1903
MARCH 14.

CIVIL RULE.

32 C. 336=9 C. W. N. 610 =1 C. L. J. 134.

vakeel was in error in stating to us that the 13th January, 1894 was the date of final publication. That date in fact still remains undetermined, and upon that ground alone we think that this Rule ought to be made absolute, as it was undoubtedly upon the footing of the date furnished to us by the appellant's vakeel that we decided the case in his client's favour. But we desire to add that, on reference to the proceedings set forth in exhibit I in the case and printed at page 12 of the Paper Book, it appears that there was no contest whatever before the Settlement Offier in regard to the matters involved in the suit of 1890. The case therefore does not fall under section 107 of the Bengal Tenancy Act, and the effect of the decision of the Settlement Officer or rather the entry in the record of rights on which reliance was placed was not that of a decree under that section. In point of fact there was no decision of the Settlement Officer upon any contested point. That being so, the only effect that could be attached to the entries in the record would be that under section 109 of the Act there would be a presumption in favour of their accuracy until the contrary was proved. It was sufficient we think for the purposes of rebutting this presumption that the decree of 1890, which was passed in a contested suit between the parties, was put in evidence. The effect of section 109, which lays down a rule of evidence, is not in our opinion to override the rules of *res judicata*, which are of general application, and until the decree of December, 1890 was superseded by something of higher effect, it remained binding between the parties. For these reasons we think that this Rule must be made absolute, our decision of the 23rd April set aside and the appeal dismissed with costs. We also think that the opposite party should bear the costs of this Rule.

Rule absolute : appeal dismissed.

---

32 C. 339 (=1 C. L. J. 43.)

[339] CIVIL RULE.

Before Mr. Justice Brett and Mr. Justice Mookerjee.

JEUN MUCHI *v.* BUDHIRAM MUCHI.*

[17th August, 1904.]

New trial, application for—Security, deposit of—Limitation—Provincial Small Cause Courts Act (IX of 1887), s. 17—Practice.

If an application under section 17 of Provincial Small Cause Courts Act (IX of 1887) 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.

***Jogi Ahir* v. *Bishen Dayal Singh* (1) distinguished.**

[Ref. 14 C. L. J. 105=15 C. W. N. 993=10 I. C. 6 ; 15 I. C. 159: Fol. 43 Mad. 579.]

RULE granted to the petitioners, Jeun Muchi and others.

On the 2nd April, 1903, the Munsif of Netrokona in the exercise of his powers as a Judge of the Court of Small Causes, passed an *ex parte* decree against the petitioners, and in execution thereof the opposite party attached their moveable property on the 8th December, 1903. On the

* Civil Rule No. 2057 of 1904.

(1) (1890) I. L. R. 18 Cal. 88.

1904
AUG. 17.

CIVIL RULE.

32 C. 339=1
C. L. J. 43.

17th December, 1903, that is, within the time prescribed by Art. 164 of the Second Schedule of the Limitation Act, the petitioners applied to the Small Cause Court to set aside the *ex parte* decree; but no security was deposited along with the application. On the 19th December, 1903, the security was furnished.

The learned Munsif dismissed the application as the security had not been filed along with the application, although he was of opinion that, on the merits, the application ought to have been granted. Against this decision the petitioners moved the High Court, under section 25 of the Provincial Small Cause Courts Act, and obtained this Rule.

[340] Babu *Gobinda Chandra Dey Roy*, for the petitioners. Although the petitioner did not make the deposit with the application under section 17 of the Provincial Small Cause Courts Act, yet he was entitled to the benefit of it, inasmuch as the deposit was made within the statutory period of limitation as provided by Art. 164 of the Second Schedule of the Limitation Act. The application of the 17th December might well be regarded as if it were filed on the 19th December with all the formalities prescribed by section 17 of the Act. In this view the case of *Jogi Ahir* v. *Bishen Dayal Singh* (1) is distinguishable.

Babu *Chandra Kant Ghose* (*contra*). The case of *Jogi Ahir* v. *Bishen Dayal Singh* (1) is in my favour. The decretal amount on the security is a condition precedent for making the application under section 17 of the Provincial Small Cause Courts Act. In this case the deposit was made two days after the filing of the application; so the lower Court was right in rejecting it.

