
(2007) 01 AHC CK 0015
In the Allahabad High Court
Case No : C.M.W.P. No. 17592 of 2003

Munni Lal and Another	Vs	APPELLANT
Special Judge, E.C. Act, and Others		RESPONDENT

Date of Decision : 12-01-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 15 Rule 5, Order 15 Rule 5(1), Order 15 Rule 5(2)
Transfer of Property Act, 1882 — Section 106

Citation : (2008) 5 AWC 5008

Hon'ble Judges : Rakesh Tiwari, J

Bench : Single Bench

Advocate : H.K. Shukla, A.K. Gupta and P.N. Tripathi, for the Appellant;
Ramanand Pandey and P.N. Pandey, for the Respondent

Final Decision : Dismissed

Judgement

Rakesh Tiwari, J.—This petition has been filed by the tenant for quashing the orders dated 14.1.1997 by which the Civil Judge Basti (Junior Division) has struck off the defence of the Petitioner and allowed the applications Ga 2/32 and Ga 2/36 directing the case file to be put up on 20.1.1997 for evidence. The Petitioner has also challenged the order dated 11.9.2002, passed by the revisional court affirming the aforesaid order dated 14.1.1997, passed by the trial court.

2. The facts of the case are that Respondent No. 3 Kanhaiya Lal filed Suit No. 198 of 1998 for eviction and recovery of arrears of rent from the Petitioner. On the said suit a compromise was arrived at between the tenant Munni Lal and the landlord Kanhaiya Lal that the landlord will demolish the shop under the tenancy of Munni Lal and construct a shop measuring 4" 9" in its place, the possession of which will be handed over to the Petitioner in lieu of the demolished shop.

3. According to the Petitioner, it was also agreed between him and the landlord that till such time the new shop is constructed and its possession is handed over

to him. The landlord was also to allow the Petitioner-tenant to run his business in another vacant shop of the landlord on rent @ Rs. 100 per month till possession of newly constructed shop is given to him. The terms of compromise in this regard relied upon by the Petitioner in the courts below are as under:

4. It is alleged by the Petitioner that though possession of the Petitioner's shop was taken by the landlord in pursuance of the agreement who demolished the same but he neither constructed the new shop in its place nor allowed the tenant to do his business in the vacant shop in the possession of the landlord as per the alleged terms of the compromise relied upon by the tenant. It is stated that the Petitioner filed proceedings against the landlord for compliance of the terms of the compromise and the landlord also filed J.S.C. Suit No. 6 of 1991 against the tenant Munni Lal and Chaudhary Kashi Tailors through its Proprietor Munni Lal for arrears of rent since October, 1989 amounting to Rs. 2,070 @ Rs. 90 per month and praying for the ejectment of the Petitioner on this ground. It was averred in the suit that notice dated 25.7.1991 u/s 106 of Transfer of Property Act had been served on the tenant on 30.7.1991 but the shop in dispute had neither been vacated nor arrears of rent had been paid to the landlord who also claimed damages amounting to Rs. 2,070 @ Rs. 300 per day for use and occupation of the shop after termination of the tenancy. Expenses and court fee was also claimed.

5. Written statement was filed by the tenant in J.S.C. Suit No. 6 of 1991, bringing on record the terms of compromise in earlier Suit No. 198 of 1988 and denying the plaint allegations inter alia that he was an old tenant and was doing business of tailoring under the name of Chaudhary Kashi Tailors which was being done by his father and he is neither in arrears of rent nor has committed any default in its payment ; that the landlord had earlier filed Case No. 7 of 1987 under Provincial Small Cause Court Act against him and two other tenants in the Court of Munsif, Basti. It was also stated that the Petitioner alongwith other tenants had also filed Case No. 198 of 1988 in the Court of Civil Judge, Basti against eviction in which they had been granted interim injunction ; that a compromise written statement entered into between the parties in which the landlord agreed to provide the Petitioner with a new shop of 9 ft 4 ft dimension as well as a triangular space 9 ft. 4 ft. (chabutra) on rent Rs. 100 per month ; that while shifting the Petitioner to the chabutra, it was found that it was only half in size and floors etc. of the shop offered to the Petitioner was incomplete. It was also averred by him that after the death of his father the tenancy devolved upon his mother Smt. Budhna and after her death on him and that he has been depositing rent in the case of Budhna v. Kashi Prasad and is not in arrears of rent due to the Petitioner. It was also stated in the written statement that the landlord had let out the newly constructed shop to another person instead of to the Petitioner as agreed. The entire rent @ Rs. 90 per month has been deposited in the Court.

