

(2011) 12 AHC CK 0431

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 70496 of 2011

Dilshad (since deceased) and Others

APPELLANT

Vs

Jama Masjid, Waqf Awagarh

RESPONDENT

Date of Decision : 12-12-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, 145, 151
Limitation Act, 1963 — Section 17, 17(1), 5
Provincial Small Cause Courts Act, 1887 — Section 25

Citation : (2011) 12 AHC CK 0431

Hon'ble Judges : Dilip Gupta, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Hon"ble Dilip Gupta, J.—This petition seeks the quashing of the order dated 11th August, 2010 passed in SCC Misc. Case No.86 of 2005 arising out of SCC Suit No.19 of 2003 by which the application filed by the defendants under Order IX Rule 13 of the CPC for setting aside the ex-parte decree dated 8th February, 2005 in SCC Suit No.19 of 2003, was rejected. The petitioners have also sought the quashing of the order dated 30th April, 2011 by which the Revision filed by the petitioners u/s 25 of the Provincial Small Cause Courts Act, 1887 (hereinafter referred to as the "Act") for setting aside the aforesaid order dated 11th August, 2010 has been rejected.

2. SCC Suit No.19 of 2003 had been filed by the respondent-landlord for decree of eviction and for payment of arrears of rent. The suit was decreed ex-parte on 8th February, 2005. The petitioners filed an application under Order IX Rule 13 read with Section 151 of the CPC together with an application u/s 5 of the Limitation Act on 17th May, 2005 for setting aside the ex-parte decree. This application was rejected by the Court on 11th August, 2010 on the ground that the provisions of Section 17 of the Act had not been complied with. The Revision filed by the petitioners for setting aside the aforesaid order has also been

rejected.

3. The order dated 11th August, 2010 mentions that an application had been filed by the petitioners u/s 17 of the Act for giving permission to give security for performance of the decree but this application was rejected by the order dated 4th January, 2008 by the Court for the reason that it had been filed subsequent to the filing of the application under Order IX Rule 13 of the Code of Civil Procedure. This order dated 4th January, 2008 attained finality as it was not assailed before any higher court. Consequently the application filed by the petitioners under Order IX Rule 13 of the CPC was rejected by the order dated 11th August, 2010 as compliance of provisions of Section 17 of the Act had not been made. The Revision filed by the petitioners has also been rejected on this ground.

4. Learned counsel for the petitioners submitted that the impugned order deserves to be set aside for the reason that when the application filed by the petitioners for deposit of security was rejected, time should have been given to the petitioners to deposit the said amount.

5. It is not possible to accept the contention of the learned counsel for the petitioners.

6. Section 17 of the Act which deals with the applicability of CPC for the procedure to be followed by Small Cause Courts and the conditions under which ex parte decree can be set aside is 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)

7. It is, therefore, clear that the applicant who moves an application for setting aside the ex parte decree has to, at the time of presenting the application, either deposit in the Court the amount due from him under the decree or give such security for the performance of the decree as the Court may, on a previous application made by him in this behalf had directed.

8. In the present case, the tenant had moved an application seeking directions of the Court to furnish the security but the learned Judge, Court of Small Causes by the order dated 4th January, 2008 rejected the application.

9. The provisions of Section 17 of the Act have been elaborately analysed by the Supreme Court in *Kedarnath Vs. Mohan Lal Kesarwari and Others*, . In the said case, the suit had been decreed ex parte on 9.8.1996. On 26.2.1998 the tenants moved an application under Order 9 Rule 13 CPC for setting aside the ex parte decree but neither the amount due under the decree was deposited and nor an application was filed seeking direction of the Court to furnish security for the performance of the decree in lieu of depositing the decretal amount. It is only on 15.10.1998 that the tenants filed an application with a prayer that they may be permitted to furnish security for payment of the decretal amount. The learned Judge Small Cause Courts rejected the application as the application filed under Order 9 Rule 13 CPC did not comply with the condition contained in Section 17 of the Act. The Revisional Court, however, condoned the delay in moving the application dated 15.10.1998 and directed the Trial Court to accept the security and hear and decide the application under Order 9 Rule 13 CPC on merits. The High Court dismissed the writ petition filed by the landlord. The landlord preferred a SLP in the Supreme Court which was allowed and the order passed by the Trial Court was restored. The Supreme Court observed :

A bare reading of the provision shows that the Legislature have 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 cause 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 pursuant 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 upto 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.

In the case at hand, the application for setting aside ex-parte decree was not accompanied by deposit in the Court 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)

10. It is, therefore, clear from the aforesaid decision that the language of the proviso contained in Section 17 of the Act is mandatory in nature and an application for setting aside the ex parte decree must be accompanied by a deposit in the Court of the amount due under the decree and that this deposit can be dispensed with by the Court in its discretion on a previous application by the applicant seeking direction of the Court for leave to furnish security. This application can be filed at any time up to the time of the presentation of the application for setting aside the ex parte decree. If the application under Order 9 Rule 13 CPC is not accompanied with a deposit and if an application has also not been moved for furnishing security in lieu of the deposit up to the time of the presentation of the application under Order 9 Rule 13 CPC, then the application under Order 9 Rule 13 CPC is incompetent and cannot be entertained and allowed.

11. The impugned orders, therefore, do not call for any interference.

12. The writ petition is, accordingly, dismissed.