
(2010) 09 AHC CK 0464
In the Allahabad High Court
Case No : Rent Control No. 4 of 1996

Kallo

APPELLANT

Vs

D.J. Gonda

RESPONDENT

Date of Decision : 27-09-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, 115, 145, 148, 151
Constitution of India, 1950 — Article 226
Limitation Act, 1963 — Section 5
Provincial Small Cause Courts Act, 1887 — Section 17, 17(1)
Registration Act, 1908 — Section 17, 17(2)

Citation : (2010) 09 AHC CK 0464

Hon'ble Judges : Anil Kumar, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Anil Kumar, J.—Heard counsel for the parties and perused the record.

2. By means of the present writ petition, the petitioner has challenged the order dated 6.12.1995 (Annexure-1) passed by Civil Judge, Gonda rejecting the petitioner's application under Order 9 Rule 13 CPC for non-compliance of the provision u/s 17 of the Provincial of Small Causes Court Act and the order dated 10.1.1996 passed by District Judge, Gonda dismissing the revision.

3. Heard Sri S.K. Mehrotra, learned Counsel for the petitioner and Sri Satish Chandra Kashish, Advocate on behalf of the contesting respondent No. 3.

4. Facts in brief that one Smt. Parvati Devi/respondent No. 3 filed a suit registered as SCC Suit No. 28 of 1986 along with her mother Smt. Mangla for ejectment and arrear of rent against the petitioner.

5. By order dated 15.4.1988, the suit was proceeded ex-parte and by order dated 5.5.1988 decreed ex-parte for ejectment and arrear of a sum of Rs. 3282.75/-.

6. Thereafter the petitioner moved an application for restoration of the suit under Order 9 Rule 13 Section 151 CPC read with Section 17 of the Provincial of Small Causes Court Act registered as Misc. Case No. 5 of 1988, dismissed in default by order dated 21.07.1990.

7. On 27.08.1990, the petitioner moved an application for restoration of Misc. Case No. 5 of 1988, registered as Misc. Case No. 7 of 1990, dismissed in default by order 13.02.1992.

8. Again on 17.02.1992, petitioner moved an application for restoration of Misc. Case No. 7 of 1990 registered as Misc. Case No. 2 of 1992, allowed by the court below by order dated 20.01.1994 on payment of cost of Rs. 35/-. Thereafter, petitioner moved an application before the respondent No. 2 supported by an affidavit (numbered as C-2/16 and C-2/17 respectively) praying exemption for depositing the amount of security in cash and accept security bonds to the satisfaction of the court below as he does not have adequate financial sources at that relevant point of time for depositing the cash security, accepted by the respondent No. 2 by order dated 21.01.1995 he was allowed to file security bond instead of cash security.

9. On 18.02.1995 the court below passed an order requiring the petitioner to file security bond on stamp paper giving details of immovable property and by order dated 24.03.1995 it was directed to file registered security bond by 12.04.1995. However, on 15.07.1995, the petitioner deposited the security bonds before the court below (respondent No. 2) on stamp paper but it was presented unregistered and a plea was taken on behalf of him that the same does not required to register in view of the provisions as contained in Section 17(2), (vi) read with the explanation of Registration Act, 1908.

10. By order dated 06.12.1995 the respondent No. 2 rejected above said request of the petitioner and also rejected the application moved by him earlier under Order 9 Rule 13 CPC. Feeling aggrieved, petitioner filed a revision u/s 25 of the (Annexure-2), rejected by order dated 10.01.1996, hence the present writ petition has been filed before this Court thereby challenging the said orders.

11. Sri S.K. Mehrotra, learned Counsel for the petitioner has assailed the order under challenge on the points mentioned hereinbelow.

(I) It is well settled law the security bond under the orders of the court concerned is not required to be registered in view of the provision contained in Section 17(2), (vi) read with explanation to the above section of the Registration Act, 1908.

(II) u/s 145 CPC as substituted in the State of U.P. the provision is made for enforcement of the security bond in the manner in which the decree of the court is executed. In view of this provision also the security bond filed under the orders of the court is not required to be registered.

(III) As per proviso to Section 17(1) of Provincial Small Causes Court Act the

requirement is that an application for an order to set aside a decree passed *ex parte* shall at the time of presenting his application or give such security for the performance of the decree or compliance with the judgment of the court as the court may, on a previous application made by him in this behalf have directed.

