

ANDHRA PRADESH HIGH COURT

Thota Pichaiah

Vs.

M. Narasimhacharyulu

Civil Misc. Petn. No. 6042 of 1955

(Subba Rao, C.J., Bhimasankaram and Satyanarayana Raju, JJ.)

07.11.1955. 06.12.1955

JUDGMENT

Subba Rao, C.J.

1. This is an application for permitting the petitioners to furnish immovable property security for the costs of the respondents in the place of cash security and to extend the time for complying with Order 45, Rule 7, C.P.C.

2. The petitioners, who lost the appeal in the Madras High Court, applied for leave to appeal to the Supreme Court. This Court granted leave by order dated 17-3-1955. The Petitioners did not furnish security in cash as provided for by Order 45, Rule 7, C.P.C. Having made default, they have filed the present application for permitting them to give security in immovable property in the place of security in cash.

3. Learned Counsel for the respondents contends that this Court has no power to permit the petitioners to do as under the proviso to Rule 7 of Order 45, the petitioners should have asked for that relief at the time when the certificate was granted. This said proviso reads :

"Provided that the Court at the time of granting the certificate may, after hearing any opposite party who appears, order on the ground of special hardship that some other form of security may be furnished."

4. Learned Counsel for the petitioners, on the other hand argues that the rule is subject to Order 12 Rule 3 of the Supreme Court Rules, which says :

"Where an appellant, having obtained a certificate from the High Court, fails to furnish the security or make the deposit required, that Court may, on its own motion or on application in that behalf made by the respondent, cancel the certificate and may give such directions as to the costs of the appeal and "the security entered into by the appellant as it shall think fit or make such further or other order as the justice of the case requires".

This rule corresponds to rule 9 of the Privy Council Rules.

5. A Division Bench of the Madras High Court, consisting of Sir Lionel Leach, C.J. and Krishnaswami Aiyangar, J. in - '*Shreeramamurty v. Ramarao*¹ held that, by reason of the proviso to Order 45 Rule 7, C.P.C., the Court has no power, after a certificate is issued, to permit the petitioner to give immovable property security. The learned Judge followed an earlier decision of the same High Court in - '*Arunachala Naidu v. Balakrishna and Company*², The two Judgments did not consider the impact of Rule 9 of the Privy Council rules on the proviso to Rule 7 of Order 45. A Division Bench of the Bombay High Court, on the other hand, in - '*Revanshidaya v. Gundna*³', relying upon Rule 9 of the Privy Council Rules, came to the conclusion that the High Court has the power in a suitable case to allow the petitioner to furnish security of immovable property even after the certificate is issued. As the question raised relates to procedure and as the Madras Judgments do not consider the scope of the Privy Council rule corresponding to the aforesaid Supreme Court Rule, we think this question should be authoritatively decided by a Full Bench. We, therefore, refer the following question to the Full Bench.

"Whether the High Court has power to permit an applicant, who obtained leave to appeal to the Supreme Court to furnish security in immovable property when he did not ask for the relief at the time the certificate was issued".

ORDER OF THE FULL BENCH

Satyanarayana Raju, J.

6. The question which has been referred to the Full Bench is whether the High Court has power to permit an applicant, who obtained leave to appeal to the Supreme Court, to furnish security in immovable property when he did not ask for that relief at the time the certificate was issued.

7. It is not disputed that if Order 45, Rule 7, C.P.C., stood alone, the High Court has no power to alter the form of security to be furnished. But, it is contended that Order 12, Rule 3 of the Supreme Court Rules, enables it to do so. Reference is made in this connection to Section 112, Civil Procedure Code, which enacts that nothing contained in the Code shall be deemed to interfere with any rules made by the Supreme Court.

There is a large body of case law on the subject though most of the cases cited before us deal not with Rule 3 of Order 12 of the Supreme Court Rules (which now govern) but with the since superseded Rule 9 of the Privy Council Rules which ran in substantially the same terms.

8. Though the argument for the petitioner rests on the terms of Order 12 Rule 3, of the Supreme Court Rules, that rule must be read along with; Order 45, Rule 7, Civil Procedure Code, because the former is obviously supplementary to the latter. Order 125 Rule 8, of the Supreme Court Rules runs thus :

"Where an appellant, having obtained a certificate from the High Court, fails

¹1939-2 Mad LJ 521

³ AIR 1931 Bom 278

² AIR 1925 Mad 449

to furnish the security or make the deposit required, that Court, may, on its own motion or on application in that behalf made by the respondent cancel the certificate and may give such directions as to the costs of the appeal and the security entered into by the appellant as it shall think fit or make such further or other order as the justice of the case-requires".