6. The landlord moved an application in the suit under Order XV, Rule 5, Code of

CPC for striking off the defence of the tenant on the ground that he had failed to comply with the aforesaid provisions of law.

7. Objections were filed by the tenant to the aforesaid application filed under Order XV, 5, Code of CPC by the landlord inter alia that the landlord-Respondent had himself failed to comply with the terms of the compromise dated 5.8.1989 by not giving the newly constructed shop to tenant in lieu of shop under his tenancy earlier which was demolished. It was also averred in the objections that since the possession of the demolished shop under the tenancy of the Petitioner has been taken by the landlord and he has not been given any shop in lieu thereof as agreed between the parties, hence in the circumstances there is neither any liability on him to pay the rent till he is given a shop in lieu of old shop nor there arises any question of ejection as such the application of the landlord for striking off the defence of the Petitioner was liable to be rejected.

8. The trial court allowed application of the landlord filed under Order XV, Rule 5, Code of CPC striking off the defence of the Petitioner by the impugned order dated 14.1.1997.

9. Aggrieved by the aforesaid order dated 14.1.1997 tenant Petitioner filed Revision No. 66 of 1997 against the order dated 14.1.1997 on the ground that the order of the trial court is illegal and without jurisdiction. He also moved an application dated 13.11.2000 along with the tender depositing the entire rent arrears @ Rs. 100 per month w.e.f. January, 2002 to January, 2003 also. Tender of entire amount was also appended therewith.

10. The revisional court during the pendency of the revision by its order dated 13.11.2000 allowed the application of the Petitioner for depositing the amount. In pursuance of the order dated 13.11.2000, the Petitioner alleges to have deposited entire rent of Rs. 15,200, by three tenders which was withdrawn by the landlord. The revisional court thereafter by its order dated 11.9.2002 dismissed the revision confirming the order dated 14.1.1997, passed by the trial court by which the defence of the Petitioner has been struck off. It is urged by the counsel for the Petitioner that the order of revisional court is illegal as it has interpreted the terms of the compromise holding that it was settled between the parties that the landlord will permit the tenant to occupy his own shop under his tenancy on rent @ Rs. 100 till the landlord gives a newly constructed shop to him.

11. It is urged that interpretation of the terms in the above manner was not even there in the plaint/case of the landlord wherein he had claimed that the settled rate of rent of the shop was Rs. 90 per month. It is stated that the revisional court has failed to consider the order of its predecessor dated 13.11.2000 (Annexure-9) to the writ petition by which the tenant had been allowed to deposit the entire rent and hence there remained no case for striking off the defence of the Petitioner. The counsel for the Petitioner has relied upon:

1. Bimal Chand Jain v. Sri Gopal Agarwal. 1981 ARC 463 (SC) Para 6.

2. Sudhir Kumar Gupta v. Dr. S. K. Raj, 1998 ARC 1545 Paras 5, 6 and 10.
3. Atma Ram Vs. District Judge, Dehradun and others,
4. Om Prakash Vs. Addl. District and Session Judge, Kanpur Nagar and others,
5. Kunwar Baldevji Vs. XIth Additional District Judge and Others, in support of his case.

12. It is further submitted that the provisions of Order XV, Rule 5, Code of CPC are to protect the interest of the landlord and not to penalize the tenant. The tenant having already deposited the entire amount in pursuance of the order of the revisional court dated 13.11.1997, his defence should not have been struck off and he ought to have allowed to contest the matter on merits.

13. It is lastly submitted that the conduct of the landlord who had entered into compromise with the Petitioner-tenant and promised to provide a shop measuring 4" 9" to the tenant but did not fulfil his assurance given to the tenant is also to be seen hence the writ petition deserves to be allowed by quashing the impugned orders.

