

(2011) 09 AHC CK 0372
In the Allahabad High Court
Case No : Civil Revision No. 398 of 2011

Raj Kumar Makhija and Others	Vs	APPELLANT
S.K.S. and Company and Others		RESPONDENT

Date of Decision : 30-09-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13
Constitution of India, 1950 — Article 226
Limitation Act, 1908 — Section 5
Limitation Act, 1963 — Section 5
Provincial Small Cause Courts Act, 1887 — Section 17, 25

Citation : (2011) 09 AHC CK 0372

Hon'ble Judges : Abhinava Upadhyaya, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Abhinava Upadhyaya, J.—The present revision has been filed against the order dated 18.8.2011 passed by the Additional District Judge, Agra in Civil Misc. Case No. 65 of 2010 by which the application of the revisionists filed under Order IX Rule 13 CPC for setting aside the ex parte decree dated 6.9.2002 in SCC Suit No. 8 of 2000 (S.K.& Company and Ors. v. Raj Kumar Makhija and Ors.) has been rejected.

2. Heard Sri P.C. Jain, Learned Counsel for the revisionists-applicants and Sri B.D. Mandhyan, learned Senior Counsel appearing for the Respondents.

3. It is alleged that the revisionists are the tenants in occupation of a portion of property known as Tara Niwas, Belan Ganj, Agra bounded on East-Common Passage, West-Open land, North-Garage in the tenancy of M /s Punni Mal Duli Chand and South-Office in the tenancy of Sri Bhajan Lal at a rent of Rs. 700/-per month since the time of their predecessor Late Sri Kali Charan Makhija.

4. It is alleged that the landlord-Respondents filed SCC Suit No. 8 of 2000 (M/s. S.K. & Company and Ors. v. Raj Kumar Makhija and Ors. against the applicants

for ejectment and arrears of rent. The said suit was instituted on 17.4.2000 in the court of District Judge/JSCC, Agra and the same was decreed ex parte on 6.9.2002 against the applicants.

5. The claim of the applicants is that they were never served with any summons or notice regarding the proceedings in the aforesaid suit and, therefore, the same remained uncontested. The knowledge of the ex parte decree is claimed to have been acquired by the applicants on 24.9.2010 upon inspection of the record of the suit, when the notice for the execution of the ex parte decree in Execution Case No. 1 of 2010 were served upon the applicants, thereafter at the earliest possible time an application under Order IX Rule 13 CPC was moved to recall the ex parte judgment and decree dated 6.9.2002 which was registered as Misc. Case No. 65 of 2010.

6. Along with the application under Order IX Rule 13 CPC the revisionists claimed to have moved an application seeking permission of the court u/s 17 of the Provincial Small Causes Courts Act (in short the Act) to make compliance in a manner that the entire decretal amount claimed till date along with the cost of the suit together with pendente lite and future damages @ 700/-per month be allowed to be deposited in cash out of Rs. 1000/-per month pendente lite and future damages as decreed and for the balance of Rs. 300/-per month, the applicants be allowed to furnish security. On 27.9.2010 itself the court called for office report. On 4.10.2010 tenders of cash deposit and security was accepted. On 13.7.2011 the application under Order IX Rule 13 CPC was heard, 21.7.2011 was the date fixed for orders. The landlord filed written arguments in between the dates.

7. It is claimed by the applicants that the cash amount deposited and the security as furnished by the applicants towards the satisfaction of the decretal amount was taken to be sufficient by the court and the matter was posted for hearing and after several dates of hearing. From the written arguments filed by the Plaintiffs-landlord it was revealed that the amount deposited by the applicants towards the pendente lite and future damages covered only 117 months whereas the actual months were 125 months and thus the amount was found to be short for 8 months, i.e., Rs. 5600/-only.

