
(2008) 04 AHC CK 0183

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 14379 of 2008

Radha Govind (Dead) Through LRs.and others

APPELLANT

Vs

Patel Bidi Company and others

RESPONDENT

Date of Decision : 02-04-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27
Provincial Small Cause Courts Act, 1887 — Section 25

Citation : (2008) 04 AHC CK 0183

Hon'ble Judges : Dilip Gupta, J

Final Decision : Dismissed

Judgement

Dilip Gupta, J.—The landlords have filed this petition for setting aside the order dated 20th February, 2008 by which the application filed by the tenants for producing additional evidence under Order XLI, Rule 27 of the Code of Civil Procedure (hereinafter referred to as the "C.P.C.") in the pending revision filed by the tenants under section 25 of the Provincial Small Cause Courts Act, 1887 (hereinafter referred to as the "Act") was allowed.

2. The records of the writ petition indicate that S.C.C. Suit No. 625 of 1971 was filed by the landlord on 24th April, 1971 for eviction of the tenants from the accommodation in dispute as well as for recovery of arrears of rent and damages. In the written statement, the tenants stated that certain amount had been deposited under section 7 (C) of U.P. Act No. 13 of 1947 in Misc. Case No. 48 of 1967 and Misc. Case No. 275 of 1970.

3. The Judge, Small Causes Courts by the judgment and order dated 31st July, 2007 decreed the suit holding that where was default in payment of rent and the tenants had also caused material alteration by which the value and utility of the accommodation in dispute had been diminished. A categorical finding was recorded by the Judge, Small cause Court that though the tenant had come out with a case that certain amount had been sent by moneyorders to the landlord on 15th June, 1970, 29th July, 1970 and 17th September, 1970 but he did not

file any evidence to show that the said moneyorders were refused by the landlords and he had deposited the amount and, therefore, he could not get the benefit. Feeling aggrieved by the judgment and order, the tenants preferred a revision under section 25 of the Act. During the pendency of the revision the tenants removed an application on 11th February, 2008 (Paper No. 17Ga) for production of additional evidence. This application has been allowed.

4. I have heard learned Counsel for the petitioners and Sri Vishal Khandelwal, learned Counsel appearing for the respondents.

5. Learned Counsel for the petitioners submitted that the Revisional Court committed an error in allowing the application filed by the tenant under Order XLI, Rule 27, C.P.C. as the said provision was not applicable to proceedings under section 25 of the Act. He further submitted that even if the principles underlying the said provision were made applicable, then too, in the facts and circumstances of the case, the Revisional Court committed an illegality in allowing the application for production of additional evidence.

6. Learned Counsel for the respondents, however, submitted that after the application for production of additional evidence was allowed by the Revisional Court, the landlord accepted that cost and, therefore, he cannot be permitted to challenge the said order and in support of his contention he has placed reliance upon the decision of this Court in *Ram Ratan v. Ashvani Kumar Singh and others* 1981 AWC 472. He further submitted that even if the provisions of Order XLI, Rule 27, C.P.C. were not made expressly applicable to the proceedings under the Act, yet the principles underlying the said provision would apply and in support of his contention he has placed reliance upon the decisions of this Court in *Smt. Amarwati and others v. XIth A.D.J. Moradabad and others* 2005 (60) ALR 131 and *Shri Durga Bhagwati Industries, Hathras and others v. Om Prakash Lohia and others* 2006 (64) ALR 492.

7. The preliminary objection raised by the learned Counsel for the respondents needs to be addressed first. His contention is that the application filed by the tenants for production of additional evidence was allowed by the Revisional Court by the order dated 20th February, 2008 upon payment of cost of Rs. 300/ and as this cost was accepted on behalf of the landlord on 21st February, 2008, the landlord cannot challenge the order passed on the application for production of additional evidence in view of the decision of this Court in *Ram Ratan* (supra).

8. Learned Counsel for the petitioners, however, submitted that the order allowing the application was not in the nature of a conditional order in the sense that payment of cost was not a condition precedent to the allowing of the application. It is his submission that in a case where the direction for payment of cost is not a condition on which the application is allowed and costs have been awarded independently in exercise of the discretionary power of the Court to award costs then the aggrieved party can challenge the order even after accepting the costs.

9. In support of his contention he has placed reliance upon the decision of the Supreme Court in *Bijendra Nath Srivastava (Dead) through LRs. v. Mayank Srivastava and others* AIR 1994 SC 2562=1994 SCFBRC 378 and of this Court in *Mayur Packaging Industries v. U.P. State Financial Corporation* 2007 (68) ALR 23 (Sum)=2007 (56) AIC 871=2007 (4) AWC 3425.