Order 45, Rule 7, Civil Procedure Code runs thus :

"(1), Where the certificate is granted, the applicant shall, within ninety days or such further period, not! exceeding sixty days as the Court may upon cause shown allow, from the date of the-decree complained of, or within six weeks from the date of the grant of the certificate, whichever is there later date :

(a) Furnish security in cash or in Government securities for the costs of the respondent, and

(b) deposit the amount required to defray the expenses of translating, transcribing, indexing, printing and transmitting to the Supreme' Court a correct copy of the whole record of there suit, except :

(1) formal documents directed to be excluded by any rule of the Supreme Court in force for the' time being;

(2) Papers which the parties agree to exclude :

(3) Accounts, or portions of accounts, which the officer empowered by the Court for that purpose considers unnecessary and which the parties have not specifically asked to be included; and

(4) such other documents as the High Court may direct to be excluded :

Provided that the Court at the time of granting the certificate may, after hearing any opposite party who appears, order on the ground of. special hardship that some other form of security may be furnished :

Provided further, that no adjournment shall be granted to an opposite party to contest the nature of such security",

It is to be noted that the Original R. 7 of Order 45 was amended by the Civil Procedure (Amendment) Act (26 of 1920) whereby the words "within ninety days or such further period, not exceeding sixty days as the Court may upon, cause shown allow from the date of the decree complained of, or within six weeks from the date of the grant of the certificate, whichever is the later date" were substituted for the words "within six, months' and the two provisos to sub-rule (1) were-added. On 1-1-1921, at the same time as this Amendment Act became law, the Judicial Committee-Rules previously in force were replaced by new Rules of which Rule 9 is as follows :

"Where an appellant, having obtained a certificate for the admission of an Appeal, fails to furnish the security or make the deposit required" (or apply with due diligence to the Court for and order admitting the appeal), the Court may, on its own motion or on an application in that behalf made by the respondent, cancel the certificate foil the admission of the appeal, and may give such directions as to costs of the appeal and the security

entered into by the appellant as the Court shall think fit, or make such further or other order in the premises as, in the opinion of the Court, the justice of the case requires".

9. An examination of the above provisions shows that while Order 45, Rule 7, prescribes a period for furnishing the security and making the deposit, it imposes no penalty for non-compliance with those requirements. It is only Rule 9 of the Judicial Committee Rules (and the corresponding rule of the Supreme Court Rules) which confers power on the Court to cancel the certificate or make such further or other order thereupon as the justice of the case requires. This is a clear indication that Rule 7 of Order 45 is merely directory. Indeed, the Judicial Committee decided as early as the decision reported in - '*Burjore v. Bhagana*⁴', that it is only such. In that case, their Lordships were dealing with Section 602, Civil Procedure Code 1877, which was in the same terms as the unamended R. 7 of Order 45 of the Code of 1908. They observed that although the period mentioned in the Section should not be normally departed from, the High Court however has power to extend the time for cogent reasons. The Legislature must be deemed to have been aware of this decision when it brought in the Amendment Act 26 of 1920. Therefore, when there is no indication in the Amending Act of 1920 to make the provisions other than directory, it follows that they must be construed in the light of the above Privy Council decision as not being mandatory.

10. After the coming into force of the new provisions two questions came up for determination before the High Courts - whether by virtue of the over-riding effect of Rule 9 of the Judicial Committee Rules over the provisions of Order 45, Rule 7, the Court has power (1) to extend the time allowed for furnishing security and for making the deposit as required by Order 45, Rule 7, beyond the periods mentioned therein; and (ii) to alter the nature of the security to be furnished at a time subsequent to the grant of certificate.

