
(2006) 08 AHC CK 0224
In the Allahabad High Court

Lalji Gupta and Another

APPELLANT

Vs

Addl. Dist. Judge/Spl. Judge and Others

RESPONDENT

Date of Decision : 29-08-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151
Provincial Small Cause Courts Act, 1887 — Section 17, 25

Citation : (2006) 7 ADJ 540 : AIR 2007 All 1 : (2007) 1 AWC 176

Hon'ble Judges : Sanjay Misra, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Sanjay Misra, J.—The respondent No. 3 filed a Suit No. 54 of 1994 in the Court of Small Causes for eviction and arrears of rent against petitioners. The suit was decreed ex parte on 30.9.1994. The petitioners filed an application under Order 9, Rule 13, CPC and also an application u/s 17 of the Provincial Small Cause Courts Act for setting aside the ex parte judgment and order and with the prayer that security bond submitted by the petitioners may be accepted for compliance of Section 17 of the Act. The said application was numbered as Misc. Application No. 149 of 1994. By an order dated 10.11.1994, the trial Court directed the petitioners to deposit half of the decretal amount in cash and to submit security bond with respect to the half of the decretal amount. The petitioners thereafter deposited Rs. 3600 in cash and by an application prayed that security bond already filed for Rs. 7200/- may be accepted for the compliance of half of the decretal amount. By an order dated 31.1.1996 the aforesaid Misc. Application No. 149 of 1994 was rejected by the Judge Small Causes. The petitioners thereafter filed a revision being Revision No. 93 of 1996 u/s 25 of the Provincial Small Cause Courts Act which has also been dismissed by the judgment and order dated 12.5.1997. The petitioners by means of the present writ petition seek quashing of the aforesaid orders as also to set aside the ex parte decree dated 30.9.1994.

2. Learned Counsel for the petitioners submitted that provisions of Section 17(1) of the Act are procedural in nature and, therefore, must be liberally construed and placed reliance upon a decision of this Court in the case of Qazi Niyamat Ullah v. VIth Addl. District Judge reported in 1993 (1) ARC 151 : 1993 ALJ 489 . He has also contended that an application u/s 17 of the Act need not be filed before the application under Order 9, Rule 13, CPC and, therefore, an application for setting aside the ex parte decree cannot be dismissed on the ground that it was filed before the filing of the application for furnishing security. He has placed reliance upon decision of this Court in the case of Bakulabai Vithoba Palampalle Vs. Rajnabai Prabhodchandra Muchala and Others, and Khursheed v. 1st Addl. District Judge, reported in II1988 ACC 363. While relying upon the decision in the case of Balvir Singh Chauhan v. Vijai Kumar Agrawal reported in I 1987 ARC 336 he has contended that an ex parte decree can be set aside u/s 151, CPC and an application under Order 9, Rule 13, CPC may not be required and, therefore, there would be no question of non-compliance of Section 17(1) of the Act. He has further submitted that if an application for setting aside ex parte decree has been filed within limitation but without security, which was filed subsequently it would amount to substantial compliance of Section 17 of the Act. For the aforesaid purpose he has cited a decision of this Court in the case of Prabhu Dayal v. District Judge, Saharanpur reported in 1983 ACC 757. It is his contention that even if the amount of deposit falls short it would not amount to non-compliance of the requirements of Section 17 of the Act if the shortfall was subsequently deposited and has relied upon a decision of this Court in the case of Mahanand Maheshwari v. U.P. Electricity Board reported in 1982 AC 41 (sic). It has been contended that an application under Order 9, Rule 13, CPC must be construed liberally and even if there has been negligence on the part of a party, the other party can be compensated by cost and has cited the decision of the Hon"ble Supreme Court in the case of G.P. Srivastava v. R.K. Raizada reported in 2000 ACJ 1390 : 2000 ALJ 863.

3. Learned Counsel for the respondents on the other hand submitted that provisions of Section 17(1) of the Act are mandatory and if the requirements are not complied then the application under Order 9, Rule 13, CPC would not be maintainable. He has stated that in the present case provisions of Section 17(1) of the Act were not complied with by the petitioners and, therefore, both the Courts below have rightly denied the relief to them and his application under Order 9, Rule 13, CPC has been rightly dismissed. In support of his contention he has placed reliance upon the decision of Hon"ble Supreme Court in the case of Oriental Insurance Co. Ltd. Vs. Momina Begum and Others, United India Insurance Co. Ltd. Vs. Nidhi Toshniwal and Others, Sagir Khan v. District Judge, Farukhabad reported in I 1996 ACC 414 in the case of Ram Chandra v. IXth Additional District Judge, Varanasi reported in I 1991 ACC 501 : 1991 ALJ 551 ; Bhaskaran Vs. Ravindran, Mohammad Yasin v. Jai Prakash reported in II 1988 ACC 575 : AIR 1989 SC 197.