10. Learned Counsel for the petitioners has further urged that in any view of the matter, it cannot be said that the costs were accepted by the landlord since it was paid to the clerk of the erstwhile Advocate and in support of his contention he has placed reliance upon paragraph 5 of the rejoinder affidavit.

11. I have carefully considered the submissions advanced by the learned Counsel for the parties on this preliminary objection.

12. In *Brijendra Nath Srivastava (supra)*, the Supreme Court clearly observed that where costs are awarded not as a condition precedent to allowing the application but by way of exercise of the discretionary power of the Court to awards costs, then in such a situation the party can challenge the order even after accepting the costs. The relevant portion of the judgment is as follows:

"That apart the principle of estoppel which precludes a party from assailing an order allowing a petition, subject to payment of costs where the other party has accepted the costs in pursuance of the said order applies only in those cases where the order is in the nature of a conditional order and payment of costs is a condition precedent to the petition being allowed. In such a case it is open to the party not to accept the benefit of cost and thus avoid the consequence of being deprived of the right to challenge the order on merits. The said principle would not apply to a case where the direction for payment of costs is not a condition on which the petition is allowed and costs have been awarded independently in exercise of the discretionary power of the Court to award costs because in such a case the party who has been awarded costs has no opportunity to waive his right to question the validity or correctness of the order. The decision of the Andhra Pradesh High Court in the *Metal Press Works Ltd., Calcutta v. GM. Cotton Press Co.* AIR 1976 A.P. 205 on which reliance has been placed by the High Court, proceeds on the basis that awarding of costs was, in fact and substance, a part of the entire order allowing amendment in a written statement and the said order was conditional one. The decision of the Madras High Court on *Prayag Dossjee v. Venkat Perumal* AIR 1993 Mad. 410, and the decision of the Patna High Court in *Ramcharan v. Custodian of Evacuee Property* AIR 1964 Pat 275 and *M. Kapura Kaur v. Narain Singh*, AIR 1949 Pat 49 on which reliance has been placed in the said judgment of the Andhra Pradesh High Court also emphasise that the orders under challenge were conditional orders and payment of costs was a condition precedent to allowing the petition. In *Devaiah v. Nagappa* AIR 1965 Mys 102, the order allowing amendment of the election petition contained a direction regarding payment of costs. It was held that the application was allowed without any condition and that the order was not a conditional order and principle of estoppel was held inapplicable.

A perusal of order dated May 8, 1976 shows that the said order is not a conditional order. The Civil Judge, after considering the merits has allowed the proposed amendments. The costs were awarded not as a condition precedent to allowing the amendment but by way of exercise of the discretionary power of the Court to award costs to the opposite party....."

(Emphasis supplied)

13. This Court in Mayur Packaging Industries (supra), in view of the aforesaid decision of the Supreme Court in Brijendra Nath Srivastava (supra), also observed:

"The learned Counsel for the respondent submitted that pursuant to the order of the Trial Court, a cost of Rs. 200 was paid which was duly received by the plaintiff and therefore he was estopped from agitating the matter or from challenging the impugned orders and that the principle of estoppel was wholly applicable upon the plaintiff.

.....In a similar matter, the Supreme Court in Brijendra Nath Srivastava (Dead) v. Mayank Srivastava and others AIR 1994 SC 2562., held that where the order was in the nature of a conditional order and that the payment of cost was a condition precedent to the petition being allowed, in such a case acceptance of the amount could stop the other party from challenging the impugned order, but where the application was allowed without any conditions and the order was not a conditional order, the principle of estoppel would not be applicable.

In the present case, the order of the Trial Court is that the application of the defendant was allowed on payment of costs of Rs. 200. In my opinion, it was not a conditional order, and therefore, even if the amount of cost was received by the plaintiff, it did not restrict the plaintiff from challenging the impugned order before an appropriate forum." 14. The facts of the present case are similar. The application for production of additional evidence was allowed on merits and it is only in the exercise of its discretionary power that the Court has awarded costs of Rs. 300/. Thus, even if the amount of costs was received on behalf of the landlord then too it would not preclude the landlord from challenging the order.

15. Learned Counsel for the respondents has, however, placed reliance upon the decision of this Court in Rain Ratan (supra) wherein it was observed:

"..... The question for consideration accordingly is whether, after accepting the amount of costs, the order allowing the amendment can be challenged. In Dr. Sewak Pamshad v. Gram Panchayat Raipur Rani AIR 1972 P&H 272, it was held that where costs had been accepted by a party in regard to an order of amendment, the same cannot be challenged. The party accepting costs is stopped from challenging the order allowing an amendment. See also Nagubai Ammal v. B. Shama Rao AIR 1956 SC 593, and Rani Charan Mahto v. Custodian of Evacuee Property Bihar li. The preliminary objection, accordingly, succeeds."

