Supreme Court of India
Arti Dixit vs Sushil Kumar Mishra on 18 May, 2023
Author: K.M. Joseph
Bench: K.M. Joseph, Hrishikesh Roy

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO._____ OF 2023
(Arising Out of SLP (C)NO. 13564/2021)

ARTI DIXIT & ANR …APPELLANT (S)

VERSUS

SUSHIL KUMAR MISHRA & ORS …RESPONDENT (S)

JUDGMENT

K.M. JOSEPH, J.

1. Leave granted.

2. The Respondents No.1 to 4 obtained an ex-parte decree against the appellants. The decree was one for ejectment and recovery of arrears of rent, taxes, damages etc. This decree was passed on 18.10.2012. The appellants filed an application under Order IX Rule 13 read with Section 151 of the Code of Civil Procedure (hereinafter Signature Not Verified referred to as 'CPC') on 06.05.2014 Digitally signed by Jagdish Kumar Date: 2023.05.18 claiming 18:45:22 IST Reason: knowledge of the Decree on execution proceeding on 05.04.2014. It was numbered as 4C. On the very same day, an application was filed under Section 17 of the Provincial Small Cause Courts Act 1887 (hereinafter referred to as the 'Act').

3. Section 17 of the Act reads as follows:

> "17. Application of the Code of Civil Procedure.— (1) The procedure prescribed in the Code of Civil Procedure, 1908 (5 of 1908), shall save in so far as is otherwise provided by that Code or by this Act,] be the procedure followed in a Court of Small Causes, 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 realised in manner provided by section 145 of the Code of Civil Procedure, 1908 (5 of 1908)." (Emphasis Supplied)

4. The relevant contents of the Application under Section 17 and the relief sought was as follows:

> "3. That the applicants pray to the Hon'ble Court that it shall be necessary in the interest of justice to grant the permission for depositing/ paying the total amount of Rs.

98,624/- (Rupees Ninety Eight Thousand Six Hundred Twenty Four Only) including decrial amount, compensation, incurred expenses etc., out from such amount, a sum of Rs. 12,600/- (Rupees Twelve Thousand Six Hundred Only) have already been deposited under section 30 (1) of Uttar Pradesh Act No. 13 of 1972 and balance amount is calculated Rs. 86,024/- (Rupees Eighty Six Thousand Twenty Four Only), out from the same, the applicants intend to furnish the surety of a sum of Rs. 50,000/- (Rupees Fifty Thousand Only) and deposit balance amount before Hon'ble Court.

4. That the applicants are annexing the Tendering Application for depositing cash amount of Rs. 36,024/- (Rupees Thirty Six Thousand Twenty Four Only), it shall be appropriate in the interest of justice to pass tender for depositing the such amount. PRAYER Therefore, it is humbly prayed to this Hon'ble court that grant the permission for depositing/ furnishing the surety of a sum of Rs. 50,000/- (Rupees Fifty Thousand Only) by passing the annexed tender along with application in compliance of section 17 of Provincial Small Cause Act, 1800 presented by applicants." (Emphasis supplied)

5. This Application came to be numbered as 8C. Subsequently, on 12.05.2014, an Application was filed with a prayer that the security in the form of a rental shop owned by the Nagar Nigam may be taken on record. This Application was 'allowed' or 'admitted' on 24.05.2014, a point of controversy to be noticed and dealt with. The surety was one Abhishek Dixit (the 7th proforma respondent in this appeal). This was the Application numbered as 14C. On 23.09.2015, the Trial Court dismissed Application 8C filed under Section 17 of the Act. The Order, inter alia, states as follows:

> "In the light of above contentions/ arguments, I carefully inspected record file and found that the Restoration Application i.e. 08C was presented itself on 06.05.2014, but this application was not corroborated before the then Presiding Officer, but after submitting the application i.e. 8C, it has been submitted the application i.e. 14C before Court, which was admitted by Court on 24.05.2015, but it was not deposited necessary compensation with the same. Therefore, it was not remained any relevance to again pass the order on application i.e., 08C after submitting the application i.e.,

> 14C. In the above circumstances, the application i.e. 08C has been fruitless as the application i.e. 14C has already been admitted on 24.05.2014 by the then Presiding Officer. Therefore, at this stage, it is not any relevance of application i.e., 08C and the same is liable to be dismissed." (Emphasis supplied)

6. This Order was challenged by the appellants by filing a Revision before the High Court. It is relevant to notice the following part of the Order passed by the High Court:

"Heard Sri Umesh Narain Sharma, learned Senior Advocate, assisted by Sri Shailendra Kumar learned counsel for the revisionists and Sri W.H.Khan, learned Senior Advocate assisted by Sri Anand Srivastava learned counsel for the opposite parties. The present revision has been filed against the order dated 23.09.2015 passed by learned Additional District Judge/Special Judge (E.C. Act) Kanpur Nagar, in Misc. Case No. 11/74/2014 whereby application paper no. 8-C under Section 17 of the Small Causes Court Act filed by the revisionists has been rejected arising out of ex-parte Judgement and decree dated 18.10.2013 passed in Small Causes Case No. 27 of 2012. Learned counsel for the revisionists contends that no notice in the SCC suit was served upon the revisionists and ex- parte order passed against the defendants- revisionists and even in execution proceedings no notice was served and ex-parte order passed against which application under Order IX Rule 13 C.P.C.. Learned counsel further contends that application under Section 17 of Small Causes Court Act was filed which remain pending which application was also filed within the statutory period. Learned has next contended that again another application under the statutory period was filed accepting the sureties which was accepted by the learned court below after one year. Thereafter earlier application paper no.8Ga has been rejected vide order impugned which is impugned in the present revision. Sri W.H.Khan, learned Senior Counsel assisted by Sri Anand Srivastava, learned counsel for the opposite parties states that once the surety has been accepted, the earlier application has become redundant which is the order impugned in the present revision, therefore no adversity has been attended to by the revisionists. In view of the submissions made by learned counsel for the parties this Court is of the opinion that once the surety has been accepted by the Court below as has also been stated by Sri W.H.Khan, learned counsel for the opposite parties, the matter may be directed to be decided expeditiously, according it is directed as such. With the aforesaid directions, this revision stands disposed off".

(Emphasis supplied)

7. This Order was passed on 03.12.2015. On the basis of the said order the Trial Court by Order dated 07.12.2016, after noticing the Order of the High Court, found that the appellants have presented the Application under Section 17 of the Act at the time of presenting the Application under Order IX Rule 13 of the CPC, and that though the Application 8C was dismissed by Order dated 23.09.2015 on the basis of the Application No. 14C, in view of the decision of this Court in Kedarnath v. Mohan Lal Kesarwari and others1, the Trial Court found that the appellant had complied with Section 17(1) of the Act in relation to depositing the decretal amount and also in view of the High Court order about surety being 'admitted' it was found that the surety submitted by the appellants was also sufficient. It further proceeded to find that service AIR 2002 SC 582 of summons could not be inferred on the appellants. Therefore, the application under Order IX Rule

13, (4C) was allowed with cost of Rs.1500. This Order was, in turn, challenged before the Additional District Judge, Kanpur (Urban). By Order dated 01.08.2017, the Orders dated 07.12.2016, 23.09.2015 and 04.10.2016 were 'dismissed' and it was found, inter alia, as follows:

> "26. In the apparent view of this Court in judicial citation i.e. Kedarnath (above), the Hon'ble Supreme Court established the principle, such principle completely clarified in the judicial citation i.e. Rajkumar Makhija (above) by the Bench of Hon'ble High Court. If it is any previously established legal principle contrary to above both legal principles, in such circumstances, it cannot be given preference to established principle in the same. It is mandatory and prior to considering the revision application, the Learned Trial Court must satisfy by this fact that whether the above section 17 has been complied or not? and Such kind of satisfaction cannot be left for later stage. In the present case, it was presented the application i.e. document no. 28C under section 17 of Provincial Small Cause Act, in fact till date, it is not passed any order on the same and on 23.09.2015 the application dismissed on the ground that it has already been passed order on the application i.e. document no. 34C. The application i.e. document no. 34C had been presented only with the intention that the surety is to be taken on record, which was admitted by Court, it means the surety had been taken on record, but this order cannot be considered that the surety was admitted by considering/ inferring sufficient. Thereafter again, when on the direction of Court, it was presented the applications i.e. document nos. 90C and 102C on behalf of defendant, in such circumstances; it was not passed any appropriate order on such applications. If it is observed in these circumstances, it is not placed any order for admitting surety, in absence of the same, it cannot be inferred/ considered to not comply in any condition to the provisions of section 17 of Provincial Small Cause Act, but as the principle established by Hon'ble Supreme Court in the case of Kedarnath that in the condition of causing delay in passing order on the part of Court, the defendant cannot be declared guilty/ defaulter, in the present case also, this Revision Court cannot declare guilty/ defaulter to the defendants.
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> 27. Whether the defendant complied the provisions of section 17 of Provincial Small Cause Court Act or not? It is the question of one fact and it can only be decided/ adjudicated by Learned Trial Court accordingly. In such circumstances, it was not in accordance of stipulated provisions of law to admitted revision petitioner without concrete conclusion in relation of compliance of above section 17 and the impugned order is liable to be set aside." (Emphasis supplied)