The Respondent has relied upon the following cases:

1. Kunwar Baldevji Vs. XIth Additional District Judge and Others,
2. Atma Ram Vs. District Judge, Dehradun and others,
3. Dinesh Chand Gupta v. Pradeep Bhargava, 1984 ACJ 214 Para15 and
4. Mranalini B. Shah and Anr. v. Bapalal Mohanlal Shah, 1978 (2) RCR 643 (SC) Para12.

14. Per contra counsel for the Respondent submits that Rule 5 under Order XV of the Code of CPC has been inserted by U. P. Act No. 157 of 1976 (1.1.1977) and w.e.f. 3.10.1981 which provides for striking off the defence on failure of the tenant to deposit the admitted amount/arrears of rent on the first date of hearing of the suit by the landlord for eviction. It is stated that the provisions of Order XV, Rule 5 of the Code of CPC are mandatory and empowers the trial court to permit the tenant to remain in possession provided he deposits the entire amount of rent and arrears as admitted to be due on him alongwith 9% interest on the first date of hearing and continues to deposit the above rent continuously month by month ; that it also provides that on failure to deposit the rent as aforesaid, the Court is empowered to strike off the defence of the tenant.

15. Relying upon the decision in Bimal Chand Jain (supra), the High Court pointed out the purpose of enacting the provisions of Rule 5 in Order XV that it was not to give lever to the landlord to get a tenant punished for insignificant lapses.

16. In the decision rendered by the Apex Court in Bimal Chand Jain (supra), the question considered was that in a case where no representation under Sub-rule

(2) was made by the Appellant, whether the Court was obliged to strike off the defence? The Supreme Court gave its views as to how the provisions of Order XV, Rule 5 should be considered.

17. According to the Court, the purpose was merely to ensure that the dues of the landlord are properly secured and he can get his rent regularly even though the litigation may continue. The matter came to be considered in *Bimal Chand Jain v. Sri Gopal Agrawal*, 1981 ARC 463, in which it was held that the provisions of Order XV, Rule 5, Code of CPC are discretionary and the Court has power not to strike off defence, even in the absence of a representation by tenant if on facts and circumstances already existing on record. It finds good reason for not striking off defence. The Hon'ble Supreme Court further held that it must be remembered that an order under Sub-rule (1) striking off the defence is in the nature of a penalty and serious responsibility rests on the Court in the matter and the power is not to be exercised mechanically. The Hon'ble Supreme Court further observed that there is a reserve of direction vested in the Court entitling it not to strike off the defence. If on the facts and circumstances already existing it not to strike off the defence on record it finds good reason for not doing so and that the provisions of Order XV, Rule 5 did not oblige the Court to strike off the defence in every case of default. Also relying upon *Surendra Nath Dubey Vs. Smt. Shakuntala Devi*, rendered by a Division Bench of Allahabad High Court in which it was observed that according to Order XV, Rule 5, Code of CPC the defence of a tenant is liable to be struck off if he fails to deposit the rent or compensation for use and occupation, admitted by him to be due, at or before the first date of hearing and also if he fails to continue to deposit regularly the amount of monthly rent or compensation of use and occupation of the premises at the rate admitted by him unless he makes a representation, on considering which and on furnishing security for making deposit the Court allows him further time to make the deposit. As the Defendant did not admit that any rent or other amount for use and occupation of the premises was due, no question of his depositing any further amount or compensation for use and occupation of the premises on that account, at the first hearing or before that arose. Further, as the Defendant did not admit that any amount by way of rent or compensation for use and occupation of the premises was due from him at the time when the first hearing took place no question of his making a representation seeking further time to make such deposit, arose. What is the duty of the Court in the matters where a representation seeking further time to deposit arrears of rent before the order of striking off the defence was passed.

18. Thus, after considering the decision in (i) *Brij Gopal and another* and (ii) *K. Gopal v. Smt. Sushila* the Court was of the view that (a) representation by the tenant was mandatory, and (b) striking off defence, without considering is illegal.