4. Having heard Sri N.D. Keshari learned Counsel for the petitioners and Sri S.C.

Srivastava, learned Counsel for the respondents and upon perusing the record it is found that by an order dated 10.11.1994 Judge, Small Cause Courts had directed the petitioners to deposit half of the decretal amount in cash and for the other half, they were required to file surety bond. From the record it appears that the petitioners deposited Rs. 3600 in cash and for the balance amount they prayed that security bond of Rs. 7200 already filed by him may be accepted. The trial Court while dismissing the application has recorded a finding that the amount deposited by the petitioners as per directions of the Court was not half of the decretal amount inasmuch as by the report dated 2.11.1994, the decretal amount was Rs. 9536 and, therefore, the deposit of Rs. 3600 as half of the decretal amount was short. An order dated 27.1.1995 was passed by the Court requiring the petitioners to deposit the short fall amount of Rs. 1136. However, according to the trial Court such short fall was not deposited by the petitioners. Consequently upon non-compliance of the provisions of Section 17 of the Act, the application under Order 9, Rule 13, CPC filed by the petitioners was rejected. The revisional Court while dismissing the revision of the petitioners found that a decree of Rs. 7200 as arrears of rent and Rs. 1136 as costs had been passed by the Court below. It has recorded that the decretal amount was Rs. 8336 and, therefore, the deposit of Rs. 3600 by the petitioner was short by Rs. 568. It has consequently proceeded to hold that in view of the aforesaid short fall the petitioners have not complied with the provisions of Section 17 of the Act therefore, the revision has been dismissed. From the record it is seen that whereas the trial Court has found the decretal amount to be Rs. 9536/- the revisional Court has taken the decretal amount to be Rs. 8336/-. After dismissal of their application by the trial Court, the petitioners had proceeded to deposit a sum of Rs. 1136/- on 12.3.1996 and have claimed that upon deposit of this amount he had made sufficient compliance of the provisions of Section 17 of the Act. Before the trial Court admittedly the petitioners had not deposited half of the decretal amount in cash but before the revisional Court the deposit made by the petitioners had total led to Rs. 4736/- (Rs. 3600 deposited on 9.2.994 + Rs. 1136/- deposited on 12.3.1996). It is therefore, seen that the revisional Court while passing the impugned order has not taken into consideration the deposit of Rs. 1136/- by the petitioners after rejection of their application by the trial Court. The contention of the learned Counsel for the petitioners is that the provisions of Section 17 of the Act are procedural and remedial in nature and, therefore, the deposit made even at a later stage would amount to sufficient compliance of Section 17 of the Act.

5. In the case of Qazi Niyamat Ullah 1993 ALJ 489 (supra) this Court was considering a situation where an application for furnishing security was filed along with the application under Order 9, Rule 13, Civil Procedure Code. This Court found that the petitioners therein had furnished the security bonds within time specified by the Court below although the Court had not passed any order accepting the same. The trial Court then proceeded to allow the application under Order 9, Rule 13, CPC and also accepted the security bond on the same

day. It was held that the requirements of Section 17 had been complied and, therefore, set aside the order of revisional Court. Facts of the aforesaid case are quite different from those in the present case. The controversy in the present case is not as to whether the application u/s 17 of the Act was filed before or along with the application under Order 9, Rule 13, Civil Procedure Code, it is that half of the decretal amount which the petitioners were required to deposit in cash by order of the trial Court was not done inasmuch as there was a shortfall by Rs. 1136/- and in spite of an order dated 27.1.1995, the petitioners had failed to deposit the said amount.

6. In the case of Suresh Chandra (supra) this Court had held that on the date the application under Order 9, Rule 13, CPC is allowed, the Court should ensure that the entire decretal amount has been deposited and the security has been furnished. The facts of the present case are quite different. In the present case, admittedly the petitioners were required to deposit half of the decretal amount in cash and by an order dated 27.1.1995, they were required to deposit Rs. 1136 (costs of the suit) which the petitioners failed to deposit. Therefore, on the date when the application under Order 9, Rule 13, CPC was considered by the trial Court, there was non-compliance of the order of the trial Court by the petitioners and the deposit u/s 17 of the Act had not been made.