8. It was thereafter ordered as follows:

> "The revision is admitted. The impugned order dated 07.12.2016 and orders dated 23.09.2015 and 04.10.2016 respectively are dismissed and it is direction to Learned Trial Court that firstly, in the light of objections of plaintiff, pass the decree after compliance of section 17 of Provincial Small Cause Act or non-compliance in relation its report on deposited amount and presented surety i.e. document nos. 16C/36C and

> thereafter pass the appropriate order in accordance of stipulated provisions of law on hearing the parties on revision petition. In the facts and circumstances of present case, the parties shall afford their respective incurred expenses. Return the record file. The parties are directed to appear on 24.08.2017 before Ld. Trial Court".
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> (Emphasis supplied)

9. On the basis of the aforesaid order the Trial Court by order dated 11.02.2019 rejected the application under Section 17 dated 06.05.2014 and also the application dated 12.05.2015. The surety provided by the appellants was also rejected. This order was confirmed by the ADJ by Order dated 26.02.2021 in revision filed by the appellants. It was found that the Order dated 01.08.2017 passed by the ADJ was binding on the Trial Court. We notice the following reasoning:

> " ... It is apparent on the basis of above whole discussion that applicant no. 3 namely Abhishek Dixit is not owner of the land of shop, of which, it was presented the surety of shop by the applicant no. 3 namely Abhishek Dixit on behalf of revisionists/ applicants and the ownership of above land of shop is vested in Municipal Corporation Kanpur Metropolitan, Kanpur. Therefore, under the provisions of section 145 of Civil Procedure Code, the surety cannot be recovered by selling the said shop as it is vested ownership right of Municipal Corporation, Kanpur Metropolitan, Kanpur on the said land of shop. The applicant no. 3 namely Abhishek Dixit is not owner of said land of shop. ... ... In accordance of principle established by the Bench of Hon'ble High Court in judicial citation/ judgment i.e. Rajkumar Makheja & Others Versus M/s. S.K.S. & Company & Others, 2012 (3) A.R.C. 117, now it cannot be granted/ extended the time limit to the revisionists for presenting surety at this stage as now, the limitation period of presenting the surety has been ceased. In this way, it is clear that applicants/ revisionists have completely not complied the provisions of section 17 of Provincial Small Cause Act."

10. The appellants thereupon filed a Writ Petition before the High Court of Allahabad by challenging the Order dated 01.08.2017 passed by the ADJ, the Order dated 11.02.2019 passed by the Trial Court and the order dated 26.02.2021 passed by the ADJ. Further order dated 09.03.2021 passed by the ADJ in Execution Case, ordering the eviction of the appellants based on the ex-parte decree, was also challenged.

11. By the impugned Order, the High Court has dismissed the said Writ Petition. It was, inter alia, found by the High Court that no Application for dispensing with surety was filed. Rather permission was sought for the security being given. It was further found that the requirement of Section 17 is mandatory and filing of application without furnishing surety and making no prayer for dispensing would be read against the appellants. It was found that only an Application (14C) was filed on 12.05.2014, wherein the only prayer was to keep the 'Application on record'. On 24.05.2014, Order was passed for keeping the Application on record. There was neither any prayer for accepting the surety towards the part of the decretal amount nor any such Order was passed. The Application (14C), it was found, was made after the filing of the Application under Order IX Rule 13 of the CPC.

The security for the amount of Rs.50,000/- was submitted on 24.05.2014. This Court in Kedarnath (supra), it was found, has not held that where the incompetent surety had been furnished, the Court may dispense with the same. It was also found the Judgments relied upon by the appellants would not apply as instead of making prayer before the Trial Court to furnish appropriate security, prior to the Order dated 23.09.2015 was passed, the appellants resorted to litigation and at no stage they offered any surety as per law. The concession by a Counsel regarding a question of law, it was found, was not binding on the party. This is by way of dealing with the submission of the appellants based on the statement of the Senior Counsel for the plaintiffs, as seen reflected on the Order of the High Court, which we have extracted.

12. We have heard Shri Pranaya Kumar Mohapatra on behalf of the appellants. We have also heard Sh. S.R. Singh, learned Senior Counsel on behalf of the respondents.