Cur. adv. vult.

BRETT AND MUKERJEE, JJ. This is a Rule calling upon the plaintiff in a Small Cause Court case, to show cause why the order of the Munsif exercising the powers of a Small Cause Court Judge, refusing an application to set aside an *ex-parte* decree, should not be cancelled and the case reheard in the presence of the petitioner. It appears that the plaintiff obtained an *ex-parte* decree against the defendant on the 2nd April, 1903, and in execution thereof attached some moveables on the 8th December 1903. On the 17th December 1903, that is, within the time prescribed by Art. 164 of the second Schedule to the Limitation Act, the defendant applied to the Small Cause Court under section 17, sub-section 1, of Act IX of 1887, to set aside the *ex-parte* decree, but the security mentioned in the proviso to that section was not deposited along with the application. Two days later, on the 19th December 1903, the security was furnished. On the 20th February 1904, the application came on for hearing and although the learned **[341]** Munsif was of opinion, that upon the merits the application ought to be granted and the case revived, he dismissed the application on the ground that as the security bond was filed two days after the application, it was bad in its inception and the defect was not cured by the subsequent deposit of the security. Against this order of rejection, the petitioner moved this Court, and obtained this Rule.

The learned vakil who appears to show cause has sought to support the order of the Court below upon the authority of the decision of this Court in the case of *Jogi Ahir* v. *Bishen Dayal Singh* (1), in which it was held it is a condition precedent to the granting of a new trial under section 17 of Act IX of 1887 that an applicant should, at the time of presenting his application for new trial, deposit in Court the decretal amount or tender

(1) (1890) I. L. R. 18 Cal. 88.

1904
AUG. 17.

CIVIL RULE.

32 C. 339=1 C. L. J. 43.

security for payment of the same. We are of opinion that the case relied upon is clearly distinguishable from the one now before us. In that case, the application for new trial was filed on the 31st October 1889, to set aside an *ex parte* decree obtained on the 16th September 1889; no security was given in accordance with the provisions of section 17, but when objection was taken at the hearing on the 30th December 1889, the applicant offered to deposit the decretal amount in Court. This offer was obviously made long after the time prescribed for making an application under section 17 had expired, and if the prayer of the petitioner had been granted, he would in substance have obtained an extension of time for making the application. In the case before us the application to set aside the *ex-parte* decree might have been presented at any time within 30 days from the 8th December 1903, that is within 7th January 1904. Although, therefore, the application presented on the 17th December 1903, did not comply with all the formalities required by section 17, and defective inasmuch as the security was not furnished, yet as it was pending on the 19th December 1903, when the security was actually deposited, it might well be treated as having been perfected on that date; in other words, the position of the applicant ought not to be **[342]** worse than what it would have been, if he had presented the application along with the security on the 19th December 1903. 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. Indeed, the learned vakil who appeared to show cause conceded that there would have been no shadow of a ground for complaint, if when the security was deposited on the 19th December 1903, it had been accompanied by another application similar to the one presented two days before. We hold accordingly that when an application has been presented under section 17 of Act IX of 1887, without deposit of decretal amount or security therefor, if before such application is rejected and within the time limited for making the application such deposit is duly made, the application may rightly be regarded as satisfying substantially the requirements of the law and ought to be acted upon by the Court. The view we take is in accordance with that taken by this Court in the case of *Promatha Nath Das* v. *Nibaran Chandra Ghose* (1), decided by Petheram C. J. and Beverley, J. on the 7th June 1895, in which Petheram, C. J. pointed out that if an application under section 17 is filed without security and is subsequently completed, within the time prescribed by the law of limitation for making the original application, by the deposit of the decretal amount or security, the applicant has a right to have his application heard on the merits.

The result, therefore, is that this Rule will be made absolute and the order of the Court below set aside. The application of the petitioner under section 17 is granted, the *ex parte* decree is set aside and the original suit must be re-heard.

The petitioner is entitled to his costs in this Court as well as in the Court below.

Rule absolute.

---

(1) (1895) Civil Rule No. 766 of 1895 (Unreported).