

(2015) 04 AHC CK 0209

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 34386 of 2011

Gorakhnath

APPELLANT

Vs

Judge, Small Causes Court, Gorakhpur and Others

RESPONDENT

Date of Decision : 08-04-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13
Constitution of India, 1950 — Article 226
Limitation Act, 1963 — Section 5
Provincial Small Cause Courts Act, 1887 — Section 17, 17(1)

Citation : (2015) 5 ADJ 622 : (2016) 1 ALJ 367 : (2015) 5 AWC 5047 : (2015) 128 RD 724

Hon'ble Judges : Suneet Kumar, J

Bench : Single Bench

Advocate : K.M. Misra, H.R. Mishra, Kamlesh Kumar Mishra and Narayan Das, for the Appellant; A.K. Pandey and Ashutosh Kumar, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Suneet Kumar, J—Supplementary-affidavit filed today on behalf of the petitioner, is taken on record. Learned counsel appearing for the respondents states that reply to the said affidavit is not required. Heard Sri H.R. Mishra, Senior Advocate assisted by Sri Kamlesh Kumar Mishra, learned counsel appearing for the petitioner and Sri A.K. Pandey, learned counsel for the respondents.

2. The respondent/landlord IInd set filed a suit for eviction and arrears of rent before Small Cause Court at Gorakhpur being Suit No. 106 of 1993. The suit was decreed against the petitioner/tenant on 23 December 1998. The petitioner filed a restoration application under Order 9 Rule 13 of the Code of Civil Procedure on 23 November 2002 for setting aside the ex parte judgment and order. The petitioner admittedly did not deposit the entire decretal amount as required in terms of the proviso to Section 17 of the Small Causes Court Act, 1887 (the Act 1887"). On 8 September 2006, the restoration application was rejected by the

Court on the ground that mandatory provision of proviso to Section 17 of the Act 1887 was not complied. On 4 January 2011, the petitioner moved another application (27-Ga) before the Small Causes Court, for recalling the earlier order dated 8 September 2006 and praying that the application under Order 9 Rule 13 of the C.P.C. be decided by permitting the petitioner to deposit the decretal amount. The Court vide order dated 16 April 2011 rejected the application being barred by res judicata.

3. The petitioner is assailing the order dated 16 April 2011 passed by the Small Causes Court, Gorakhpur rejecting the application (27-Ga) of the petitioner, and a direction has been sought that the restoration application (4-Ga) dated 23 November 2002 be decided on merit.

4. It is made clear that the order dated 8 September 2006 rejecting the restoration application is not being assailed.

5. It is not disputed by learned counsel for the petitioner that the provisions contained in proviso to Section 17 of the Act 1887 was not complied with. The learned counsel would submit that the language of the proviso is directory in nature and not mandatory, therefore, in the interest of justice, the judgment and decree should be recalled and the suit be heard on merits.

6. In rebuttal, Sri A.K. Pandey, learned counsel appearing for the respondents IInd set would submit that proviso to Section 17 of the Act, 1887 is a mandatory provision and not directory, it is not in dispute that the petitioner had not deposited the entire decretal amount, there is no illegality or infirmity in the impugned order.

7. The Court below vide order dated 8 September 2006 noted that the judgment and decree was passed on 23 December 1998 whereas the application under Order 9 Rule 13 of the C.P.C. was filed supported by an affidavit dated 23 November 2002. It was admitted by the petitioner in the application that due to wrong legal advice, mandatory provisions of Section 17 of the Act 1887 was not complied with, accordingly, the application was rejected. The petitioner on 4 January 2011 moved another application to recall the above mentioned order stating that due to inadequate legal advice, he was not aware of the provisions contained in Section 17 of the Act, 1887. It was further stated that the petitioner realised the mistake, consequently, filed an application to recall the order dated 8 September 2006 which has been rejected by the impugned order being an application for the same cause of action. The record would, thus, reflect that the requirement of depositing the decretal amount in terms of Section 17 of the Act 1887 was not complied by the petitioner.

8. The Apex Court in *Kedarnath Vs. Mohan Lal Kesarwari and Others*, AIR 2002 SC 582 : (2002) 1 JT 82 : (2002) 1 SCALE 87 : (2002) 2 SCC 16 : (2002) 1 SCR 144 : (2002) AIRSCW 170 : (2002) 1 Supreme 72 , held as follows:

"A bare reading of Section 17(1) Proviso shows that the legislature have chosen

to couch the language of the proviso in a mandatory form and there is 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 was to 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 de-posit 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 dispensation may be filed. 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. This Court in the case of Smt. Khilla Devi alias Manju Singh Vs. Smt. Vishwa Mohini Misra, (2005) 1 ARC 253 : (2005) 1 AWC 843 , Jai Prakash Vs. Gulab Singh Rathor, (2002) 1 AWC 557 , Dinesh Kumar Dubey Vs. Ganga Shankar Tiwari, (2006) 4 AWC 4134 and in Raj Kumar and Another Vs. Neeraj Kumar Singhal, (2010) 2 AWC 1157 , held that the compliance of Section 17 of the Act is mandatory for the maintainability of an application under Order IX, Rule 13 C.P.C.

10. A Division Bench in Raj Kumar Makhija and Others Vs. S.K.S. and Company and Others , on a reference made regarding the scope of Section 17 of the Act held that a bona fide mistake on the part of the applicant in not depositing the entire decretal amount cannot be condoned under Section 17 of the Act, the application would be liable to be rejected. The reference before the Court was as follows:

"Whether the proviso to Section 17 of the Provincial Small Causes Courts Act completely bars any rectification or removal of a bona fide error after the expiry of the period of limitation when substantial compliance by way of deposit of the decretal amount and furnishing security has been made within the period of limitation particularly when Section 5 of the Limitation Act, 1963 has been made applicable to Order IX Rule 13 of the Code of Civil Procedure?"

11. The Division Bench considered the judgment rendered in Kedarnath (supra) and held that the provisions of Section 17 of the Act is mandatory and non compliance thereof would entail dismissal of the application, non-compliance cannot be condoned or overlooked by the Court. There is no provision in the statute that would provide either for extension of time or to condone the default in depositing the rent within the stipulated period, the Court does not have the power to do so.

12. The Constitution Bench of the Supreme Court in Radhey Shyam and Others Vs. Chhabhi Nath and Others(2015) 3 AD 73 : (2015) 2 RCR(Civil) 606 : (2015) 3 SCALE 88 : (2015) 5 SCC 423 : (2015) 3 SCJ 552 : (2015) 1 UPLBEC 646 , held that writ petition under Article 226 of the Constitution is not maintainable against a judicial order of a Court. The Court approved the ratio laid down in Shalini Shyam Shetty and Another Vs. Rajendra Shankar Patil, (2011) 1 CTC 854 : (2010) 7 JT 529 : (2011) 1 RCR(Rent) 1 : (2010) 7 SCALE 428 : (2010) 8 SCC 329 : (2010) 8 SCR 836 : (2010) AIRSCW 6387 , that no petition can be entertained in writ jurisdiction being a dispute between landlord and tenant i.e. amongst private parties.

13. For the reasons and law stated herein above, I do not find any illegality or irregularity in the impugned order dated 16 April 2011 passed by first respondent, Judge Small Causes Court, Gorakhpur. The writ petition is dismissed, both on merit and maintainability.

Interim order, if any, stands vacated.

No order as to costs.