THE CONTENTIONS OF THE APPELLANTS

13. The appellants had moved the Application under Order IX Rule 13 of the CPC as well as the Application under Section 17 of the Act on the same day, i.e., 06.05.2014. The Trial Court did not pass any Order on the Application under Section 17 dated 06.05.2014. The Application under Section 17 being filed on the same day as an Application under Order IX Rule 13, was validly filed in terms of the Judgment of this Court in Kedarnath (supra). There was a fault on the part of the Court in not passing Order on the Application under Section 17 filed on 06.05.2014. The appellants cannot be made to suffer on account of the fault of the Court. On 24.05.2014, the Application filed for taking on record the security, was accepted. The prayer in the application (14C) was 'TAKEN ON RECORDS'. The earlier Application dated 06.05.2014, under Section 17, was pending consideration. The security, which was accepted, was Shop No. 25. The same was allotted by the Municipal Council, Kanpur. For the allotment, a sum of Rs.85,000/- had been received by the Local Body, which had been deposited. Once the security was accepted, any insufficiency found after the prescribed period, cannot be laid at the doorstep of the appellants. Reliance is placed on the Judgment of the Full Bench of the Allahabad High Court in the case of Bhagwandas Arora v. First ADJ Rampur. Also, reliance is placed on the decision of this Court reported in Bhagwan Dass Arora v. First Additional District Judge, Rampur and others2. The Trial Court passed Order on security after two years, viz., on 29.03.2015 with the expression 'inappropriate security'. The Trial Court (1983) 4 SCC 1 had to give direction on sufficiency of security within the prescribed period. If that had been passed and the Trial Court raises questions about sufficiency of the security, the appellants could not have submitted other security or cash without the Order of the Court. Reliance is placed on the Order dated 03.12.2015 passed by the High Court. In view of the Order passed by the High Court, in the hierarchical system, the ADJ erred in overlooking the Order of the High Court. We are reminded that the Order of the ADJ dated 01.08.2017 was also challenged before the High Court in the Writ Petition. The merits of the case must be considered. THE SUBMISSIONS OF RESPONDENTS 1 TO 6

14. The requirements under Section 17 are mandatory. Security was not filed on 06.05.2014 but on 24.05.2014. Therefore, the mandatory condition in proviso to Section 17(1) was not complied with. The Court should have passed an Order on the Application under Section 17(8C) dated 06.05.2014

indicating the nature of the security, that would be sufficient for the performance of the Decree. However, it was contended that it is not forthcoming as to why appellants did not press the Application under Section 17 dated 06.05.2014 and also filed other Application for security. Therefore, the failure on the part of the Court to pass Orders on the Application dated 06.05.2014 under Section 17 could not be a factor entitling appellants to contend that in the absence of an Order, they were prejudiced. This is for the reason that they are presumed to know, having regard to Section 17(2) of the Act, that security must be such as may be enforceable in law. The security, which was furnished, consisted of a shop room, which belonged to the Municipal Corporation and not to Shri Abhishek Dixit (the surety) who was the third Writ Petitioner and who is shown as Proforma Respondent No.7 in the Appeal. The security was not enforceable. The period of limitation for providing security had expired. While an Application under Section 17 can be filed with application under Order IX Rule 13, the security must be filed along with the Application. Otherwise, it may not be possible for the Court to find whether the security, which was filed, was in conformity of the Section 17(2) of the Act. Even assuming that the security could be furnished subsequently, the subsequently furnished security was not enforceable in law. The Application under Order IX Rule 13 has not been rejected on the ground that security was not furnished but on the ground that the security furnished on 12.05.2014 (Application 14C) was not a valid security. Therefore, the plea that the appellants cannot suffer on account of the fault of the Court, does not arise.

ANALYSIS; 3 DECISIONS; KEDARNATH (SUPRA)

15. We have already set out Section 17 of the Act. It is necessary to notice that in Kedarnath (supra), this Court, inter alia, held as follows:

> "8. A bare reading of the provision shows that the legislature has chosen to couch the language of the proviso in a mandatory form and we see no reason to interpret, construe and hold the nature of the proviso as directory.

An application seeking to set aside an ex parte decree passed by a Court of Small Causes or for a review of its judgment must be accompanied by a deposit in the court of the amount due from the applicant under the decree or in pursuance of the judgment. The provision as to deposit can be dispensed with by the court in its discretion subject to a previous application by the applicant seeking direction of the court for leave to furnish security and the nature thereof. The proviso does not provide for the extent of time by which such application for dispensation may be filed. We think that it may be filed at any time up to the time of presentation of application for setting aside ex parte decree or for review and the court may treat it as a previous application. The obligation of the applicant is to move a previous application for dispensation. It is then for the court to make a prompt order. The delay on the part of the court in passing an appropriate order would not be held against the applicant because none can be made to suffer for the fault of the court.

9. In the case at hand, the application for setting aside ex parte decree was not accompanied by deposit in the court of the amount due and payable by the applicant under the decree. The applicant also did not move any application for dispensing with deposit and seeking leave of the court for furnishing such security for the performance of the decree as the court may have directed. The

application for setting aside the decree was therefore incompetent. It could not have been entertained and allowed.

