FULL BENCH.

Before Tek Chand, Bhide and Agha Haidar JJ.

SEDI MAL-DHARAM DAS (DEFENDANTS) Petitioners

versus

HUNA MAL-SEDHU RAM (PLAINTIFFS) Respondents.

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April 1.

Civil Revision No. 319 of 1930.

Provincial Small Cause Courts Act, IX of 1887, section 17—Ex-parte *decree—application to set aside—deposit of decretal amount or security with application—whether Court can extend time.*

Held, that the provision contained in section 17 of the Provincial Small Cause Courts Act, that an applicant for an order to set aside an *ex-parte* decree shall *at the time of presenting his application*, either deposit in the Court the amount due from him under the decree or give security to the satisfaction of the Court for the performance of the decree as the Court may direct, is directory and not mandatory; and that it is open to the Court in appropriate cases to extend the time within which the deposit is to be made or security furnished.

Mohammad Fazal Ali v. *Karim Khan* (1), and *Mukandi Lal* v. *Pars Ram* (2), followed.

Case law discussed.

Application for revision of the order of Chaudhri *Chajju Ram, Subordinate Judge, exercising the powers of Judge, Small Cause Court, Hissar, dated the 18th March 1930, dismissing the application for setting aside the* ex-parte *decree as time-barred.*

DINA NATH BHASIN, for Petitioners.

QABUL CHAND and MUHAMMAD AMIN, for Respondents.

TEK CHAND J.—The facts of the case which has given rise to this reference are as follows:— TEK CHAND

On the 30th October, 1929, a decree was passed *ex-parte* in favour of the respondent against the

(1) 108 P. R. 1894. (2) (1919) 50 I. C. 917.

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petitioner by a Judge of the Court of Small Causes. Under Article 164 of the Indian Limitation Act an application to set aside the decree could be made within 30 days from the date of the decree or, if the summons was not duly served on him, within 30 days from the date he had knowledge of the decree. On the 13th of November the judgment-debtor applied to the Court to have the decree set aside alleging that the summons had not been served on him and that he came to know of the decree only two days before. This application, however, was not accompanied either by a deposit of the decretal amount or security, as required by the proviso to section 17 of Act IX of 1887. The period of thirty days from the date of the decree expired on the 29th of November. The two following days, *i.e.*, the 30th of November and 1st of December, were Court holidays. On the 2nd of December the judgment-debtor applied to the Court for permission to deposit the decretal amount. The Court permitted this to be done subject to objection by the opposite party. The decree-holder appeared at the next hearing and urged that the application to set aside the *ex-parte* decree was not in proper form as it was not accompanied by cash deposit or security and that the Court had no power to extend the time. The Court upheld the objection and dismissed the application. Thereupon the judgment-debtor preferred a petition for revision in this Court, which was heard in the first instance by Jai Lal J. sitting singly. The main ground taken was that the words " at the time of presenting his application " in section 17 of the Provincial Small Cause Courts Act were merely directory and not mandatory, and that the time for making the deposit or giving the security could be extended at the discretion of the Court. In support of this contention

reliance was placed upon a Division Bench ruling of the Chief Court reported as *Mohd. Fazal Ali* v. *Karim Khan* (1). For the respondent it was contended that the ruling cited did not lay down the law correctly and that the weight of the authority in the other High Courts was against it. In view of this divergence of opinion and having regard to the general importance of the question, the case was referred to a Division Bench. The learned Judges composing the Division Bench thought that the matter required consideration by a larger Bench and they have referred to the Full Bench the following question :—

" Whether the provisions of section 17 of the Small Cause Courts Act that an applicant for an order to set aside an *ex-parte* decree shall, at the time of presenting his application, either deposit in the Court the amount due from him under the decree or give security to the satisfaction of the Court for the performance of the decree as the Court may direct, are mandatory or merely directory. In other words whether *Mohd. Fazal Ali* v. *Karim Khan* (1) was correctly decided."

The case has been fully and ably argued by both counsel and the relevant decisions of the various Courts have been placed before us. An examination of these cases discloses a serious divergence of judicial opinion on the point. The cases divide themselves into three distinct groups :

(1) those in which it has been held that the words " at the time of presenting the application " in the proviso to section 17 are *directory* and the Court has the discretion to extend the time in appropriate cases;

(1) 108 P. R. 1894.

