

(2012) 02 AHC CK 0208

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 54533 of 2010

Naresh Pal Solanki

APPELLANT

Vs

Addl.District Judge Court No.9, Ghaziabad and another

RESPONDENT

Date of Decision : 10-02-2012

Acts Referred:

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

Citation : (2012) 02 AHC CK 0208

Hon'ble Judges : Dilip Gupta, J

Final Decision : Dismissed

Judgement

Dilip Gupta, J.

This petition seeks the quashing of the order dated 4th May, 2010 passed by the Judge, Court of Small Causes by which the application filed by the petitioner under Order 9 Rule 13 of the Code of Civil Procedure for setting aside the exparte decree dated 16/26th July, 2008 passed in SCC Suit no.66 of 2008, has been rejected.

The application filed by the petitioner for setting aside the exparte decree was rejected by the Judge, Court of Small Causes by the order dated 4th May, 2010 for the reason that the condition stipulated in the proviso to section 17(1) of the Provincial Small Cause Courts Act, 1887 (hereinafter referred to as the "1887 Act") for deposit of the amount due under the decree at the time of presentation of the application had not been complied by the judgment debtor.

Learned counsel for the petitioner has submitted that the petitioner is ready to deposit the amount, if some time is now granted by this Court.

It is not possible to accept the contention of the learned counsel for the petitioner.

Section 17 of the 1887 Act which deals with the applicability of Code of Civil Procedure for the procedure to be followed by Small Cause Courts and the

conditions under which ex parte decree can be set aside is as follows:

"17. Application of the Code of Civil Procedure. (1) The procedure prescribed in the Code of Civil Procedure, 1908 (5 of 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 subsection (1), the security may be realised in manner provided by section 145 of the Code of Civil Procedure, (1908) (5 of 1908)"

It is, therefore, clear that the applicant who moves an application for setting aside the ex parte decree has to, at the time of presenting the application, either deposit in the Court the amount due from him under the decree or give such security for the performance of the decree as the Court may, on a previous application made by him in this behalf had directed.

The provisions of Section 17 of the Act have been elaborately analysed by the Supreme Court in Kedar Nath Vs. Mohan Lal Kesarwani, AIR 2002 SC 582. In the said case, the suit had been decreed ex parte on 9.8.1996. On 26.2.1998 the tenants moved an application under Order 9 Rule 13 CPC for setting aside the ex parte decree but neither the amount due under the decree was deposited and nor an application was filed seeking direction of the Court to furnish security for the performance of the decree in lieu of depositing the decretal amount. It is only on 15.10.1998 that the tenants filed an application with a prayer that they may be permitted to furnish security for payment of the decretal amount. The learned Judge Small Cause Courts rejected the application as the application filed under Order 9 Rule 13 CPC did not comply with the condition contained in Section 17 of the Act. The Revisional Court, however, condoned the delay in moving the application dated 15.10.1998 and directed the Trial Court to accept the security and hear and decide the application under Order 9 Rule 13 CPC on merits. The High Court dismissed the writ petition filed by the landlord. The landlord preferred a Special Leave Petition in the Supreme Court which was allowed and the order passed by the Trial Court was restored. The Supreme Court observed :

"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 of the amount due from the applicant under the decree or in pursuant of the judgment.

The provision as to deposit 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 for dispensation may be filed. We think that it may be filed at any time upto 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.

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."

(emphasis supplied)

It is, therefore, clear from the aforesaid decision that the language of the proviso contained in Section 17 of the 1887 Act is mandatory in nature and an application for setting aside the *ex parte* decree must be accompanied by a deposit in the Court of the amount due under the decree and that this deposit can be dispensed with by the Court in its discretion on a previous application by the applicant seeking direction of the Court for leave to furnish security. This application can be filed at any time up to the time of the presentation of the application for setting aside the *ex parte* decree. If the application under Order 9 Rule 13 CPC is not accompanied with a deposit and if an application has also not been moved for furnishing security in lieu of the deposit up to the time of the presentation of the application under Order 9 Rule 13 CPC, then the application under Order 9 Rule 13 CPC is incompetent and cannot be entertained and allowed.

It transpires from the records that at the time when the petitioner moved the application for setting aside the *ex parte* decree dated 16/26th July, 2008, he did not deposit the amount due under the decree.

The impugned order, therefore, does not call for any interference under Article 226 of the Constitution of India.

The writ petition is, accordingly, dismissed.