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of the facts alleged is admitted, the inquiry under section 202 must clearly be at an end, and the proceedings then be transformed into a trial.

This is what has happened here. The facts alleged were admitted, and an exception was pleaded. It was then the duty of the Magistrate to proceed with the case as at a trial, and decide the plea of the exception on the merits, the burden being on the accused to show that he acted under a *bona fide* mistake of fact, thinking that the Commissioner of Police's order was one of deportation, a power which the Commissioner of Police has, under the City of Bombay Police Act, in certain circumstances, and after deciding on the validity or otherwise of the plea, to acquit the accused, or to convict him as the facts might require. But the learned Magistrate discharged the accused when the facts were admitted on the bare plea of the exception, and here I think that he was in error.

I agree, therefore, with the order proposed by the learned Chief Justice.

Order of discharge set aside and case remanded.

B. G. R.

CIVIL REVISION.

Before Mr. Justice Patkar, Acting Chief Justice, and Mr. Justice Barlee.

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July 8.

HAJI AHMED HAJI IBRAHIM (ORIGINAL DEFENDANT), APPLICANT *v.* ABDULHUSSEIN TAYABALLI AND ANOTHER (ORIGINAL PLAINTIFFS), OPPONENTS.*

Provincial Small Causes Courts Act (IX of 1887), section 17 (1), proviso to—Ex parte decree—Limitation—Application to set aside decree filed in time—Security subsequently furnished within time, effect of.

Where an application is made under Order IX, rule 13, of the Civil Procedure Code to set aside an *ex parte* decree the security required under the proviso to section 17 (1) of the Provincial Small Causes Courts Act, 1887, may be lodged subsequently to the date of the application provided it is lodged within the 30 days allowed by the Indian Limitation Act, 1908, Article 164.

*Civil Revision Application No. 156 of 1930.

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Jeun Muchi v. *Budhiram Muchi*[1]; *Assan Mohamed Sahib* v. *Rahim Sahib*[2] and *Moti Lal Ramchandar* v. *Durga Prasad*,[3] followed.

Somabhai v. *Wadilal*,[4] differentiated.

Application for setting aside the order passed by N. R. Gundil, Second Class Subordinate Judge at Andheri.

Application to set aside *ex parte* decree.

An *ex parte* decree for Rs. 112-14-0 was passed against the petitioner (defendant) in the Court of the Second Class Subordinate Judge at Andheri in Small Cause Suit No. 665 of 1927.

At the date of the decree the petitioner was outside British India. He returned to Bombay on or about December 22, 1929, and thereafter learnt about the decree. On January 11, 1930, he made an application under Order IX, rule 13, of the Civil Procedure Code, 1908, to set aside the *ex parte* decree and on January 21 he furnished the security required of him under the proviso to section 17 (*1*) of the Provincial Small Causes Courts Act, 1887.

The application was dismissed by the Subordinate Judge on the ground that the security was not furnished till a week after the application.

The petitioner applied in revision to the High Court

U. L. Shah, for the applicant.

A. A. Adarkar, for the opponents.

PATKAR, AG. C. J. :—The question for decision in this application is whether an applicant who applies to set aside a decree passed *ex-parte* must, at the time of presenting his application, either deposit the amount due under the decree or give security to the satisfaction of the Court for the performance of the decree, or whether if an application is made within time and

(1) (1904) 32 Cal. 339.
(2) (1920) 43 Mad. 579.
(3) [1930] A. I. R. (All.) 830.
(4) (1907) 9 Bom. L. R. 883.

followed by a deposit within time, there would not be a sufficient compliance with the terms of the proviso to section 17 of the Provincial Small Causes Courts Act.

It appears that in this case a decree was passed by the Small Cause Court and the defendant, who was out of British India, knew of the result of the suit on December 22, 1929. On January 11, 1930, he made an application to set aside the *ex parte* decree under Order IX, rule 13, and offered to furnish security. On January 21, 1930, he furnished the security within 30 days provided by Article 164 of the Indian Limitation Act. The application was heard on March 8, 1930, and the learned Subordinate Judge held that the security not having been furnished at the time when the application was made in accordance with the proviso to section 17 of the Provincial Small Causes Courts Act, the application failed, and rejected the application.

It is urged on behalf of the applicant that even though the proviso to section 17 is mandatory, it should be considered that the proviso has been sufficiently complied with, if the application is made and the deposit or security is furnished within time. Apart from decided cases, it appears that the provisions of section 17 are mandatory, and the proviso says that an applicant shall, at the time of presenting his application, either deposit in Court the amount due from him under the decree or in pursuance of the judgment, or give security to the satisfaction of the Court for the performance of the decree or compliance with the judgment, as the Court may direct. The concluding words of the proviso "as the Court may direct" may govern both the making of the deposit and the giving of the security. If it is necessary for an applicant to get the directions of the Court as to whether the deposit of the amount is to be made or the giving of

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the security would be sufficient, it would be impossible to comply with the proviso by doing either of these things at the time of presenting the application. When the application is filed, he has to apply to the Court for directions as to whether a deposit is to be made or security is to be given, and some time must necessarily elapse between the presenting of the application and directions of the Court. Assuming that the proviso gives discretion to the applicant either to deposit the amount or to give security, still the concluding words of the proviso " as the Court may direct " might govern the latter part of the proviso and the applicant will have to get directions as to the form of the security which the Court might direct, because if the deposit is made no Court will take any objection to the deposit of the amount due from the applicant under the decree or in pursuance of the judgment. It appears, therefore, that if the proviso is strictly construed, it will be impossible to give effect to it, for directions of the Court will be necessary before he does either of the two things required by the proviso.

