

# ALLAHABAD HIGH COURT

Mahavir Singh

Vs.

Gauri Shankar

Civil Revn. No. 1271 of 1961, against order of Civil J. Bareilly  
(K.B. Asthana, J.)

30.09.1961. 27.03.1963

## ORDER

### **K.B. Asthana, J**

1. I have heard the learned counsel for the parties. The important question which arises for consideration in this revision relates to the meaning of the word 'entertain' occurring in the proviso added by this Court to Order 21, R. 90, C.P.C. The execution Court rejected the application of the judgment-debtor for setting aside of the sale on the ground that he had failed to comply with the conditions of the proviso, namely, had failed to deposit the security within the period of limitation though the application for setting aside the sale was filed within time. The Courts below relied on the decision of a single Judge of this Court in the case of *Bawan Ram v. Kunj Behari Lal*,<sup>1</sup> The learned counsel for the applicants has before me cited a decision of a Division Bench consisting of Mukherjee and Uniyal, JJ., in the case of *Kundanlal v. Jagaimath Sharma*,<sup>2</sup> in which it was held that the case of 1960 All LJ 578 : AIR 1962 Allahabad 42 (supra) had not been correctly decided. The learned counsel for the opposite parties relied on certain observations in the case of *Dullo v. Devi Charan*,<sup>3</sup> also decided by a Division Bench consisting of Srivastava and Katju, JJ. In that case the learned Judges rejected the argument that the word 'entertain' had been used in the proviso to mean 'admit', but observed that the application (for setting aside the sale) may be filed but the applicant will have, in any case, to comply with the proviso before the period for the filing of the application allowed by law expires, otherwise he took the risk of his application being thrown out as not entertain able. What is, therefore, required is that not only should the application for setting aside the sale be filed within time but the compliance with Clause (b) of the rule should also be made within time.

The decision, however, in the case of 1962 All LJ 759 turned on the circumstance that the objector had applied to the Court for filing of the security before the expiry of limitation for riling an application for setting aside the sale and that application remained pending and could only be decided after the period of limitation had expired and it was held that no one should suffer because of the fault of the Court and as the objector had within time, sought the direction of the Court about the way in which the security was to be furnished but the necessary directions were not given if she filed a security bond within time but was not allowed to have the bond registered and no orders were passed within time on her application to have the bond corrected and the formal defects in it removed, the appellant could not be made to suffer for those omissions and it was further observed by the learned Judges that in those circumstances the learned Civil Judge in exercise of his inherent powers should have permitted the bond to be corrected and 'registered and then proceeded to consider the application under Rule 90 on merits. I agree with the contention of the learned counsel for the applicants that the observation of the learned Judges that the applicant will have, in any case, to comply with the proviso before the period of the filing of the application allowed by law expired was not necessary for the decision of the case and was obiter. I do not, therefore, agree with the contention of the learned counsel for the opposite party that there is an apparent conflict between the case of 1962 All LJ 574 : AIR 1962 Allahabad 547 and *Dullo v. Devi Charan*, 1962 All LJ 759 (*supra*). My attention has further been drawn to another decision of this Court also by a Division Bench consisting of the Chief Justice and Mr. Justice S.D. Singh in the case of *Rahim. Bux v. Haji Sanaulla and Sons*,<sup>4</sup> The view taken in this later case is the same as the view taken in the case of 1962 All LJ 574 : AIR 1962 Allahabad 547. It is clear, therefore, that the decision of the learned Single Judge in the case of 1960 All LJ 578 : AIR 1962 Allahabad 42 relied upon by the Court below stands overruled. It is not, therefore, the requirement of the law that the amount for the security must be deposited at the time of the presentation of the application for setting aside of the sale under Order 21, R. 90, C.P.C. The proviso added by this Court only means that the application for setting aside of the sale would not be taken into consideration and adjudicated upon till compliance had been made with the proviso. It is not the law that if the compliance has not been made with the proviso before the limitation for filing of the application for setting aside of the sale has expired that application for setting aside of the sale would be treated as being beyond limitation.

2. I, therefore, allow this revision, set aside the order of the Court below and send the case back to the executing Court for allowing an opportunity to the applicant for

complying with the proviso and then consider the application under Order 21, R. 90 on merits. In the circumstances of the case there would be no order as to the costs.

Revision allowed. .

Cases Referred.

1. 1960 All LJ 574: AIR 1962 All 42
2. 1962 All LJ 574: AIR 1962 All 547
3. 1962 All LJ 759
4. 1963 All LJ 204: AIR 1963 All 320