12. He further submits that as the clause "previous application" has been interpreted by the Hon"ble Apex Court and by this Court thereby laying down that the security bond has to be presented before the court and should be available for consideration before the application under Order-9 Rule 13 CPC comes up for consideration of the court. So, in view of the settled proposition of law the application under Order 9 Rule 13 CPC filed by the petitioner could not have been rejected before the 1st restoration application under Order-9 Rule 13 CPC came to be restored, became fit to be considered by the trial court. The rejection of the security bond filed by the petitioner by the trial court was unsustainable and arbitrary for the said reason.

13. In support of his submission, learned Counsel for the petitioner relied on the case:

(i) Ram Saran Das Vs. Yudhishtar Prasad and Others, column II it has been held that;

the assignment is really by an order of the Court, and the order is exempted from registration u/s 17(2), (vi).

The legislature obviously contemplated that a security bond may be in favour of the presiding officer of the Court itself and may be assigned by him to any person whom he considers to be a fit person or entitled to sue upon it. We also find that various forms of security bonds are given in the appendices E, F, G, and H attached to the Civil Procedure Code, and many of them are in favour of the presiding Judge himself. It is therefore difficult to believe that the legislature intended that there should in every case have to be a registered deed of transfer executed by the presiding officer and duly registered.

(ii) B. Rama Bhatta v. B. Kodandarama Bhatta And Ors. AIR 1963 Mys 332, in which it has been held as under:

A Bench of the Bombay High Court in Jayappa Lokappa Narsinganawar Vs. Shivangouda Dyamangouda Patil, held that a security bond, being a part of judicial proceedings and incorporated with it, the provisions of Section 17 of the Registration Act, do not apply to it, as proper judicial proceedings whether consisting of pleadings hied by the parties or of orders made by the Court, do not require registration.

(iii) Khursheed v. 1st Additional District Judge, Moradabad and Ors. 1988 ARC 363 paras 7 and 9 at page 367

The further intent of this proviso is that before an application for setting aside an

ex parte decree is considered either the applicant deposit, in cash, or furnishes security, it is not the intention that even if the judgment-debtor deposits in cash and security then too, his application for setting aside the decree be not considered. In the circumstances, the use of the word "previous" application in the proviso is not mandatory but only directory. What the Court has to see at the time of examining the application for setting aside the ex parte decree, is to ensure that either the decretal amount has been deposited in cash or security has already been furnished. The making of the application for furnishing security before the making of the application for setting aside the ex parte decree is not a mandatory requirement.

In view of the above, I am clearly of the opinion that the proviso to Section 17 being only a rule of procedure, the provision for making a previous application for permission to furnish security is only directory and not mandatory. The Court has only to see as to whether the security has been furnished before it considers the application for setting aside the ex parte decree.

(iv) Suresh Chand v. VIIth Addl. District Judge, Muzaffarnagar and Ors. 1991 (2) ARC 545, para 12 at page 548 held as under.

The use of the word "previous application" is only directory and not mandatory. The only duty cast upon the Court is to ensure, that on the date of allowing the application under Order 9, Rule 13, C.P.C.

(v) Kedar Nath v. Mohan Lal Kesarwani and Ors. 2002(1) ARC 186 Para - 9 at page 190 held as under:

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.

14. In view of the above said facts, Sri S.K. Mehrotra, learned Counsel for the petitioner has argued that the orders under challenge are arbitrary in nature and liable to be set aside.

15. Sri S.C. Kashish, learned Counsel for the contesting respondent No. 3 supported the orders under challenge in the present writ petition on the ground that as the petitioner had not complied the mandatory provisions as provided u/s 17 of the Provincial Small Causes Court Act. So, the action on the part of the respondent No. 2 thereby rejecting the petitioner's application under Order 9 Rule 13 for recalling of the order dated 05.05.1988 is perfectly valid and also the action on the part of the respondent No. 1 thereby rejecting the petitioner's revision by order dated 10.01.1996 is in accordance with law.

16. He further submits that in the present case, the petitioner wants to linger the matter in question on one or other pretext evident from the fact that after ex-parte decree dated 5.5.1988 passed against him the application moved under Order 9 Rule 13 dismissed in default, twice for want of prosecution. Keeping the

said facts, the petitioner is not entitled for any equitable relief under Article 226 of the Constitution of India and the present writ petition liable to be dismissed.