8. It is alleged that on coming to know the aforesaid calculation mistake, immediately an application was moved on 22.7.2011 u/s 5 of the Limitation Act read with Section 17 of the Small Causes Act with a tender of Rs. 9,000/- covering 9 months mensue profits with the prayer that the delay be condoned and the tender of Rs. 9,000/-be allowed to be deposited in the court. The said application was objected to by the landlord and the court below by the impugned order dated 18.8.2011 has rejected the application of the applicants filed under Order IX Rule 13 CPC holding that the applicants have failed to deposit the entire decretal amount at the time of presentation of the application and it would not be justified to permit the applicants to deposit the deficient amount on a subsequent date. Hence, the present revision.

9. Sri P.C. Jain, Learned Counsel appearing for the revisionists-applicants submits that the entire decretal amount was deposited by the applicants within time from the date of knowledge of the ex parte decree and the court once having accepted the deposit of cash towards satisfaction of the decree and for the remaining has also accepted the security and the Plaintiffs-landlord having raised no objection with regard to the amount to be deposited towards the satisfaction of the decree, now they cannot raise objection especially when the applicants have come up with the case that the deficiency of Rs. 5,600/-and odd in deposit of the decretal amount was due to calculation error and the same ought to have been allowed, when the application to condone the delay in making good the deficiency u/s 5 of the Limitation Act has been filed.

10. According to Sri P.C. Jain, Learned Counsel appearing for the revisionists-applicants, the Limitation Act having now been made applicable, the court below erred in law in rejecting the application especially in view of the fact that the provisions of Section 17 of the Act were sufficiently been complied with.

11. On the other hand Sri B.D. Mandhyan, learned Senior Counsel appearing for the landlord-Respondents submits that the provisions of Section 17 of the said Act is mandatory in nature and if at the time of presentation of the application under Order IX Rule 13 CPC the entire decretal amount is not deposited, the court has no jurisdiction to make good the lacuna or deficiency towards the satisfaction of the decretal amount upon an application made by the applicants at a belated stage. The application under Order IX Rule 13 CPC was incompetent as it was not accompanied by the deposit of the entire decretal amount as applicable u/s 17 of the said Act and it has rightly been rejected.

12. To substantiate the aforesaid argument Sri B.D. Mandhyan, learned Senior Counsel appearing for the landlord-Respondents has relied upon a decision of the Hon"ble Supreme Court in the case of Kearnath v. Mohan Lal Kesarwari and Ors. reported in 2002 (1) ARC 186. The case before the Supreme Court was that the landlord there filed a suit for recovery of arrears of rent and for eviction against the tenants-Respondents. The said suit came to be decreed ex parte. The said decree was put to execution and the decree holder obtained possession over the suit premises with the police help. The tenants Respondents then moved an application under Order IX Rule 13 CPC seeking setting aside the ex parte decree but neither the amount due under the decree was deposited nor any application was filed seeking for security for the performance of the decree in lieu of depositing the decretal amount in cash. The application under Order IX Rule 13 CPC was thus heard and the Court fixed a date for hearing. The Plaintiffs-landlord pointed out that the said application for setting aside the ex parte decree was not maintainable and should be dismissed in limine for non-compliance of the provisions of Section 17 of the said Act. The tenants-Respondents then filed an application praying that they may be permitted to furnish security for the payment of the decretal amount. The reason assigned for failure to deposit the amount due under decree or to furnish security along with the application

seeking setting aside the ex parte decree, conflicting statements were made including the ground of ignorance of law. Under the aforesaid background the Hon"ble Supreme Court in paragraph Nos. 9, 10 and 11 held as under:

9. 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 Causes 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 pursuance 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 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. 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.

10. In the case at hand, the application for setting aside ex parte decree was not accompanied by deposit in the court of 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.

11 We need not examine the other question whether a sufficient cause for condoning the delay in moving the application for leave of the court to furnish security for performance was made out or not and whether such an application moved at a highly belated stage and hence not being a "previous application" was at all entertainable or not.

13. In the above Kedarnath's case (supra) the Apex Court, while considering the case where the application under Order IX Rule 13 CPC for setting aside the ex parte decree was not accompanied by any deposit or security nor any application was made for dispensing with the deposit on security, held that the provisions of Section 17 of the said Act are mandatory. The Supreme Court was not considering the question whether any substantial compliance of Section 17 of the said Act, any deficiency in the deposit of decretal amount if can be allowed to be removed subsequently. In fact in paragraph-11 as quoted above, the Hon"ble Court has left the question open.