If the application is made within time and the security is also furnished within time, it would be manifestly unjust to the applicant if he is punished for being diligent in making an application soon after he comes to know of the *ex parte* decree and subsequently furnishes the security within the prescribed time. Further, if the previous application is withdrawn by him, and he makes an application together with the deposit subsequently within time, there would be a sufficient compliance with the terms of the proviso even if it is strictly construed.

In *Somabhai* v. *Wadilal*[1] it was held that in the proviso to section 17 of the Provincial Small Causes

[1] (1907) 9 Bom. L. R. 883.

Courts Act, 1887, the words " at the time of presenting his application " govern and refer to both " the deposit of the amount in Court ", and " the giving of security, etc."; and therefore " deposit " or " security " is a condition precedent to the granting of the review. It appears from the facts of that case mentioned in the argument on behalf of the applicant that the deposit was made beyond time, and it was held that the deposit or security was a condition precedent to the granting of the review. The case is no authority for the contention on behalf of the opponent that if the application is made it should be rejected if it is not accompanied either by a deposit or security even though the deposit or security is subsequently furnished within time. In *Jeun Muchi* v. *Budhiram Muchi*[1] it was held that if an application under section 17 of the Provincial Small Causes Courts Act 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 the decretal amount or security, the applicant has a right to have his application heard on the merits. It is observed in that case (p. 342) :—

" To hold otherwise would lead to the conclusion that the petitioner ought to be punished for his diligence in presenting the application earlier than he need have done under the law."

The same view was taken by the Madras High Court in a Full Bench decision in the case of *Assan Mohamed Sahib* v. *Rahim Sahib*,[2] where it was held that the provisions of section 17 (1), Provincial Small Causes Courts Act, are mandatory, but the deposit of the decretal amount may be made or the security given, within the period prescribed by the law of limitation for applications under the section, namely, thirty days from the date of the *ex parte* decree, although it did not accompany the application itself. To the same effect is

[1] (1904) 32 Cal. 339.

[2] (1920) 43 Mad. 579.

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the decision of the Allahabad High Court in *Moti Lal Ramchandar* v. *Durga Prasad*[1] where the case cited on behalf of the opponent, *Badlu Singh* v. *Panthu Singh*,[2] has been distingnished and dissented from.

We think, therefore, on the whole that if the application is made within time and the security is subsequently furnished within time, the provisions of section 17 will be sufficiently complied with.

We would, therefore, make the rule absolute and set aside the order of the lower Court and direct the lower Court to decide the application on the merits. The costs of this application will be costs in the application to the lower Court.

BARLEE, J. :—I agree. The applicant made an application under section 17 of the Provincial Small Causes Courts Act to set aside an *ex parte* decree made against him. His application contained an offer to furnish security, but he did not actually furnish security or deposit the amount due under the decree, as required by the proviso to the section, until 8 days after his application and the learned Subordinate Judge has, therefore, dismissed his application.

I agree with the learned Chief Justice that the proviso is *prima facie* mandatory; but, as he has pointed out, it is not clear how an applicant can comply literally with its provisions. He has to present an application and give security or deposit the decretal amount as the Court may direct, and it follows, therefore, that after his application he is entitled to seek the directions of the Court before he actually deposits the amount due under the decree or gives security. There must, therefore, be some interval between the application and the actual deposit. This difficulty has been realised by other

(1) [1930] A. I. R. (All.) 880. (2) [1928] A. I. R. (All.) 270.

Courts, and it has been held by the Madras High Court in *Assan Mohamed Sahib* v. *Rahim Sahib*,[1] by the Allahabad High Court in *Moti Lal Ramchandar* v. *Durga Prasad*,[2] and by the Calcutta High Court in *Jeun Muchi* v. *Budhiram Muchi*,[3] that, so long as the deposit of the decretal amount or the giving of security is done within the time limit, the application is good. This is of course a fiction to avoid injustice. The Courts assumed that the applicants had done what would have been beneficial for them to do, that is that they had asked for leave to withdraw their applications and to file fresh applications within the time of limitation. This is the principle which was embodied in the old section 101 of the Transfer of Property Act, and is reasonable and equitable: so I agree that we are entitled to follow the authority of the other High Courts and hold that the application under consideration was good.

I, therefore, agree with the order proposed by his Lordship the Chief Justice.

Rule made absolute.

J. G. R.

[1] (1920) 43 Mad. 579. [2] [1930] A. I. R. (All.) 830.
[3] (1904) 32 Cal. 339.

APPELLATE CIVIL.

Before Mr. Justice Patkar and Mr. Justice Murphy.

BAI MANGU WIDOW OF BALABHAI KEVALDAS AND OTHERS (ORIGINAL PLAINTIFFS-APPELLANTS), APPLICANTS *v.* THE BHARATKHAND COTTON MILLS CO., LTD. (ORIGINAL DEFENDANTS-RESPONDENTS), OPPONENTS.*

1931 *July* 13.

Civil Procedure Code (Act V of 1908), section 109, clause (a)—Leave to appeal to Privy Council—Final decree passed by the High Court in pursuance of directions of Privy Council not a decree passed on appeal—Letters Patent clause 39—Two categories of cases—Remedy of the aggrieved party.

When the High Court passes a final decree in pursuance of the directions of the Privy Council no leave to appeal to the Privy Council against such decree can be granted either under section 109 (*a*) of the Civil Procedure Code or under clause 39 of the Letters Patent it not being a decree passed on appeal.

*Civil Application No. 1038 of 1930.