(Emphasis supplied) THE FULL BENCH IN RAM BHAROSE

16. Since the appellants have also relied upon the Judgment of the Full Bench of the High Court of Allahabad, we deem it appropriate to advert to the same, i.e., Ram Bharose v. Ganga Singh3. The Full Bench of the High Court was dealing with the following facts:

> The Application under Order IX Rule 13 was accompanied by a security bond to cover the decretal amount. One of the questions, which arose was, as to whether the Application was not maintainable in as much as the direction of the Court had not been obtained in regard to the deposit of the decretal amount or the filing of the security in terms of the proviso to Section 17 of the Act. Three separate opinions were pronounced. In the opinion rendered by Mukherjee, J., we consider it appropriate to refer to the following:
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> "17. Now I come to consider the second point. On a plain reading of Section 17, Provincial Small Cause Courts Act, the applicant for the setting aside of a judgment has to do these things: To start with, he ought to apply to the Court to which he proposes to make an application, to tell him what kind of security, in the circumstances detailed in the applicant's application, the Court would require of him to furnish. Usually the Court would ask for a cash security, but it may be satisfied on the applicant's representation that a cash security may be dispensed with.

In rare cases, as in the illustration given AIR 1931 Allahabad 727 by me in my judgment in Jhabboo Misir's case, cited below, the Court may refuse to take a cash security and may insist on other kind of security being taken and may insist on the move-able property in dispute being itself produced. When the Court gives its direction, namely, whether the applicant is to furnish cash security or is to give some other kind of security, the applicant should present his application for setting aside the decree, together with the security demanded. Then his duties are over. The security filed will then be scrutinized by the Court, and the Court shall see whether the security is to its satisfaction. Then 'presumably a notice would go to the plaintiff to show cause why the decree should not be set aside. This was also the view which I took in the case of Jhabboo Misir v. Howladar Tewari.

18. Although the rule (Section 17, Small Cause Court Act), requires that the security is to be furnished at the time of presenting an application for setting an ex parte decree, it has been held in this Court in Moti Lal Ram Chandar Das. v. Durga Prasad MANU/UP/0193/1930 : AIR1930All830 that the security may be furnished even after the application has been made provided the security is forthcoming within the period of 30 days of limitation. To this decision I was a party. This view was taken by other High Courts also : see V. M. Assan Mohamad Sahib v. M.E. Rahim Sahib [1920] 43 Mad. 579, Jenu Muchi v. Budhiram Muchi [1905] 32 Cal. 339 and Narain v. Pudan MANU/OU/0001/1929. The reason of this decision is that the previously made application may be taken as made on the date on which the security was furnished, as the period of limitation has not

yet expired, and it would be a mere formality (which may be safely dispensed with) to direct the applicant to file a fresh application on the day when he furnishes the security.

xxx xxx xxx

20. Where an applicant, without formally applying for the Court's direction, makes an application for setting aside an ex parte decree and furnishes security with it, and the Court directs a notice to issue to the other side, it must be taken that the Court is cognizant of the fact that the applicant has furnished security as required by Section 17, Small Cause Courts Act. The order that notice should issue may be taken as an approval by the Court of the security furnished, in the circumstances disclosed by the applicant in his application and affidavit (if any). We may also take it that, the Court, by implication, gave the applicant a direction that he should furnish security of the kind actually furnished by him. This is not a more attempt to get over what may be believed to be rather hard directions of the law. If the Court instead of issuing a notice in the case just mentioned, rejects this application because its direction has not been obtained, and if limitation has not already expired, it would be open to the applicant to make a fresh application and to furnish such security as the Court may direct. A party cannot suffer by the act of a Court, and therefore we must accept the position that the Court has given the direction, according to law to the furnishing of the security actually furnished, where the Court instead of rejecting the application of the defendant directs that a notice should issue.

23. The conclusion that I arrive at; therefore is that the proper course is for a party to make an application to the Court to obtain its direction as to the nature of the security, and then to apply with the security of the nature directed by the Court for setting aside the ex parte decree. The security furnished must comply with the directions of the Court, and the Court will see that the security is to its satisfaction, i. e., sufficient. But where the Court adopts a security without question and directs a notice to issue, it, by necessary implication, gives a direction that the security should be of the nature directed by it 'and that the security furnished is sufficient to its mind." (Emphasis supplied) The view taken by Boys J., insofar as it is relevant, is contained in the following paragraph: "37. The conclusion from this, then, is that no initial defects in the making of the application must be allowed to stand in the way of the applicant getting a notice issued to the decree-holder, provided that an application has been filed, and further that cash has been deposited, or, if the Court has so permitted, security has been given, all before the expiry of 30 days. A reasonable and practical interpretation of the section is therefore as follows: (1) the applicant must within 30 days file his application either with cash or with a [statement that he is prepared to give security (and in the latter case, he may, of course, tender the security he proposes and ask for the direction of the Court (2) In the case where he wants to give security, if the Court refuses to direct (security, he must deposit cash within [the 30 days, or his application will be [rejected. (3) If the Court agrees to direct security, then (a) it will consider (the security already offered, if it has been so offered; or (b) name security to its satisfaction which must be filed within the 30 days. (4) If the applicant does not in fact ask for a direction or if, though the applicant does ask for a direction, the Court does not in fact give any direction, but in fact the Court does issue notice, the Court shall be taken to have approved the deposit of cash or the security offered as the case may be. (5) If filed within the 30 days and accepted by the Court expressly or impliedly by the issue of notice the application is a good application,