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(2) those which decide that the words are *mandatory* and that it is a *condition precedent* to the making of an application for setting aside the decree that the applicant should, at the time of presenting his application, deposit in Court the decretal amount or tender security for payment of the same; and

(3) those which lay down that the words are directory to this extent that the deposit or security need not be made or tendered with the application, but that this can be done *within* the period of limitation but not beyond it.

The first view has held the field in the Punjab Courts from 1894 and has been accepted as correct by the Chief Court and this Court, the leading cases being *Mohd. Fazal Ali* v. *Karim Khan* (1), where the question is discussed at length by Plowden S. J. in his referring order and by Stogdon and Chatterji JJ. in the judgment. This decision was followed by Reid C. J. in *Rugh Nath Das* v. *Doctor Panna Lal* (2) and Shadi Lal J. in *Mukandi Lal* v. *Pars Ram* (3).

The second view was first enunciated by the Calcutta High Court in *Jogir Ahir* v. *Bishen Dayal Singh* (4) and was adopted by the Allahabad High Court in *Jagan Nath* v. *Chet Ram* (5), *Chhotey Lal* v. *Lakhmi Chand-Magan Lal* (6), *Shri Bhagawat Chaudhri and others* v. *Balkaran Saithwar and another* (7), *Lala Mool Chand* v. *Niranjan Singh* (8), it was also followed by the Bombay Court in *Somabhai Hirachand* v. *Wadilal Premchand* (9); the Patna Court in *Ram Charitar Ram* v. *Hashim Khan* (10),

(1) 108 P. R. 1894.
(2) 54 P. R. 1910.
(3) (1919) 50 I. C. 917.
(4) (1891) I. L. R. 18 Cal. 83.
(5) (1906) I. L. R. 28 All. 470.
(6) (1916) I. L. R. 38 All. 425.
(7) 1922 A. I. R. (All.) 29.
(8) 1922 A. I. R. (All.) 265.
(9) (1907) 9 Bom. L. R. 883.
(10) (1920) 56 I. C. 810.

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Kawleshwar Lal v. *Satya Brata Banarji and another* (1) and other cases; the Chief Court of Oudh in *Dunia Din* v. *Farzand Hussain* (2) and *Edu* v. *Hira Lal* (3) and the Judicial Commissioner of Nagpur in *Chandulal* v. *Motilal Bansilal* (4).

The Calcutta High Court, however, modified its opinion a few years later and accepted the third view in *Jeun Muchi* v. *Budhiram Muchi* (5) which has been followed in all subsequent rulings of that Court. This interpretation was also adopted by a majority of the Full Bench of the Madras High Court in *V. M. Assan Mohamed Sahib* v. *M. E. Rahim Sahib* (6), the third learned Judge Seshagiri Ayyar J. dissenting and agreeing with the reasoning and conclusion of the Punjab Chief Court in *Mohd. Fazal Ali* v. *Karim Khan* (7). This view seems to have now found favour in the Allahabad High Court also [See *Suraj Prasad and another* v. *Baldeo* (8)] where the majority decision in *V. M. Assan Mohammad Sahib* v. *M. E. Rahim Sahib* (6) was referred to with approval. At Patna and Lucknow too, rulings can be found in which the later Calcutta view enunciated in *Jeun Muchi* v. *Budhiram Muchi* (5) has been adopted [See *Khantar Potdar* v. *Punni Naddaf* (9), *Ram Charitar Ram* v. *Hashim Khan* (10) and *Edu* v. *Hira Lal* (3)].

It will thus be seen that while the Punjab stands alone in upholding the first view, the stricter and more literal interpretation in (2) has been definitely abandoned at Calcutta and Madras in favour of (3), and

(1) 1927 A. I. R. (Pat.) 90.
(2) 1926 A. I. R. (Oudh) 544.
(3) 1928 A. I. R. (Oudh) 488.
(4) (1929) 116 I. C. 641.
(5) (1905) I. L. R. 32 Cal. 339.
(6) (1920) I. L.R. 43 Mad. 579 (F. B.)
(7) 108 P. R. 1894.
(8) (1928) I. L. R. 50 All. 254.
(9) (1920) 54 I. C. 971.
(10) (1920) 56 I. C. 810.

