

Bhagwan Dass Arora

Vs

First Additional District Judge, Rampur and Others

Civil Appeal No. 2982 of 1983

(D. A. Desai, R. B. Misra JJ)

25.07.1983

JUDGMENT

DESAI, J. –

1. Their respondent Smt. Savitiri Devi filed a small cause case No. 43 of 1976 in the court of Civil Judge, Rampur designated as Court of Small Causes for recovering arrears of rent, electricity charges etc. in respect of House No. 368 situated in Adarsh Colony, Civil Line, Rampur against the present appellant. On service of the summons, the appellant appeared and contested the suit by filing his written statement. The suit came to be adjourned for hearing to August 6, 1977. On that day, the appellant and his advocate were absent and the suit was decreed ex parte. On August 8, 1977, appellant appeared and moved an application under the proviso to Section 17(1) of the Provincial Small Cause Courts Act, 1887 ('Act' for short) requesting the court to permit him to give such security for the performance of the decree in lieu of the liability to deposit in cash the amount due from him under the decree. On the same day, the court granted him the permission subject to the condition that the appellant shall deposit Rs. 2700 in cash and for the balance of the decretal amount, he was directed to give an adequate security. Subsequently on August 31, 1977, the applicant moved an application under Order 9, Rule 13 of the Code of Civil Procedure requesting the court to set aside the ex parte decree sub-mitting that on August 6, 1977 when the suit was called on for hearing, he was prevented by a sufficient cause from remaining present in person because he had suddenly taken ill and neither he could remain present nor could he inform his advocate about his illness. Simultaneously, he deposited Rs. 2700 in cash as directed by the court. On September 21, 1977, Munsari of the court reported that the security bond furnished by the appellant was not duly stamped nor was it drawn on an appropriate stamp paper. The court directed the appellant to furnish the requisite stamps within a week. In compliance with this order, the appellant supplied requisite stamps for the bond on October 5, 1977. The decree-holder contested the application for setting aside the ex parte decree inter alia contending that there was non-compliance with the mandatory provision contained in the proviso to Section 17(1) of the Act and therefore the application purporting to have been made under Order 9, Rule 13 for setting aside the ex parte decree was incomplete and was liable to be dismissed on this short ground. The trial court held that the failure of the appellant to file surety bond duly stamped for the balance of the decretal amount as directed by the court in its order dated August 8, 1977 on or before August 31, 1977, when the substantive application under Order 9, Rule 13 was filed and the surety bond submitted by the appellant on a court-fee stamp of Rs. 2 being not a legal document, there was non-compliance with the proviso to Section 17(1), and therefore the application under Order 9, Rule 13 was liable to be dismissed. The application of the appellant was accordingly dismissed. After an unsuccessful revision petition to the District Court under Section 25 of the Act, the appellant moved a petition under Article 227 of the Constitution in the High Court of Judicature at Allahabad.

2. A learned Single Judge of the High Court after noticing the conflict of opinion between the Madras High Court and Calcutta High Court preferred the view expressed by the Calcutta High Court that a surety bond as contemplated by the proviso to Section 17(1) of the Act would be governed by the Indian Stamp Act. Accordingly the learned Judge that as the appellant had failed to submit a valid surety bond duly stamped, within the period of limitation, the application under Order 9, Rule 13 was incomplete and ineffective and has been rightly dismissed by the Small Cause Court. Hence this appeal by special leave.

3. Section 17 of the Act may be extracted :

17. (1) The procedure prescribed in the Code of Civil Procedure, 1908, shall, save insofar as is otherwise provided by that Code or by this Act, be the procedure followed in a Court of Small Cause in all suits cognizable by it and in all proceedings arising out of such suits :

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.

(2) Where a person has become liable as surety under the proviso to sub-section (1), the security may be realized in manner provided by Section 145 of the Code of Civil Procedure, 1908.

4. The narrow question in this appeal is whether the surety bond which a judgment-debtor has to furnish for complying with the order made under the proviso to Section 17(1) would be governed by Article 6 of Schedule 2 to the Court-fees Act or Article 57 of the Indian Stamp Act. The learned Judge referred to the conflicting views expressed by the Madras High Court on the one hand and the Calcutta and Bombay High Courts on the other and preferred the view taken by the Calcutta High Court in this behalf. This conflict of opinion may be noticed first. A Full Bench of Madras High Court in *Kalapati Peda Pitchamma v. Chiruvella Pedamuneyya* [AIR 1935 Mad 380 : ILR (1935) 58 Mad 687 : 68 Mad LJ 466 : 41 Mad LW 482] held that an order made by the court under the proviso to Section 17(1) is nonetheless an order passed under the Code of Civil Procedure as the provisions of the Provincial Small Cause Courts Act are only supplementary to the Code of Civil Procedure and accordingly it was held that the security bond executed by a surety to comply with an order made by the court under the proviso would be governed by Article 6, Schedule 2 to the Court-fee Act and not by the provisions of the Indian Stamp Act. The learned Judge then referred to *Kasemali v. Ajoyendu Paul* [AIR 1956 Cal 375 : 60 Cal WN 224] which in its turn had followed *Baburao Keshavrao Malkapure v. Kalavatibai Amrutrao Khase* [AIR 1940 Bom 275 : 42 Bom LR 668 : 190 IC 224] wherein it was held that the provisions of the Provincial Small Cause Courts Act cannot be said to be supplemental to the Code of Civil Procedure and that the special provision enacted in the proviso to Section 17(1) of the Act would have to be complied with on its own force and cannot be treated as part of Order 9, Rule 13 of the Code of Civil Procedure. It was noticed that even though the application for setting aside an ex parte decree has to be made under Order 9, Rule 13 that provision does not obligate the judgment-debtor to give any security as condition precedent which the proviso to Section 17(1) mandates.