17. I have heard the counsel for the petitioner and perused the record.

18. In order to resolve the controversy which is involved in the present case, it is necessary to have a look at the provisions as provided u/s 17 of the Provincial Small Causes Courts Act, 1887, the same is quoted hereinbelow:

Application of the Code of Civil Procedure.- (1) The procedure prescribed in the Code of Civil Procedure, 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 realized in manner provided by section (145) of the CPC (1908).

19. The provisions of Section 17 of the Act have been interpreted by the Hon"ble Apex Court in the case of Kedar Nath v. Mohan Lal Kesarwani and Ors. 2002(1) ARC 186, it has been observed as under:

The object behind establishing Small Causes Courts conferred with jurisdiction to try summarily such specified category of cases which need to be and are capable of being disposed of by adopting summary procedure of trial is to secure an expeditious disposal and to curtail the lengthy procedure of litigation. Excepting an order for compensatory costs in respect of false or vexatious claims or defences or an order imposing fine or directing the arrest or detention in the civil prison of any person (except where such arrest or detention is in execution of a decree), orders and decrees of courts of small causes are not appealable: they are only revisable by the High Court (or by District Court u/s 115 of CPC as amended in its application to State of U.P.). The jurisdiction to entertain and hear an application to set aside a decree passed ex-parte or for a review of judgment by courts of small causes is sought to be qualified and narrow down by imposing condition as to deposit or giving security for performance or compliance by enacting proviso to Sub-section (1).

Such a provision fits in the scheme of the PSCC Act. Although there is no authoritative pronouncement by this Court (none brought to our notice) interpreting the nature and scope of the proviso however, the learned Counsel for the appellant brought to our notice a number of decisions delivered by the High Courts of Allahabad, Oudh, Madras, Orissa, Rajasthan and Lahore which have

taken the view that the proviso is mandatory and non-compliance therewith would entail dismissal of the application because such non-compliance cannot be condoned or overlooked by the court.

20. In *Puran Prasad v. Judge, Small Cause Courts/Civil Judge (Sr. Div.). Dehradun* and Ors. 2005 (2) U.D. 388, it has been observed as under:

4. View of the principle of law laid down in *Kedar Nath v. Mahesh Lal Keserba* 2002 (1) ARC 186, in which Hon'ble Supreme Court has held that the compliance as required under Proviso to Section 17 of the aforesaid Act is mandatory. Learned Counsel or the petitioner drew my attention to the principle of law contained in *Viswa Nath Singh v. Gopal Singhal* 1986(1) ARC 102 and *Surendra Nath Mittal v. Dayanand* 1985(2) ARC 517, and argued that the Court can condone the delay in making the compliance of Proviso to Section 17 of the Provincial Small Cause Courts Act, 1887. On examination of *Vishwa Nath* case (supra), it was found that the deposit was made in said case but the same was short and the court permitted the party to make good the shortage in deposit required u/s 17. In *Surendra Nath Mittal's* case (supra) also deposits were made but the same were found to be short and the defendant was permitted to make good the deficiency. But, in the present case, the application under Rule 9, Order XIII of the Code of Civil Procedure, 1908 was moved on 26.07.1999 and neither any deposit is made that day, nor any application for permitting to furnish security was sought. Not only this, even after the objections were filed on 4.12.2000 by the of Section 17 was not made by the defendant, the defendant still slept over the matter and moved application only on 9.1.2002 for condoning of delay to deposit the amount required under Proviso to Section 17 of the Provincial Small Cause Courts Act, 1887. It is stated in said application that it occurred to the defendant on 4.1.2002 that compliance of aforesaid proviso is to be made. The same cannot be said to be a valid explanation/reason for non-compliance of the above provision.

22. From the perusal of the judgment of the Apex Court in the case of *Kedarnath Vs. Mohan Lal Kesarwari and Others*, as well as in the case of *Puran Prasad v. Judge, Small Causes Court, Dehradun* 2005(2) UD 388. The position is clear that Section 17 being mandatory, the application under Order 9 Rule 13 CPC cannot be allowed unless the deposit has been made before the Judge, Small Cause Court along with an application under Order 9 Rule 13 CPC.