16. This decision, in view of the decision of the Supreme Court in Brijendra Nath Srivastava (*supra*), does not help the respondents.

17. Learned Counsel for the petitioners has also placed reliance on the averments made in paragraph 5 of the rejoinder affidavit wherein it has been stated that the cost of Rs. 300/ was not accepted either by the lawyer or by his clerk but was accepted by the clerk of the erstwhile lawyer. Paragraph 5 of the rejoinder affidavit is as follows:

"5. That the impugned order by which the application 17Ga was allowed awarding Rs. 300.00 as costs will not debar the aggrieved party from challenging the same even costs were accepted for the following reasons:

(a) Rs. 300.00 as costs was paid of Ram Singh, clerk of Sri Ashok Kumar Gupta the erstwhile Advocate of the petitioners. The present Advocate who was contesting the proceedings is Sri Naveen Kumar Gupta (N.K. Gupta) and as such any payment made to Ram Singh clerk was with mala fide intentions.

(b) The clerk of any Advocate is not authorised to accept the costs and as such any payment done to Ram Singh Clerk was no payment in the eyes of law.

(c) The amount of Rs. 300.00 as costs were not a condition precedent for allowing the application 17Ga and hence even it is assumed that the costs were accepted it will not debar the plaintiff from challenging the order.

(d) That the tenants have deliberately made payment to Ram Singh Clerk being fully conscious of the fact that Sri Ashok Kumar Gupta is no more the Counsel for the plaintiffs. This was deliberately and malafidely done by them."

18. It is not necessary to decide this controversy since it has already been held that acceptance of cost of Rs. 300/ will not preclude the landlord from challenging the order.

19. The question that now remains to be considered is whether the Revisional Court was justified in allowing the application filed by the tenants for production of additional evidence.

20. The contention advanced by the learned Counsel for the petitioners is that Order XLI, Rule 27, C.P.C. does not apply to the proceedings under section 25 of the Act in view of the provisions of Order 1, C.P.C. and, therefore, the application was liable to be rejected. Learned Counsel for the respondents has, however, placed reliance upon the decisions of this Court in *Smt. Amarwati (supra)* and *Shri Durga Bhagwati Industries, Hathras (supra)* and has contended that even if Order XLI, Rule 27, C.P.C. does expressly apply to the proceedings under the Act, still the principles underlying the said provision will apply.

21. This Court in *Smt. Amanuati (supra)* observed:

"All the judgments relied upon by both sides ultimately rest upon the law laid down by the Division Bench of this Court in the case of *Babu Ram (supra)*. In the

said cases this Court, after holding that even though an order under Order XLI, Rule 27, C.P.C. cannot be pressed into service for admitting the additional evidence in revision under section 25 of the Act, but at the same time the Division Bench held that the Court is constituted for the purpose of doing justice according to law and must therefore to be deemed to possess as a necessary corollary and as inherent in its very constitution such powers as may be necessary to do justice and undo wrong in the course of the administration of the justice. The Division Bench further goes on to say that inherent power of a Court to do justice in fact flows from the well recognized principle of equity, justice and good conscience which equally applies to Courts deciding a suit under the Small Causes Courts Act. The Division Bench while considering the provision contained in Order L, Rule 1(b) held as follows:

"After a revision of the various provision of the Provincial Small Causes Courts Act and the Code of Civil Procedure, we find that there is no prohibition contained in either of the two enactments expressed or impliedly providing for the bar of admitting additional evidence. What Order L, Rule 1 (b) did not excluding Order XLI was only that this provision will not apply to revision. But the fact that Order XLI, Rule 27 has been excluded does not led to the conclusion that the Court cannot in exercise of its inherent power admit additional evidence when the ends of the justice requires the same to be done.

Thus, there is no doubt that the Court of Small Causes can in exercise of its inherent power admit additional evidence. However, when that power could be exercised and in what manner, that is a different question and that should not be mixed up with the jurisdiction of the Court to admit additional evidence.

In view of the above clear and unambiguous law laid down by Division Bench of this Court in the case of Babu Ram (supra), which has also been followed and concurred with in the subsequent judgment in the case of Gayatri Devi (supra) there cannot be nay doubt that he Revisional Court exercising power under section 25 of the Act can admit additional evidence.

In the present case, I have already considered and recorded that the documents sought to be admitted were relevant and necessary for meeting out justice between the parties and also for the Court to arrive at a correct and proper decision inter se between the parties, therefore, the Revisional Court has correctly exercise its jurisdiction in admitting the additional evidence."