5. After having noticed this conflict, the learned Judge concluded that he preferred the Calcutta view

and consequently held that the surety bond to be furnished for complying with the order made under the proviso to Section 17(1) of the Act must be duly stamped as required by the Indian Stamp Act. Article 57 of the Indian Stamp Act was called in aid of this conclusion. Frankly speaking, we have our own reservations whether Article 57 would at all be attracted but we are not disposed to resolve this controversy in this case and leave it for a more detailed argument because in this case, as directed by the court, the appellant had furnished the requisite stamps to be affixed on the surety bond which was submitted within the period of limitation.

6. To recall a few facts, an application praying for an order under the proviso to Section 17(1) was made within two days from the date on which the suit was decreed ex parte. The suit was decreed ex parte on August 6, 1977 and the application under the proviso to Section 17(1) was made on August 8, 1977. On that very day, the court made an order for security bond to be furnished for a certain amount and a bond was furnished with the legal infirmity as found by the learned Judge of the High Court that instead of it being stamped as required by the Indian Stamp Act, it was stamped with a court fee stamp of Rs. 2.

7. Look at the agony and misery of the appellant. Two premier High Courts, Madras and Calcutta, differ on the requirement of a valid security bond to comply with the proviso to Section 17(1). And the degree of difference is not narrow but irreconcilable. If the view taken by the Madras High Court had prevailed with the learned Judge, the matter would have been decided in favour of the appellant because he had already furnished a bond stamped with court-fee stamp of Rs. 2 and it was never suggested that it was inadequate. But as the learned Judge preferred the view taken by the Calcutta High Court, the surety bond was found to be not duly stamped. However, when the matter was before the trial court, on the contention being raised by the decree-holder, the appellant, as directed by the court, did supply the requisite stamps as required by the provisions of the Indian Stamp Act. There was no fresh bond but old bond was duly stamped. In this situation, why should the appellant be penalized by shutting the doors of justice even though as advised by his lawyer, he acted in the best possible manner to comply with the court's order. Uncertainty of the law, as far as the State of U.P. is concerned, came to be resolved by the decision of the learned Single Judge of the High Court. Till then, the trial court was faced with two conflicting views of two different High Courts. What ought to be the position of an indigent litigant, advised by his lawyer, in this situation left us guessing if not wholly bewildered. We are of the opinion that in this situation, the litigant cannot be visited with the consequence of being thrown out of court and shutting the doors of justice in his face. What horrible agonising situation, the appellant faced cannot be gauged. He had produced the surety bond on the first day i.e. August 8, 1977 duly stamped as then advised. And had the learned Single Judge preferred the Madras view which required that it should be stamped with court-fee stamp, the appellant was fully protected. To his utter misfortune, the Calcutta view found favour with the learned Single Judge and the appellant suffered the irremediable consequence of this later day preference. We are of the opinion that preferences of judges should not be allowed to work hardship on litigant in respect of a procedural provision. In this state of law and in view of the further fact that after the limitation period of 30 days expired, Munsarim of the court drew the attention of the court to the fact that the surety bond was not duly stamped, the appellant, a litigant, cannot be penalized on the pain of being thrown out of court on this technical ground. Justice cannot be a playground by kicking the ball from one court to other depending upon which of the conflicting views will ultimately prevail leaving a litigant on the tenter-hooks and ultimately to be told that he acted according to the view taken by a Full Bench of a High Court which did not find favour with the learned Single Judge of the High Court of the State in which he resided. This is not justice. This is legalese which ought to be avoided.

8. We accordingly allow this appeal, set aside the order of the trial court as well as the order in revision petition by the learned Additional District Judge as also the decision of the High Court and grant the application made by the appellant for setting aside the ex parte decree and set aside the ex parte decree. The trial of the suit shall proceed from the stage where the suit was decreed ex parte. In the circumstances of the case, there will be no order as to costs.

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