23. Now reverting to the facts of the present case, it is not disputed that initially the suit filed by the respondent No. 3 for rejecting the arrears of rent against the petitioner was decreed ex-parte by order dated 15.4.1988 and it was allowed. The petitioner was in arrear of rent amounting to Rs. 3282.25 p against which he filed an application under Order 9 Rule 13 and admittedly in the present case there is non-compliance of the mandatory provisions of Section 17 of the Provincial Small Causes Courts Act, 1887 by the petitioner. The said application was dismissed on 21.07.1990 thereafter again petitioner applied for restoration along with an application u/s 5 of the Limitation Act dismissed by order dated

13.02.1992, again, he moved an application for restoration of the order dated 17.02.1992 allowed by order dated 20.01.1994 by the respondent No. 2 with a cost of Rs. 35/-.

24. Thereafter, on behalf of the petitioner an application was moved to allow him to deposit the security bond instead of cash security allowed by the respondent No. 2 by order dated 21.01.1995. Thereafter, in the matter in question the O.P. No. 2 passed the order dated 18.02.1995 and 24.03.1995 respectively directing the petitioner to file registered security bond by 12.04.1995 on stamp paper giving details of immovable property. In response to the same, the petitioner moved an application before the trial court (respondent No. 2) requesting therein that there is need to file registered security bond in view of the provisions as contained in Section 17(2), (vi) of Registration Act, 1908, the same was registered by the Judge, Small Cause Court (respondent No. 2) by order dated 06.12.1994 on the ground that there is a non-compliance on the part of the petitioner for the mandatory provisions of Section 17 of the Provincial Small Causes Courts Act, 1887 and rejected the petitioner's application under Order 9 Rule 13.

25. Needless to mention herein while passing the order dated 06.12.1995 the respondent No. 2 had given a categorical finding of fact that the petitioner (Kallo) has not taken any steps to comply the order dated 24.03.1995 even he has not taken any steps to comply the order dated 15.07.1995 by which an order has been passed to deposit the security bond. Further a finding of fact has also been given by the court below that the alleged security bond by way of security should be registered under the provisions of Section 17 of the Registration Act, 1908 and further it was held that the order dated 24.03.1995 passed by the previous predecessor for depositing the security bond which has to be registered had not been valid by the averment and even no application has been moved u/s 148 CPC for extension of time for the said purpose. Against which the revision has been filed, the same was rejected by respondent No. 1 by order dated 10.01.1996.

26. In the case of M.P. Patil v. Methodist Church in Sourthern Asia and the Methodist Episcopal Church in sourther Asia, Bombay and Ors. 1983 ALJ N.O.C. 19, the court took a view that case security is personal as well as immovable property needs registration because part of the security is related to immovable property.

27. In the case of Prabhu Dayal v. District Judge, Saharanpur 1983(1) ARC 757, the court took a view that security, furnished by the defendant in compliance of Section 17(1) of the Act, if accepted by the Court, in spite of the fact that it was un-registered, such an order should not be disturbed.

28. In view of the above said facts, the position emerged out is that where the security is furnished by way of un-registered bond then it is the discretion of the court to accept it or not. In the present case the petitioner requested that he is

unable to deposit the security in cash due to financial hardship therefore the court has permitted him to deposit registered security bond etc. Accordingly, the contention raised by the learned Counsel for the petitioner that the said action of the court below is contrary to law is rejected.

29. Further, the Hon"ble the Supreme Court in the case of Kedar Nath (Supra) has held that the provisions of Section 17 of the Provincial of Small Causes Act are mandatory and the decretal amount of Security with the prior permission of the court is to be deposited along with the application for restoration and admittedly in the present case, the petitioner did not comply the said mandatory condition as such the argument raised by the petitioner that the security bond filed by the petitioner not required registration in view of the Section 17(2), (vi) of Registration Act, 1908 and the authorities relied in support of the said submission did not help or improve the case of the petitioner,

30. I do not find least error in the impugned orders as repeated opportunities were granted to the petitioner to deposit the decretal amount but he has neither avail the same nor deposit the same as directed by the court below.

31. For the foregoing reasons, the present writ petition filed by the petitioner lacks merit and is dismissed.

32. No order as to costs.