though it will be open to the decree-holder to challenge the nature land sufficiency of the security and to the Court under Order 9, Rule 9 to make such further conditions as it thinks fit. In the course of the argument it has been suggested that difficulty might arise if the Court delayed in giving its direction, or approving expressly or impliedly the security already tendered, so long that the period of limitation had expired before the applicant had fair opportunity of complying with the direction. It is not a case which we have now to consider, but in a suitable case it would bet open to the Court itself to consider and exercise its inherent powers reserved to it by Section 151, Civil P.C." (Emphasis supplied) Chief Justice Suleman concurred with the other Judges that the Revision must be dismissed and he, inter alia, held as follows:

"46. No doubt the language of the proviso-is very unhappy and there is some apparent inconsistency between the expression " at the time of presenting his application " and the expression " as the Court may direct. " If we take the two expressions literally, the two things cannot happen exactly simultaneously. But the direction of the Court may be obtained before the application is presented or just after presenting the application.

47. It is quite clear to me that an application cannot be presented after the prescribed period, nor can cash or security be deposited after the expiry of that period. The Court is not given any discretion at all to extend the time. If the security deposited within the time is discovered afterwards to be defective or unsatisfactory in any way, the Court has no power to direct a fresh security to be substituted for it after the expiry of the period.

52. Of course, the question whether the security is sufficient and satisfactory need not be finally determined during the period of 30 days. Indeed, the plaintiff decree- holder may come in afterwards and challenge its sufficiency. The mere fact that it is found afterwards that the security was sufficient, would not make the deposit of the security within the time in any way defective." BHAGWANDAS (SUPRA)

17. As far as the Judgment of this Court in Bhagwandas (supra) is concerned, the relevant facts were as follows:

> A suit was decreed ex-parte on 06.08.1977. The appellant moved an Application on the said day within the meaning of the proviso to Section 17 of the Act to permit him to furnish such security for the performance of the decree in lieu of cash due under the decree. On the same day, Court granted him permission subject to making a cash deposit for part and for the balance he had to furnish the security. Thereafter, on the 31.08.1977, he moved the Application under Order IX Rule 13 to set aside the ex-parte decree. He also deposited the cash on 31.08.1977. On the basis of a defect pointed in the security bond on 21.09.1977, the Court directed the appellant to supply the defect, which consisted of deficient stamp in the security bond. The appellant complied with the said Order. It was in these facts, the Court took the view that the Application of the appellant was wrongly rejected on the basis that there was a legal infirmity in the bond as instead of it being stamped under the Stamp Act it was stamped with court fee of Rs.2/.

OUR FINDINGS

18. When a Decree is passed by a Court of Small Causes ex-parte, inter alia, under the proviso to Section 17 of the Act, the applicant, who files an Application to set aside the ex-parte Decree is bound to do the following:

a. He must deposit in the Court, the amount due under the Decree;

b. In the alternative, he should give security for the performance of the Decree 'on a previous Application' made by him in this behalf;

19. In view of the Judgment of this Court in Kedarnath (supra), the words 'on a previous application' in proviso to Section 17, have been understood to be an application, which may be made along with the application under Order IX Rule 13 of the CPC. On 06.05.2014, on the same day the Court ordered notice to be issued fixing 19.07.2014 as the date. The execution proceeding was stayed till 19.07.2014. It could indeed be said, that even notice being issued was permissible only after compliance with the proviso to Section 17 of the Act. The appellants had filed an Application under Order IX Rule 13 of the CPC and Section 17 of the Act, on the same day. If the Application under Section 17 was accompanied with a cash deposit, then, the Application under Order IX Rule 13 would have been, indeed, maintainable. The controversy arises as in the Application dated 06.05.2014, filed under Section 17, the appellants sought for permission to deposit/furnish surety for a sum of Rs.50,000/- out of a total sum of Rs.98,624/-. No order was passed on the said Application. On 12.05.2014, appellant moved an Application (14C). Therein, the appellant sought to furnish security in the form of a shop room of which the Proforma Respondent in this Appeal, Shri Abhishek Dixit was the tenant, but the owner was the Municipal Corporation, Lucknow. On the said Application, the Court passed an Order on 24.05.2014. It reads:

> "Order 24.05.2014 Today application has been filed on behalf of the judgment debtor Dr. Aarti Dikshit for taking on record surety. Order passed. Allowed".

