
(1990) 07 AHC CK 0036
In the Allahabad High Court
Case No : Writ Petition No. 2914 of 1989

Chamanlal Sharma

APPELLANT

Vs

Ist Addl.District Judge, Kheri and Others

RESPONDENT

Date of Decision : 31-07-1990

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 15 Rule 5

Citation : (1990) 07 AHC CK 0036

Hon'ble Judges : S.H.A.Raza, J

Final Decision : Allowed

Judgement

S.H.A. Raza, J.—Invoking the jurisdiction of this Court under Article 226 of the Constitution of India the petitioner has prayed for the issue of a writ in the nature of certiorari quashing the order dated 14th October, 1988 contained in Annexure3, by means of which the Additional Judge Small Causes, Lakhimpur Kheri decreed the suit of the plaintiff for arrears of rent and ejectment, as well as the order dated 23rd February, 1989 passed by Additional District Judge, Kheri dismissing the revision filed by the petitioner against the said order, on the ground that the trial court committed a manifest error of law by striking off the defence of the petitioner under Order 15 Rule 5 CPC, inspite of the fact that no objection to the representation of the petitioner was made. The trial court totally ignored to consider that the entire arrears of rent was given to the counsel, who did not deposit the same in Court and hence on account of laches on the part of the counsel the Court below ought not to have rejected the representation of the petitioner; the Court below relying upon the assessment of the house in question by the Nagarmahapalika for the year 198283 wrongly held that the provisions of U.P. Act No. 13 of 1972 were not applicable and the trial court wrongly held that the notice under Section 106 of the Transfer of Property Act was served upon the petitioner.

2. As far as the first ground is concerned it has to be seen as to whether the Courts below were justified in rejecting the representation of the petitioner to the

effect that he had given the arrears of rent for depositing the same to his counsel who failed to deposit the same and hence the court below committed an error apparent on the face of the record in striking out of the defence of the petitioner.

Supreme Court in *Bimal Chand v. Gopal Agarwal* (AIR 1981 SC 1657) has indicated as under:

It seems to us on a comprehensive understanding of Rule 5 of Order XV that the true construction of the Rule should be thus. SubRule (1) obliges the defendant to deposit, at or before the first hearing of the suit, the entire amount admitted by him to be due together with interest thereon at the rate of nine percent per annum and further, whether or not he admits any amount to be due to deposit regularly throughout the continuation of the suit the monthly amount due within a week from the date of its accrual. In the event of any default in making any deposit the court may subject to the provisions of sub rule (2) strike off his defence. We shall presently come to what this means. Subrule (2) obliges the court, before making an order for striking off the defence, to consider any representation made by the defendant in that behalf. In other words, the defendant has been vested with a statutory right to make a representation to the court against his defence being struck off. If a representation is made the Court must consider it on its merits, and then decide whether the defence should or should not be struck off. This is a right expressly vested in the defendant and enables him to show by bringing material on the record that he has not been guilty of the default alleged or if the default has occurred there is good reason for it. Now, it is not impossible that the record may contain such material already. In that event, can it be said that subrule (1) obliges the court to strike off the defence? We must remember that an order under subrule (1) striking off the defence is in the nature of a Penalty. A serious responsibility rests on the court in the matter and the power is not to be exercised mechanically. There is a reserve of discretion vested in the court entitling it not to strike off the defence if on the facts and circumstances already existing on the record it finds good reason for not doing so. It will always be a matter for the judgment of the court to decide whether on the material before it, notwithstanding the absence of a representation under subrule (2), the defence should or should not be struck off. The word 'may' in subrule (1) merely vests power in the court to strike off the defence. It does not oblige it to do so in every case of default. To That extent, we are unable to agree with the view taken by the High Court in *Puran Chand* (1981 All LJ 82) (*supra*). We are of opinion that the High Court has placed an unduly narrow construction on the provisions of clause (1) of Rule 5 of Order XV.

After the aforesaid decision there are numerous cases in which this Court has taken the view that the purpose of striking out of the defence is not (?) punitive in nature and the Court while dealing with the matter must not exercise his discretion in a way which results into injustice. Only in the cases of deliberate and wilful default the Court while invoking its power under Order 15 Rule 5 CPC may strike off the defence. Before taking this extreme step the Court should look

into the totality of the circumstances and exercise its jurisdiction in the judicial manner. In the case of Smt. Leela Devi and another v. Smt. Shanti Devi AIR 1986 All 90 it was indicated as under:

?The provisions of Rule 5 are discretionary and not mandatory. The fact that the provisions are discretionary presupposes that even if there is a default the court has to consider as to whether in a particular case it was in the interest of justice to strike off the defence. For deciding whether in a particular case defence should or should not be struck off one has to consider the circumstances of that particular case. One of the main circumstances which requires consideration is the nature of the default. If the amount of default is small or negligible considering the amount already deposited lenient may be taken. The Court below has not even mentioned the total amount due, the amount deposited and the amount remaining unpaid and, therefore, it cannot be ascertained as to what was the actual extent of the default. Similarly another important circumstance is the nature of explanation offered for not complying with the provisions regarding deposit of the amount. If the allegation of the tenant that he failed to deposit necessary amount in the Court within time due to wrong legal advice is found correct the defence may not be struck off on this ground alone. The view that as no representation was made at the time of making the deposit for condonation of delay the defence was liable to be struck off is incorrect. When the relationship of landlord and tenant between the parties is questioned, it was incumbent upon the Court below to decide the question of relationship before proceeding to decide the application for striking off the defence.?

In the instant case the petitioner has submitted a representation in which he stated that he had given the amount to his counsel for depositing the same but the counsel did not deposit the same. The Courts below dismissed this plea on the ground that no affidavit on behalf of the said counsel was filed. If the counsel had committed breach of trust and misappropriated the amount which was given by the petitioner to him, how the petitioner could ask the counsel to file an affidavit. Such a counsel would never file an affidavit, as he would be held guilty of misconduct and breach of trust. It has been the consistent view of this Court that a litigant should not be punished for the laches on the part of his counsel. No objection was filed against the said representation and there existed no material on the record to disbelieve the contention of the petitioner. Both the Courts have committed manifest error of law in ignoring the contention of the petitioner that the default if any was due to the laches on the part of his counsel. Interest of justice required the Court to have examined the matter in the light of the decision of

Supreme Court in the case of Bimal Chand Jain (supra).

3. As far as the two other grounds regarding the service of notice and the house in question was beyond the purview of U.P. Act no. 13 of 1972 are concerned, the Courts below upon consideration of the evidence on record came to a definite conclusion that the notice was served and the house was constructed in the year

1982. In a writ petition under Article 226 of the Constitution of India the findings of fact recorded by the Courts below cannot be disturbed.

4. In view of what has been indicated hereinabove this writ petition is allowed. The impugned orders contained in Annexures 3 and 5 to the writ petition are quashed. The Additional Civil Judge/Judge Small Causes Court, Lakhimpur Kheri is directed to restore back S.C. Suit No. 22 of 1986 and to decide it afresh in accordance with law and in the light of observations made above. However, there shall be no order as to costs.