etc."

mean unless the applicant deposits at the time he makes his application 12½ per cent. of the sale proceeds or such other sum or such other security as the Court has previously directed. I am not prepared to place such a construction upon these words. In my view the applicant can be said to deposit with his application a sum of money or other security even if he does it after he has presented the application. In my judgment if a sum of money or other security is deposited with a view to ensuring the admission of an application, such can be said to be deposited with the application provided such deposit is made before the date of admission.

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The learned Munsif appears to have thought that the deposit need not be made at the time the application is presented. In his view if no deposit is made at the time of presentation of the application to set aside the sale, then a further application to dispense with the deposit or for leave to deposit a smaller sum or other security should accompany the application to set aside the sale. Further, he was clearly of opinion that an application to set aside a sale unaccompanied by a deposit was a defective application and that such defect could not be cured unless a deposit was made within thirty days of the sale. In his view admission of the application was bound to take place within the period of limitation.

In my judgment there is no justification for this view as there is nothing in the rule to suggest that admission must take place within the period of limitation. Further, the wording of the substituted proviso in no way suggests that in the event of no deposit being made at the time the application is presented, the application should be accompanied by a further one to dispense with the deposit or for leave to deposit a lesser sum or other security.

The view of the learned Munsif that admission must take place within the period of limitation is further open to a very grave objection. The point of time when the application is admitted depends upon the Court, and if admission must be within limitation an applicant might find his application dismissed by reason of the failure of the Court to deal with it within thirty days of the sale. Such can never have been the intention of the framers of this rule.

The learned District Judge appears to have thought that the substituted proviso contemplated a deposit of 12½ per cent. in every case at the time when the application to set aside the sale was presented. In his view if the applicant desired that the deposit should be dispensed with or that he should be permitted to deposit a lesser sum or other security an

application should be made to the Court to that effect. In other words, the learned District Judge appears to have thought that 12½ per cent. of the proceeds must first be deposited and then an application made for leave to dispense entirely with the deposit or to reduce the amount of such deposit or to substitute some other security for it. In my judgment this view also cannot be sustained. Obviously the framers of the substituted proviso contemplated that nothing need be deposited in cases in which the Court thought that no deposit was necessary and that a lessor sum or other security could be deposited when the circumstances warranted the Court taking that view. Clearly the framers of the rule never contemplated that in every case a deposit of 12½ per cent. should first be made and then steps should be taken to have such deposit dispensed with or reduced.

Unless the view which I have expressed of the meaning of the words "deposits with his application" is accepted, extraordinary results might ensue. If the substituted proviso means that the applicant must in every case deposit at the time he makes his application 12½ per cent. of the proceeds or such other sum or security as the Court may direct, then if an application is made without any deposit and a deposit of 12½ per cent. is subsequently made within thirty days of the sale and before admission, such application would have to be rejected because the deposit was not made at the time the application was presented. In my view if a deposit of 12½ per cent. is made after the application is filed but within thirty days of the sale, such would clearly be a deposit made with the application. Why, therefore, should not a deposit made after thirty days of the sale but before admission be a deposit made with the application. In my judgment all that this substituted proviso requires is that before admission the necessary sum of money or security, unless dispensed with, must be deposited. The applicant can then be said to have deposited with his application such deposit or

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security within the meaning of the substituted proviso. The Limitation Act only requires that the application be made within thirty days of the sale, and in my view there is nothing in the substituted proviso to suggest that the money or other security must be deposited within limitation. The substituted proviso is complied if such is made before actual admission and the date of admission cannot be governed by the Limitation Act.

As I have stated earlier in this judgment, this application was registered as a miscellaneous case immediately upon presentation, and it has been argued that rightly or wrongly the application was admitted and that it was not open to the learned Munsif at a later stage to question his own order. There is some force in this contention; but it is unnecessary to decide the point because at a later stage the trial Court actually accepted a deposit of 12½ per cent. On the 10th of October, 1936, the present petitioner applied for leave to deposit a sum equal to 12½ per cent. of the sale proceeds and the Court issued a chalan and the money was actually deposited. Even if the original admission of this application could not be justified, the acceptance of this deposit and the subsequent proceedings clearly show that the application was properly admitted at the date of the deposit and the Court was bound thereafter to adjudicate upon it.

For the reason which I have given, I am satisfied that where no deposit accompanies an application to set aside the sale the Court has no power to reject such application forthwith. On the other hand, it must give the applicant an opportunity to urge that the deposit should be dispensed with or to deposit the full or lesser amount or other security before some date fixed for admission. If the orders of the Court are complied with, the application must be admitted and heard upon the merits provided that it complies also with the substituted proviso (*i*) (*a*). In the

present case the Courts below should have exercised the jurisdiction vested in them and heard this application upon its merits.

Having regard to the view which I have taken, it is unnecessary for me to consider the second contention of the petitioner, namely, that the amendment made by this Court to Order XXI, rule 90, of the Code of Civil Procedure, is ultra vires the rule-making powers of this Court as the question does not arise. Counsel for the petitioner relied upon a Full Bench case of the Rangoon High Court in *O. N. R. M. M. Chettyar* v. *The Central Bank of India*(1). For the reasons which I have given, I prefer to leave the consideration of this question open and to decide the matter in a case where the decision of such point is essential.

The result, therefore, is that I would allow this petition, set aside the orders of the Courts below and remand the case to the Court of the learned Munsif through the Court of the District Judge with a direction that the application should be heard and determined on the merits according to law.

WORT, J.—I agree.

JAMES, J.—I agree.

AGARWALA, J.—I agree.

MANOHAR LALL, J.—I agree.

S. A. K.

Rule made absolute.

(1) I. L. R. [1937] Rang. 268, F. B.