11. Four views are possible on these questions and there is authority in support of each of the four possible positions that could be taken. Firstly, there is the view that despite Rule 9 of the Privy Council Rules the High Court has no power either to extend the time or alter the nature of the security later. This was the earlier view of the Allahabad High Court but it has not however found support either in that Court or in any other High Court since. The Second view is that while the Court has power to extend the time, it has no power to alter the nature of the security after the grant of the certificate. This is the view taken by a Full Bench of the Madras High Court in - '*Ramayya v. Lakshmayya*⁵', While in the former decision, the Full Bench held that the Court had power under Rule 9 of the Privy Council Rules to extend the period allowed for furnishing the security and for making the deposit required by Order 45, Rule 7, beyond the periods mentioned therein, in the latter, a Divisional Bench following an earlier decision of the same Court reported in - 'AIR 1925 Madras 449', held that by reason of the proviso to Rule 7 of Order 45, Civil Procedure Code, the Court has no power, after a certificate is once issued, to permit an applicant to substitute some other form of security. But, unfortunately the attention of the Bench was not drawn either to the earlier Full Bench decision or Rule 9 of the Privy Council Rules. Indeed, the learned Judges say :

⁴10 Cal 557 (PC)

⁵AIR 1938 Mad 796 (FB)(E) and in '1939-2 Mad LJ 521

"The learned Advocate for the petitioner has been unable to point to any Privy Council Rule which has the effect of overriding this proviso, and that being so it must be given effect to".

12. The third view is that though there is no power in the High Court to extend time, it has power to alter the security a view which has found favour with the Calcutta High Court, Vide - '*Purnendu Nath Tagore v. Radha Kanta Jew*⁶', The fourth view is that the High Court has power to be both, i.e. to extend the time beyond the period limited by O. 45 as well as to alter the form of security subsequent to the grant of the certificate. This is the view of the Bombay High Court as expressed in - 'AIR 1931 Bombay 278'.

13. It seems are possible : (i) extend the time and (ii) to alter furnished even at of the certificate do either the one to us that only two logical views that the Court has power (i) to allowed for furnishing security, the nature of the security to be the time subsequent to the grant ; or (2) that it has no power to or the other. The reasoning of the Full Bench in - 'AIR 1938 Madras 796 (FB)', a decision which is binding upon us - leads to the conclusion that the former view should be the more acceptable view. In delivering the opinion of the Full Bench, Leach, C.J. gave the following reasons in support of his opinion :

"Does Rule 9 of the Privy Council Rules give a discretion to the Court to extend the time? If it does, nothing in Order 45, Rule 7, can take away that discretion. In my opinion Rule 9 does leave a discretion in the Court, and therefore must prevail over Order 45, Rule 7. I read Rule 9 in this) way : On failure by the appellant for leave to appeal to the Privy Council to furnish the security or make the deposit the Court has two courses open to it.

It may cancel the certificate and pass consequential orders or it may instead of cancelling the certificate make such 'other' order as it considers) requisite. If it does not cancel the certificate, the only other order it can pass is to extend the time for furnishing security or making the deposit, or doing both as the case may be

We have been asked to hold that the words 'make such further or other order in the premises, as in the opinion of the Court, the justice of the case require ? are to be read with the words 'may give such directions as to the costs of the appeal, and the security entered into by the appellant as the Court shall think fit' but with respect to the Judicial opinion which has supported this construction, I consider its acceptance would mean violating the plain meaning of the rule".

14. We are in respectful agreement with this reasoning. Logically, however, the same reasoning should apply with equal force to the determination of the question as to whether the High Court has power subsequently to alter the nature of the security. If the attention of the learned Judges had been drawn to Rule 9 and the earlier Full Bench decision, when they decided - '1939-2 Mad LJ 521, they would have perhaps taken a different view. The provisions of Order 45, Rule 13 are, as pointed out by the Privy Council in the decision already cited, only directory and not mandatory. It is to

be observed that they do not provide for a penalty for failure to comply with the

⁶ AIR 1950 Cal 318

requirements laid down thereby. It is only Rule 9 of the Privy Council Rules (now Rule 3 of Order 13 of the Supreme Court Rules) which, while providing for the consequences of default, also enables the Court at the same time to pass "such further or other orders as the justice of the case requires".

15. A Divisional Bench of the Bombay High Court, following an earlier Full Bench decision of that Court in - '*Nilakanth Balwant v. Vidya Narasinha Bharati*⁷', held in - 'AIR 1931 Bombay 278', that if the High Court had jurisdiction to extend the time in one case, it had also power to alter the nature of the security subsequent to the grant of the certificate for leave. It is pointed out in this decision that the words "make such further or other order as the justice of the case requires", are comprehensive enough to cover both the cases.