20. The contention of the appellants appears to be that the Application dated 06.05.2014, was in order as it was filed along with the Application under Order IX Rule 13 and it accords with the law laid down in Kedarnath (supra). Once such an Application is filed, it was the duty of the Court to pass an Order. The Court according to the appellants had a duty to indicate as to whether the Application for permission to give security was allowed and in what form the security should be furnished. It was as no orders were passed, that the appellants on their own filed Application and purported to furnish the security in the form of the rented shop. The High Court in its Order dated 03.12.2015, accepted the submission of the Counsel for the parties that the surety was accepted by the Court on 25.04.2015 and the matter was directed to be decided expeditiously and on the said basis, the Trial Court had allowed the Application under Order IX Rule 13. This order was set aside by the ADJ by order dated 01.08.2017 on the basis that the order dated 24.05.2014 did not mean that the security was accepted. The trial court was to consider the application dated 06.05.2014 on its own merits. This was so ordered after finding that no order had been passed on the application dated 12.05.2014 accepting the security. It must be noticed that the appellants did not challenge the

Order dated 01.08.2017. Pursuant to the Order dated 01.08.2017, the Trial Court, by Order dated 11.02.2019, did not find merit in the case of the appellants and dismissed the Application filed under Section 17 dated 06.05.2014 as also the Application dated 12.05.2014 and rejected the surety. It is this Order, which has been upheld again by the ADJ by Order dated 26.02.2021 and then by the High Court, by the impugned Order.

21. On a literal interpretation of Section 17 of the Act, which contemplates the Application under Section 17 being filed before the Application under Order IX Rule 13, whether appellants have made out a case. The first question, which we would have to consider is, whether the Application is in conformity with the proviso to Section 17. Did the applicant furnish any security on 06.05.2014? The answer can only be in the negative. The appellant did not seek for dispensing with deposit as such. [See paragraph-9 of Kedarnath (supra)]. Therefore, the appellant had not in the said sense complied with the mandatory requirement of Section 17. Next, was the prayer, viz., the request to permit the appellant to deposit/furnish security for a sum of Rs.50,000/- due under the Decree in consonance with Section 17? What was the duty of the Court in the face of such prayer under Section 17? Was the furnishing of the security consisting of the rented shop belonging to the Local Body, sufficient compliance of Section 17? What is the effect of the application dated 12.05.2014 and the order dated 25.05.2014 on the same which is obviously after 06.05.2014 (the date of the application under Order IX Rule 13).

22. The High Court in the impugned order finds that no application for dispensing with surety was filed and that this will be read against the appellants. The High Court perseveres in this observation on three occasions. We must observe that what Section 17 of the Act contemplates in the proviso is that the applicant seeking to set aside an ex-parte decree inter alia must either make a deposit of the amount in question or give security. What this Court in Kedarnath (Supra) laid down was that the provision as to deposit can be dispensed with by the Court. The applicant can, in other words, seek a dispensing with of the deposit and seek leave for furnishing such security as the Court may direct. Therefore, the High Court was not correct in proceeding on the basis that appellants did not make any application for dispensing with surety. No doubt, at one place, the High Court states that there is no prayer for dispensing with the surety or the amount sought to be deposited by way of security. The prayer of the appellants was to permit deposit/furnishing surety of Rs.50000/- which was part of the decretal amount. This could be treated impliedly as seeking a direction within the meaning of Section

17. An applicant could no doubt also propose the security which he wishes to give. In fact, ordinarily, an application for dispensing with the cash deposit and for direction to furnish security should be made prior to application under Order IX Rule 13 of CPC. On the order passed on the same, the applicant is to comply with the same and furnish the security at the time when he files the application under Order IX Rule 13. Since an application under Section 17 which is really required only in the absence of the cash deposit can be filed up to the date of the application under Order IX Rule 13 as held in Kedarnath (supra)ordinarily, the security must be made available along with such application. There then arises the aspect that the application under Order IX Rule 13 can be filed within 30 days as provided in Article 123 of the Limitation Act. Undoubtedly, the deposit or security must be furnished within 30 days as held by the full Bench of the Allahabad High Court in Ram

Bharose (supra). This is on the basis that the application can be made under Order IX Rule 13 upto the 30th day but at the same time, the conditions in the proviso, namely, the deposit or the security must be furnished at the time of presenting the application under Order IX Rule 13. But if the application under Section 17 can be moved along with the application under Order IX Rule 13, then if a direction is required for furnishing security and the Court grants permission and time, then it may be possible to furnish the security only after the date of the application under Order IX Rule 13. As held by this Court in Kedarnath (supra), the Court is expected to pass an order promptly on the application which may be filed under Section 17 which may be of the same date as the application under Order IX Rule 13. Any delay on the part of the Court cannot prejudice the applicant.