14. Sri B.D. Mandhyan, learned Senior Counsel appearing for the landlord-

Respondents has then relied upon a decision of the learned Single Judge of this Court in the case of Shahjahan Begum (Smt.) v. Smt. Nigar Kauser reported in 2011 (2) ARC 813. The fact of the case in Shahjahan Begum was that an application under Order IX Rule 13 CPC was filed for setting aside the judgment and decree dated 28th March, 2006 passed by the court of Judge Small Causes Court, Kanpur. The applicant-tenant before filing the application under Order IX Rule 13 CPC appears to have presented a tender of an amount of Rs. 12,254/-in compliance of Section 17 of the said Act and the trial court allowed the application of the Petitioner-applicant. Upon objection being filed by the Plaintiff-landlord that the entire decretal amount has not been deposited as the accrued damages pendente lite interest and mense profits which form part of the decree has remained to be deposited and thus it was contended that instead of Rs. 16,273/-only a sum of Rs. 12,254/-has been deposited thereby causing a deficiency of Rs. 4,019/-. An application thereafter was moved by the applicant-tenant for permitting to pay the balance amount which was dismissed against which revision was preferred u/s 25 of the said Act. While dismissing the revision it was held that Section 17 of the Act provides for applicability of CPC and vide proviso to Section 17 of the Act the entire amount due under decree had to be deposited or security had to be given for performance of the decree before the application under Order IX Rule 13 CPC could be heard and since there was deficiency to the tune of more than Rs. 4,000/-, therefore, it was held that on the first date the entire decretal amount was not deposited and, therefore, the application was not maintainable. It was further held that making good of deficiency on the subsequent date cannot be permitted in view of the case of Kedarnath (supra) and the learned Single Judge while relying on the case of Kedarnath (supra) in paragraph-6 has held which is as under:

Admittedly, in this case the whole of the decretal amount was not deposited on the first date of hearing and by subsequent application desire to rectify non compliance of the mandatory provisions was expressed. This has rightly not been permitted by the courts below and there appears no illegality or infirmity in the order the courts below.

15. Sri B.D. Mandhayan, learned senior counsel appearing for the Respondents has further placed reliance on various decisions of this Court on the same principles, which, in my opinion, are not necessary to be referred.

16. Sri P.C. Jain, Learned Counsel appearing for the revisionists-applicants, on the other hand, vehemently urged that upon application being made under Order IX Rule 13 Code of Civil Procedure, an application seeking permission u/s 17 of the said Act, the court on 27.9.2010 itself called for Munsarim's report and after satisfying itself on 4.10.10201 the tender of cash and security was accepted by the court and thereafter proceeded to hear the application under Order IX Rule 13 CPC and fixed the date for orders on the said application as 20.7.2011 so therefore, for all practical purposes the court was satisfied with regard to the compliance of Section 17 of the Act. However, subsequently, from the written

arguments submitted on behalf of the landlord, it came to light that there was certain error in calculation of the decretal amount made on behalf of the tenant and immediately upon such revelation an application was moved for correction and permission to deposit along with an application for condonation of delay.

According to Sri Jain, Learned Counsel, in the Full Bench decision of this Court in the case of Ram Bharose v. Ganga Singh, reported in 1931 ALJR 1049 at page 1053 it has been held that ".....When the court gives its direction, namely, whether the applicant is to furnish cash security or is to give some kind of security, the applicant should present his application for setting aside the decree, together with the security demanded. Then his duties are over. The security filed will then be scrutinized by the court and the court shall see whether the security is to its satisfaction. Then presumably a notice would go to the Plaintiff to show cause why the decree should not be set-aside." Further on page 1053 the Full Bench has held that ".....Where an applicant, without formally applying for the court's direction, makes an application for setting aside an ex parte decree and furnishes security with it, and the court directs a notice to issue to the other side, it must be taken that the court is cognizant of the fact that the applicant has furnished security as required by Section 17 of the Small Cause Court Act. The order that notice should issue may be taken as an approval by the court of the security furnished, in the circumstances, disclosed by the applicant in his application and affidavit (if any).