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in the other Courts also, opinion is gradually veering round towards the third view.

As pointed out by Plowden J. at page 411 of *Mohammad Fazal Ali* v. *Karim Khan* (1), section 17 is not happily worded and there is a clear incongruity between the words " at the time of presenting the application " and the words " as the Court may direct." If the words " at the time of presenting the application " are taken literally and held to be mandatory, the words " as the Court may direct " become absolutely meaningless. It seems to me that the legislature clearly intended to lay down that it is for the Court, and not the applicant, to decide whether a cash deposit should be made or security furnished, and as the applicant cannot, at the time of presenting the application, know which of the two alternatives will be acceptable to the Court, the making of the deposit or the furnishing of security cannot possibly be held to be a condition precedent to the making of the application. In addition to the difficulty pointed out above, the literal interpretation in (2) leads to various other anomalies and as observed in *Jeun Muchi* v. *Budhiram Muchi* (2) it may in some cases have the effect of punishing the applicant " for diligence in presenting the application earlier than he need have done under the law." We are, therefore, driven to the conclusion that the words " at the time of presenting the application " are not mandatory in the sense that the application for setting aside the decree is incompetent unless it is actually accompanied by a cash deposit or security.

The prevailing view (No. 3) in the other High Courts recognizes that the correct legal position is as stated above and it is not possible to put a strict and

(1) 108 P. R. 1894, p. 411. (2) (1905) I. L. R. 32 Cal. 339.

literal interpretation on the words "at the time of presenting the application." They have, however, tried to solve the problem by striking a middle course and holding on the one hand that the words are not mandatory and at the same time laying down that the words are directory in a limited sense, inasmuch as the deposit must be made or security furnished *within* the period prescribed by Articles 164 of the Limitation Act. With the utmost respect for the high authority of the learned Judges who have adopted this view I find myself unable to accept it. It seems to me that the words in question are either mandatory or directory, and cannot be directory in a limited sense. It seems to me, if I may venture to say so with all respect, that the reasoning of *Mohammad Fazal Ali* v. *Karim Khan* (1) and the dissenting judgment of Seshagiri Ayyar J. in *V. M. Assan Mohammad Sahib* v. *M E. Rahim Sahib* (2) has not been met in any of the cases which uphold the second and third views, and as I am in complete agreement with their reasoning I do not think it necessary to repeat here what has been stated so lucidly in those judgments.

After careful consideration I am of opinion that it was correctly laid down in *Mohd. Fazal Ali* v. *Karim Khan* (1) that the provisions of section 17 that an applicant for an order to set aside an *ex-parte* decree shall, *at the time of presenting his application*, either deposit in the Court the amount due from him under the decree or give security to the satisfaction of the Court for the performance of the decree as the Court may direct, are directory and not mandatory and that it is open to the Court in appropriate cases

(1) 108 P. R. 1894. (2) (1920) I. L. R. 43 Mad. 579 (F. B.).

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to extend the time within which the deposit is to be made or security furnished.

I would answer the reference accordingly.

BHIDE J.

BHIDE J.—I concur with the answer given by my learned brother Tek Chand.

AGHA HAIDAR J.

AGHA HAIDAR J.—The facts leading up to the present reference to the Full Bench are given in the judgment of my brother Tek Chand and need not be recapitulated.

The view of law as expressed in *Jagan Nath* v. *Chet Ram* (1) has been accepted in a number of decisions in the various High Courts in India, and I feel personally inclined to that view. At the same time I realise that the contrary view was held by the Punjab Chief Court in *Mohd. Fazal Ali* v. *Karim Khan* (2), which has been consistently followed ever since by the Chief Court as well as by the Lahore High Court. I must at once admit that the view held by this Court as well as by the Punjab Chief Court is not unreasonable. Having regard to the fact that this view has held the field so far as the Punjab is concerned for a considerable period, I do not think it desirable to disturb the interpretation of section 17 which has been accepted in this province. I, therefore, agree with the answer given by my brother Tek Chand.

N. F. E.

(1) (1906) I. L. R. 28 All. 470. (2) 108 P. R. 1894.