23. In this case, the appellants filed the application both under Section 17 of the Act and under Order IX Rule 13 on the same day, namely, 06.05.2014. The application under Order IX Rule 13 is premised on knowledge of the ex parte decree being obtained on 05.05.2014 in the Execution Proceedings. There was no security offered on 06.05.2014. Though a direction as such was not expressly sought for but permission was sought for to furnish security, it could be said that in substance the appellants essentially sought for direction within the meaning of the proviso to Section

17. We have already found that the High Court was in error in finding that the appellants did not seek for dispensing with the security, and therefore, apparently holding the same against the appellants. When the appellants sought for permission to furnish security, if the permission was granted and a direction to furnish security was given on the same date and it had been complied with within the time, then the appellants would have been compliant with Section 17. No orders were passed on the application under Section 17 dated 06.05.2014. Within 6 days, on 12.05.2014, the appellants on their own purported to furnish security. The surety was one Abhishek Dixit (the 3rd writ petitioner who is the 7th proforma respondent in the appeal). The security was however, a shop. The shop was not owned by the surety. The Municipal Corporation, Lucknow was the owner. The surety was a tenant. A security to be provided under Section 17 by a surety is to be enforced under the provisions of Section 145 of the Code of Civil Procedure as contemplated in Section 17 (2) of the Act. Section 145 of the CPC inter alia provides that the security provided by a surety can be enforced by effecting sale of the property. The courts in this case have held that the security provided by the appellants through the surety is not acceptable in law having regard to Section 17 (2) as the shop belonged to the Municipal Corporation, Lucknow and it could not be sold for enforcing the surety.

24. While it is true that no order was passed on the application under Section 17 on 06.05.2014, the fact remains that the appellants on their own furnished a surety as stated. The High Court reasons that the security so provided was unacceptable on two grounds. Firstly, it was not furnished along with the application under Order IX Rule 13 on 06.05.2014. Secondly, it is found that it was not acceptable in law.

25. It is true that the High Court in the order dated 03.12.2015 proceeded to find that the “security was accepted by the court below”. This is by way of accepting the submission of the counsel for the plaintiffs. It was on this basis that the matter was remanded. Following the remand, the trial court

allowed the application filed by the appellants and also the application under Order IX Rule 13. This has been set aside as noticed by us by the ADJ and the matters stood remanded back by Order dated 01.08.2017. This order was not challenged by the appellants. It is thereafter that the courts have concurrently found that there was non-compliance of Section 17. The earlier order of the High court dated 03.12.2015 has been overcome by finding that there was a sweeping statement before the High Court in the earlier round that the surety furnished had been accepted. The High Court further finds that actually the prayer made in application dated 12.05.2014 was only to take the surety on record. The order dated 25.04.2014 only shows that only the surety was taken on record. It is further found that the application dated 12.05.2014 was filed after 06.05.2014 and could not be the basis for a valid order under Section 17.

26. We are in agreement with the courts that the security furnished by the appellants in the form of the rented shop belonging to a third party cannot be accepted as security in law. It is patent. It is not clear from the order dated 24.05.2014 that the Court had applied its mind to the sufficiency of the security or as to whether it was acceptable security. If security is given, which is later found to be unacceptable even if it is within 30 days within the meaning of Article 123 of the Limitation Act, then it would not be complying with Section 17 [see the observations of the full Bench of the Allahabad High court in Ram Bharose (supra)].

27. While it is true that there may have been a failure on the part of the court to pass orders on the application dated 06.05.2014 apparently, the appellants proceeded to furnish the security in this case on 12.05.2014. Therefore, we proceed on the basis that within 30 days of the date of knowledge of the decree, as alleged by the appellants, but after the date of the application under Order IX Rule 13, the appellants have furnished security. We are mindful of the fact that no order was passed by the Court on 06.05.2014. Even proceeding to consider the security however we would find that it is clearly unacceptable in law. The effect of the order of the High Court dated 03.12.2015 must be understood with reference to the concession made by the counsel and may not withstand the requirement of law under Section 17 of the Act being fulfilled. We cannot be unmindful of the fact that the appellants did not challenge the order of the Additional District Judge dated 01.08.2017. The trial Judge was bound by the same as the appellants did not challenge the order dated 01.08.2017. The fact that the appellants, after participating in the remanded proceedings mounted a challenge in a writ to the order dated 01.08.2017 appears to us as not advancing the case of the appellants. This is both for the reason of the belated challenge as also the nature of the earlier order involved.

28. In the facts, having regard to the Order dated 01.08.2017 and the security being found unacceptable, we find no merit in the appeal generated by special leave. The appeal will stand dismissed. There shall be no order as to costs.

.....J.

[K.M. JOSEPH] .....J.

[HRISHIKESH ROY] New Delhi Dated; May 18, 2023.