19. The judgment in *Sudhir Kumar Gupta* (supra) cited by the counsel for the Petitioner the Allahabad High Court answered the question as to where the Defendant revisionist has given cogent and plausible reason that the rent for the

period 5.1.1997 to 14.2.1997 could not be deposited on account of the lapse of his counsel or his clerk even though he has paid the money to his counsel to deposit the rent regularly. Another plea of Defendant revisionist is that he has deposited the amount in excess of the amount which was payable to the Plaintiff-Respondents and therefore, the defence could not be struck off.

20. The learned court below, in that case, had not appraised the facts and circumstances of the case prior to strike off the defence of the Defendant-revisionist. A specific representation/application dated 5.12.1997 supported with an affidavit was filed by the Defendant-revisionist. This representation was not considered by the court below. Not only this, the effect of the failure of the counsel or his clerk to deposit the rent for the period of one month, i.e., 15.1.1997 to 14.2.1997, even though it is alleged that the Defendant-revisionist had paid the money to his counsel to deposit the rent regularly, has not been considered by the trial court.

21. In the case of Kunwar Baldevji Vs. XIth Additional District Judge and Others, it was held that Order XV, Rule 5, Code of CPC does not contemplate that when Court decides the question of liability of payment of rent in future, the same should be treated as the admitted rent due within the meaning of the expression contained under Order XV, Rule 5, Code of Civil Procedure. It was also held that it is clear and unambiguous and there is no scope for doing violence to it and stretch it to mean "rent found by court to be due" ; (2) The Court in Atma Ram v. District Judge, Dehradun and Ors. (supra) held that while decreeing the suit for eviction, the courts below have to take into consideration the defence and the evidence adduced in support thereof, therefore, if the order of striking off the defence is not found sustainable, the decree of eviction cannot be upheld.

22. In the case of Mranalini B. Shah and Anr. v. Bapalal Mohanlal Shah, 1978 (2) RCR 643 (SC), it was held that provisions of Clause (b) of Section 12(3) are mandatory, and must be strictly complied with by the tenant during the pendency of the suit or appeal if the landlords' claim for eviction on the ground of default in payment of rent is to be defeated. The word, "regularly" in clause of Section 12 (3) has a significance of its own. It enjoins a payment of tender characterized by reasonable punctuality, that is to say, one made at regular times or intervals. The regularity contemplated may not be a punctuality or clock-like precision and exactitude, but it must reasonably conform with substantial proximity to the sequence of times or intervals at which the rent falls due. Thus, where the rent is payable by the month the tenant must, if he wants to avail of the benefit of the latter part of Clause (b), tender or pay it every month as it falls due, or at his discretion in advance. If he persistently defaults during the pendency of the suit or appeal in paying the rent, such as where he pays it at irregular intervals of 2 or 3 or 4 months-as is the case before us, the Court has no discretion to treat what were manifestly irregular payments, as substantial compliance with the mandate of this clause irrespective the fact that by the time the judgment was pronounced all the arrears had been cleared by the tenant.

23. In the case of *Dinesh Chand Gupta v. Pradeep Bhargava*, 1984 A CJ 214, it was held that if the provisions of Order XV, Rule 5, Code of CPC hardship to the tenant, it is matter for the consideration of Legislature. A Judge has certain limitations. He has to administer the law as it is and not as it should be. It is not the law that the delay or irregularity in deposit of rent in compliance of Order XV, Rule 5, Code of CPC has to be condoned as a matter of course, if the entire admitted amount has been deposited prior to the consideration of the application for striking off the defence. In this case there was neither any explanation nor any material on record explaining the delay. The trial court was justified in striking off the defence. The aforesaid case generally lay down proposition of law that where monthly deposit contemplated in Order XV, Rule 5, Code of CPC having not been deposited, neither oral or written explanation offered nor material on record explaining the delay or irregularity in deposit is available, the defence is to be struck off.