16. The general trend of recent decisions in the different High Courts is that the Court has power under Rule 9 of the Privy Council Rules to extend the time for furnishing security beyond that allowed by Order 45, Rule 7, although the Calcutta High Court has consistently held a contrary view.

17. The latest view of the Allahabad High Court as expressed in a Full Bench decision of five Judges of that High Court in - '*Bishnath Singh v. Court of Wards Estate Sri Ramchandra Naik*⁸', is that –

"The provisions of Rule 9 which are wide and general in their terms do confer upon the High Courts a discretion to extend the time prescribed by Order 45, Rule 7, Civil Procedure Code a discretion however which is only to be used in exceptional circumstances".

18. There is a decision of the Full Bench of the Patna High. Court reported in - '*Lachmeshwar Prasad Shukul v. Girdhari Lal*⁹', in which the majority took the view that Rule 9 empowered the Court in exceptional cases to extend the time. In Lahore, a similar view was taken by a Full Bench of that High Court in - '*Ghulam Rasul v. Ghulam Qutab Ud-Din*¹⁰', The Rangoon High Court also by a Full Bench decision reported in - '*Ismail Piperedi v. Momin Bibi*¹¹', overruling an earlier decision of the same Court in - '*J.N. Surty v. T.S. Chettiyar Firm*¹²', held that the High Court has power for cogent reasons to extend the time for furnishing security beyond that allowed by Order 45, Rule 7. The same is the view of the Nagpur High Court as expressed by a Full Bench in '*Gulam Hussain V. Mansurbeg*¹³',

19. As already stated in - 'AIR 1950 Calcutta 318, a Divisional Bench of the Calcutta High Court consisting of Harries, C.J. and Bachawat, J., held that while they were bound by the earlier decisions of that Court to hold that time could not be extended, they were not so bound in regard to the question as to the power of the High Court to permit substitution of one form of security for another, even after the issue of the certificate. This is an anomalous position which has been justified on the ground of stare decisis.

⁷ AIR 1927 Bom 217 (FB)

⁹ AIR 1939 Pat 667 (FB)

¹¹ AIR 1940 Ran 12 (FB)

⁸ AIR 1939 All 299 (FB)

¹⁰ AIR 1942 Lah 147 (FB)

¹² AIR 1927, Rang 20

¹³ AIR 1952 Nag 302 (FB)

20. A recent decision of the Orissa High Court in - '*Pitamhari Dibya v. Chandrasekhar Praharaj*¹⁴', cited for the respondent, remains to be noticed. There, a Divisional Bench of that High Court was dealing with Rule 3 of the Supreme Court Rules. Following - '1939-2 Mad LJ 521, the learned Judges held that the expression "at the time of granting the certificate" in the proviso should be read as being limited to the time when the Court orders the issue of a certificate. Panigrahi, C.J., who delivered the Judgment of the Bench, stated his view in these

words :

"The language of the Code does not either expressly or by implication, indicate that the Court can exercise this power at any other time subsequent to the grant of the certificate. The further proviso to the rule which says that no adjournment shall be granted to the opposite parties to contest the nature of such security would indicate that all these matters should be decided at the time of granting the certificate.

Having regard to the addition of the proviso in the amended Rule 7, it appears to me that the object of the Legislature was to cut down the period unnecessarily occupied in presenting] the appeal to the Supreme Court and to leave no discretion with the Court to extend the time beyond what is expressly stated in the proviso".

21. The learned Judges, however, conceded that by virtue of the express provision in R. 3, the Court has power to extend the time. While it may be agreed that the object of the Legislature was to have a speedy disposal of the appeals before the Supreme Court, the object can as much be defeated by granting extension of time, as by permitting the alteration of the nature of security. However the object is not necessarily defeated in either case if it is remembered that the discretion which is vested in the High Court under Rule 5 of the Supreme Court Rules must be very sparingly exercised and only for cogent reasons. In any case, the question being one of jurisdiction of the Court, the matter cannot be decided merely with, reference to the object of the Legislature, especially when it has not thought fit to provide a penalty for non-compliance with the requirements laid down by Rule 7 of Order 45, Civil Procedure Code

22. For the reasons stated above, the answer] to the question referred to the Full Bench must be in the affirmative.

Subba Rao, C.J.

23. I have had the advantage of reading the judgment prepared by my learned brother Satyanarayana Raju, J. I agree with him.

Bhimasankaram, J.

24. I too agree.

Reference answered.

¹⁴ AIR 1954 Ori 71