(Emphasis supplied)

22. In Shri Durga Bhagivati Industries, Hathras (supra) this Court observed:

"The provisions of Order XLI, Rule 27, C.P.C. which apply to Civil Court have not been made expressly applicable to the proceedings under the Act. However mere absence of a specific provision will not necessarily mean that statute intended to prohibit the application of Order XLI, Rule 27 or at least the principles underlying the said provision. In the case of Narsingh Ram v. Mangal Pandey ILR 5 Alld 173

it has been observed by Hon"ble Mahmood, J. as follows:

"Courts are not act upon the principle that every procedure is to be taken as prohibited unless it is express provision of the Code but on the converse principle, that every procedure is to be understood as permissive till it is shown to be prohibited by law. As a matter of general principles prohibition cannot be presumed."

Applying the above principles, there being no specific prohibition for application of Order XLI, Rule 27, C.P.C., the general principle laid down therein for receiving additional evidence can be drawn upon by the appellate authority while exercising the discretion to admit additional evidence.

In the present case, the appellants have given reasons, in their application to produce additional evidence, which have not been tested by the Appellate Court. The Appellate Court has not held that documents sought to be filed as additional evidence was irrelevant but the application has been rejected simply on the ground that the documents were in existence prior to the filing of the appeal and were not filed before the prescribed authority. Order XLI, Rule 27 does not contemplate that the documents, which were in existence prior to the filing of the appeal, cannot be taken in additional evidence. The requirement is that party seeking to produce additional evidence in appeal must satisfy the Court that inspire of due diligence the said evidence could not come to his knowledge or could not be produced by him before the Court below. In order to arrive at the conclusion whether the additional evidence is liable to be accepted or not the Appellate Court is required to test the reasons given by the party seeking to produce additional evidence. The Appellate Court has miserably failed to test the reasons given by the appellants and wrongly rejected the application on irrelevant considerations."

23. The submissions advanced by the learned Counsel for the petitioners that the application should have been rejected as the provisions of Order XLI, Rule 27, C.P.C. are not applicable, cannot therefore, be accepted.

24. It has, therefore, now to be seen whether on merits the application filed by the tenant for production of additional evidence at the revisional stage was liable to be allowed.

25. The application filed by the tenant for production of additional evidence mentions that after the landlord refused to accept the amount of rent from the tenant, the amount of rent was deposited under section 7C of U.P. Act No. 3 of 1947 through tenders in Misc. Case No. 48 of 1969 and Misc. Case No. 275 of 1970 but the file of misc. case had been weeded out and since tenders were not returned to the revisionist and they have been weeded out, it was not possible to have filed them in the Court. However, the amount of Bank Challan dated 17.1.1970 deposited in Misc. Case No. 48 of 1969 is recorded in register No. 35 maintained in Nazarat, Agra and is also mentioned in the record of Lapse Register No. 16. Like wise, the tenant had also deposited Rs. 551.60 in Misc.

Case No. 275 of 1970 but the tenders were not received back. The file was also weeded out but the deposit of the amount had been recorded in Register No. 35. In the application, therefore, a prayer was made to file certified copies of the deposit register. The reason assigned for not filing these papers in the suit is that the revisionist had not been advised, prior to the filing of the revision, to file the same in the Court.

26. The Revisional Court while allowing the application for production of additional evidence has observed that the sole dispute that has arisen is whether the tenant was a defaulter or not and, therefore, the application was liable to be allowed.

27. Learned Counsel for the respondents submitted that the Court in exercise of its inherent power can admit additional evidence when the ends of justice requires the same to be done in view of the decisions of this Court in *Smt. Amrawati (supra)* and *Shri Durga Bhagwati Industries, Hathras (supra)*. His contention is that the evidence now sought to be produced by him is necessary for determining whether the tenant was a defaulter or not and, therefore, it would help the Court in arriving at a correct and proper decision and keeping these principles in mind the Court below had allowed the application filed for production of additional evidence.

28. Learned Counsel for the petitioners, however, submitted that these documents do not indicate that the amount had been deposited by the tenant in the two misc. cases referred to above and further that even if that amount was taken into consideration, the entire default would not be met.

29. The contention of the learned Counsel for the petitioners that the documents do not *prima facie* show that the amount was deposited by the tenant in the two misc. cases is to be examined by the Revisional Court and the application filed by the tenant for production of the evidence cannot be rejected on this ground. The Revisional Court has to determine whether the tenant is a defaulter of rent or not and if any evidence has been filed by the tenant in this regard by way of additional evidence then the same can be accepted to meet the ends of justice. They would also help the Court to arrive at a correct and proper decision. The Court below, therefore, committed no error in allowing the application for production of additional evidence.

30. There is, therefore, no merit in this petition. It is, accordingly, dismissed.