24. From the above it is undisputed that the view of Supreme Court on consideration of Order XV, Rule 5, Code of CPC is that on true construction of the Rule should be that Sub-rule (1) obliges the tenant to deposit, on or before the first hearing of the suit, the entire amount admitted by him to be due to the landlord together with interests thereon at any amount to be due, to deposit regularly throughout the continuation of the suit the monthly amount due within a week from the date of its accrual. In the event of any default in making any deposit, "the Court may subject to the provisions of Sub-rule (2) strike off his defence." Sub-rule (2) obliges the Court before making an order for striking off the defence to consider any representation made by the Defendant in that behalf against his defence being struck off by the Court. It is a right expressly vested in the tenant to bring material on the record that he is not guilty of the default alleged or that there is some good reason for it. In the event some material is already on record, can it be said that Sub-rule (1) obliges the Court to striking off defence? The Court may, however, not lose sight of the fact that an order under Sub-rule (1) striking off the defence is in the nature of penalty, hence a serious responsibility rests on the Court in the matter and as such this power is not to be exercised arbitrarily or mechanically. The discretion vested in the Court empowering it to or not to strike off the defence has to be with good reason within judicious approval notwithstanding the absence of a representation under Sub-rule (2), the defence should or should not be struck off. The word "may" in Sub-rule (1) merely vests the Court with power to strike off the defence and does not oblige it to exercise this power. Therefore, the Courts are to be cautious not to place unduly narrow the construction of the provision of Clause (1), Rule 5 of Order XV, Code of Code of Civil Procedure

25. It is evident that Respondent No. 3 moved an application under Order XV, Rule 5, Code of CPC praying therein that since the Petitioner has not paid the alleged admitted rent his written statement and defence may kindly be struck off. The Petitioner also filed objection against the aforesaid application stating therein that since the Respondent No. 3 had not given possession of the newly

constructed shop as per condition of compromise dated 5.8.1989, as such he is not required to pay the rent as stated by the Respondent No. 3 in his plaint. Respondent No. 2 by the impugned order dated 14.1.1997, struck off the defence of the Petitioner written statement filed by Petitioner was also rejected. Being aggrieved by the order dated 14.1.1997, the Petitioner filed a revision in the Court of District and Sessions Judge, Basti. Pending revision the Petitioner moved an application before the revisional court that he is ready to make payment of arrears of rent and upto date rent @ Rs. 100 per month, hence he sought permission from the revisional court to do so. In pursuance of the order dated 13.11.2000, passed by revisional court the Petitioner deposited the whole rent together with arrears to the Respondent. However, the revisional court by the impugned order dated 11.9.2002, rejected the revision of the Petitioner after considering the fact that with the permission of the Court the Petitioner has already deposited the upto date rent as per order of the revisional court. (1) The revisional court has dealt the question of compromise thus:

26. Regarding payment of arrears of rent during the period concerned, the Court held that :

27. The contention of the counsel for the Petitioner that Order XV, Rule 5 is mandatory and in case there was upto date deposit of the rent with the permission of the revisional court, then the revisional court ought to have allowed the revision by setting aside the impugned order dated 14.1.1997, passed by the trial court is misconceived. Admittedly the Petitioner paid rent at the revisional stage and not the first date of hearing before the prescribed authority. The provisions of Order XV, Rule 5 are mandatory. The revisional court had allowed the Petitioner to deposit the arrears of rent on his application that he is ready to make payment of arrears upto date at the rate of Rs. 100 per month. The permission granted by the revisional court in the circumstances will not change the provision of law that the arrears of rent are to be deposited under Order XV, Rule 5 by the prescribed authority. On or before the first date of hearing. The view taken by this Court as well as by the Apex Court that a lenient approach is required to be taken by the courts below in matter of striking off offence pertaining to a stage where arrears are deposited before the prescribed authority on or before the first date of hearing and not in proceeding at the revisional stage.

28. Admittedly by moving the application at the revisional stage for depositing the arrears, of suit by the Petitioner there remains no doubt that Petitioner was in arrears of rent and after the revisional stage and had not deposited the arrears by the first date of hearing before the prescribed authority.

29. In fact it appears from the record that Petitioner had been given an incomplete shop as well as an open area by the landlord where he is doing his business.

30. For the reasons stated above and in view of the law that deposit of arrears

under Order XV, Rule 5 has to be made by the tenant by the first date of hearing, before the prescribed authority, which was admittedly also not deposited even by the first date of hearing before the revisional court, hence he cannot get any benefit of Order XV, Rule 5. There is no illegality or infirmity in the orders impugned. The writ petition is accordingly dismissed.

No orders as to costs.