
(2017) 03 AHC CK 0059

In the Allahabad High Court

Case No : Matters Under Article 227 No. 1496 of 2017

Jagrup

APPELLANT

Vs

Satish

RESPONDENT

Date of Decision : 10-03-2017

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13
Provincial Small Cause Courts Act, 1887 — Section 17(1)

Citation : (2017) 2 ARC 69

Hon'ble Judges : Manoj Misra, J.

Bench : Single Bench

Advocate : Subhash Gosain, Advocate, for the Petitioner; Vivek Kumar Tripathi, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Manoj Misra, J.— Heard learned counsel for the petitioner and Sri V.K. Tripathi for the respondent.

2. The present petition has been filed against orders dated 13.12.2016 and 16.03.2016 passed by Additional District Judge, Court No. 7, Varanasi and Small Cause Court Varanasi in SCC Revision No. 07 of 2017 and Misc. Case No. 03 of 2004 respectively, by which petitioner's application under Order 9, Rule 13 CPC to set aside ex-parte decree dated 22.8.2003 in SCC Suit No. 58 of 1997 has been rejected and, thereafter, the revision preferred by the petitioner against rejection of his application has also been dismissed.

3. The admitted position in the case, as it appears from the order of the revisional court, is that the petitioner against whom ex-parte decree was passed by Judge Small Cause Court, has not complied with the provision of the proviso to sub-section (1) of section 17 of Provincial Small Cause Courts Act by either making a deposit of the decretal amount or by making an application, at the time of presenting the application to set aside ex-parte decree, to furnish security in lieu thereof. The petitioner has sought to explain non compliance of the aforesaid

provision by claiming that the decree was passed by a transferee court without any prior issuance of notice as regards transfer, as is required by Rule 89A of General Rules (Civil), and therefore the decree was a nullity.

4. The above contention of the petitioner has been rejected by the court below on the ground that prior to transfer of the suit proceeding, the suit was proceeding ex-parte against the defendant-petitioner and therefore there was no requirement to issue fresh notice to the defendant-petitioner upon transfer of the proceeding and in any case the provisions of the proviso to sub-section (1) of section 17 of Provincial Small Cause Courts Act have been held to be mandatory by the Apex Court therefore an application to set aside an ex-parte decree, without compliance of the mandatory provisions, was not maintainable.

5. Learned counsel for the petitioner has pressed the same pleas, which have not found favour with the courts below.

6. A perusal of the record would reveal that the SCC Suit No. 58 of 1997 was directed to proceed ex-parte against the petitioner on 03.09.2001 when despite service of summons, the defendant-petitioner failed to appear. When the case was proceeding ex-parte against the petitioner, it was transferred to another court on 03.09.2002. The transferee court, later, decreed the suit ex-parte on 22.08.2003 for arrears of rent and ejectment. It is not the case of the petitioner that the court to which the case was transferred lacked jurisdiction to proceed and decide the suit. In the given facts of the case, therefore, the ex-parte decree cannot be said to be nullity which may justify giving a go bye to the requirement of the proviso to sub-section (1) of section 17 of the Act.

7. In *Kedar Nath v. Mohanlal Kesharwani*: (2002) 2 SCC 16, the Apex Court has held that the provisions of the proviso to sub-section (1) of section 17 of Provincial of Small Cause Courts Act are mandatory in nature and if the said provisions are not complied with, the application under Order 9, Rule 13 CPC would not be maintainable. Admittedly, there was not only a decree for eviction but also of arrears of rent operating against the petitioner and there is no compliance of the requirement of the proviso to sub-section (1) of section 17 of the Act.

8. Under the circumstances, this Court finds no good reason to entertain this petition. The petition is dismissed.