7. In the case of Balvir Singh Chauhan (supra) facts were that the suits were transferred from one Court to another Court and no information of the transfer was given to the parties. The suit was subsequently decreed ex parte. The defendant thereafter had filed an application under Order 9, Rule 13, CPC and the Court found that the reason of his absence was sufficiently explained, but it dismissed the application on the ground of non-compliance of Section 17 of the Act. This Court therefore, held that since the notice of the transfer of suit was not given to the parties the Court had inherent powers u/s 151, CPC to set aside the ex parte decree. The facts of the case are not at all applicable to the facts of the present case.

8. In the case of Prabhu Dayal (supra) it was held that when the application had been filed within limitation and the Court had allowed time to furnish security which was furnished within time allowed by the Court then it would amount to substantial compliance of Section 17(1), of the Act. In the present case, the Court, allowed the petitioners to deposit Rs. 1136/- by order dated 27.1.1995. the petitioners did not deposit the amount and their application was dismissed for non-compliance of the requirements of Section 17 therefore, the facts of the present case are quite different from those in the case of Prabhu Dayal (supra).

9. In the case of Mahanand Maheshwari (supra) the amount deposited as security was found short but the trial Court proceeded to set aside the ex parte decree. The defendant deposited the deficient amount after setting aside of the decree thereby making the deficiency good at a late stage. It was held that this would amount to compliance of Section 17 of the Act. The facts of the present case are not to the effect that the application under Order 9, Rule 13, CPC was

allowed in spite of the short fall in depositing half of the decretal amount in cash as directed by the Court below.

10. In the case of G.P. Srivastava 2000 ALJ 863 (supra) the Hon''ble Supreme Court has laid down that the expression "prevented by any sufficient cause" must be construed liberally and sufficient cause cannot mean to cover circumstances prior to the date of the order and, therefore, the ground of illness cannot be rejected merely because medical certificate is obtained from the private doctor and held that even if the defendant was negligent the opposite party could be compensated by costs by setting aside the ex parte decree. In the present case, the application under Order 9, Rule 13, CPC has been rejected due to non-compliance of the provisions of Section 17 of the Provincial Small Cause Courts Act and, therefore, the aforesaid decision cannot be of any help to the petitioners.

11. In the case of Kedar Nath 2002 ALJ 351 (supra), Hon''ble Supreme Court has laid down in paras 8 and 9 as under:

8. 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 in the amount due from the applicant under the decree or in pursuance of the judgment. The provision as to deposit can be dispensed with the Court in its discretion subject to a previous application by the applicant seeking 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 upon 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. 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.

12. In the present case the petitioners had filed an application for acceptance of surety bond towards decretal amount. It was the discretion of the Court to accept the security bond or to direct the petitioners to deposit the decretal amount. Once the Court passes the order with respect to requirements of Section 17 of the Act, the delay made on the part of the Court in passing the appropriate

order cannot be said to be a delay on the part of the applicant. In the present case, deposit of half of the decretal amount was directed by the Court. It was not deposited by the petitioners inasmuch as the deposit made by them was short. They were given an opportunity by the trial Court to make good the short fall. They failed to avail the aforesaid opportunity which if they had availed within time would have ensured that they had made full compliance of the provisions of Section 17 of the Act. Therefore, in so far as the order of the trial Court is concerned, no error can be found in the same. Admittedly the petitioners had not deposited the short fall in spite of the order of the trial Court.

13. The revisional Court has recorded the decretal amount which is different from that recorded by the trial Court. However, irrespective of the decretal amount as mentioned by the trial Court or as mentioned by the revisional Court, the petitioners had deposited the short fall of Rs. 1136 after rejection of their application by the trial Court hence such deposit made subsequently would not amount to compliance of the requirement of Section 17 of the Act. The record indicates that upon deposit of Rs. 1136/- on 12.3.1996 subsequently the petitioners had deposited half of the decretal amount in cash at the time when their revision has been considered. The revisional Court has failed to consider that aspect of the matter and has not addressed itself on the fact that the deposit was made after the order of the trial Court. However, this Court finds that there was non-compliance of the mandatory provisions of Section 17(1) of the Provincial Small Cause Courts Act where the applicant praying for setting aside a decree passed ex parte is required to satisfy the requirement of deposit of the decretal amount at the time of presenting his application or as the Court may have directed. There has not been compliance by the petitioners even upon a direction issued by the Court. Rejection of the application under Order 9, Rule 13, CPC by the Court below therefore, does not suffer from any error whatsoever. The jurisdiction of the revisional Court u/s 25 of the Provincial Small Causes Courts Act is quite limited and since the order of the trial Court was in accordance with law, the revision of the petitioners was liable to be dismissed.

14. For the reasons stated above, this writ petition has no merits. It is accordingly dismissed. No order is passed as to costs.