18. Relying upon the aforesaid observations Sri Jain, Learned Counsel appearing for the revisionists-applicants submits that by tendering cash and furnishing security the provisions of Section 17 of the Act were substantially complied with. However, any error that may occur regarding the calculation the Court has power to allow such correction in the interest of justice.

19. Sri Jain has further relied upon another decision of the Division Bench of this Court in the case of Hukam Khan v. Ist Additional District Judge, Nainital and Ors. reported in 1983 ALJ 737. In the aforesaid case the grievance of the Petitioner-landlord before the trial court and the lower revisional court was that the security furnished by the Respondents-tenants for the decretal amount was short by an amount of Rs. 200/-and, therefore, the proviso to Section 17 of the said Act was not complied with as full security for the decretal amount had not been given within 30 days. A Division Bench in the case of Hukam Khan(supra) while relying upon the Full Bench decision in the case of Ram Bharose (supra) in paragraph-5 held as under:

5.....A reasonable and practical interpretation of the section is as follows:

(1)The applicant must within 90 days file his application either with cash or with a statement that he is prepared to give security(and in the latter case he may, or course, tender the security he proposes) and ask for the direction of the court.

(2)In the case where he wants to give security, if the court refuses to direct security, he must deposit cash within 30 days, or his application will be rejected.

(3) If the Court agrees to direct security, then (a) it will consider the security already offered, if it has been so offered; or (b) name security to its satisfaction which must be filed within the 30 days.

(4) If the applicant does not in fact ask for a direction or if, though the applicant does ask for a direction, the court does not in fact give any direction, but in fact the court does issue notice, the court shall be taken to have approved the deposit of cash or the security offered as the case may be.

(5) If filed within the 30 days and accepted by the court expressly or impliedly by the issue of notice the application is a good application, though it will be open to the decree-holder to challenge the nature and sufficiency of the security and to the Court under Order 9. Rule 9 to make such further condition as it thinks fit.

If the Court delayed in giving its direction or approving expressly or impliedly the security already tendered so long that the period of limitation had expired before the applicant had fair opportunity of complying with the direction, then in a suitable case it would be open to the Court itself to consider and exercise the inherent powers reserved to it by Section 151.

The principles laid down in cls. 3 and 4 are fully applicable to the facts of the instant case. The trial court directed the Respondent to furnish security and in pursuance of that order he deposited Rs. 2000/- in cash and furnished security for Rs. 3000/-. The trial court accepted the security bond as sufficient and issued notice to the Petitioner. Therefore, it must be held that the court had approved the deposit of cash and the security offered by the Respondent. On the Petitioner's objection that the security was short by a sum of Rs. 200/- the court permitted the Respondent to furnish security for that amount which was complied by the Respondent. The trial court had jurisdiction to extend time for furnishing security and as such the trial court did not commit any patent error or exceeded its jurisdiction in passing the order dated 6.11.1981. The Additional District Judge rejected the Petitioner's revision on the ground that no material irregularity had been committed by the trial court and there was no defect of jurisdiction in the trial court's order. There is no patent error in the impugned orders warranting interference by this Court under Article 226 of the Constitution.

20. Sri Jain then invited my attention to the decision of this Court in the case of Smt. Ram Piyari Vs. Budh Sen and Others, The Hon'ble Single Judge in the aforesaid case while interpreting Section 17 of the said Act has noticed the change in the provisions so far it applied to application under Order IX Rule 13 CPC and Section 5 of the Limitation Act, 1908 and the Limitation Act of 1963. According to the learned Judge while Section 5 of the Limitation Act, 1908 was made applicable with regard to appeal or application for review of judgment or for leave to appeal or any other application to which this Section was made applicable by or under any enactment made for the time being in force whereas the Limitation Act of 1963, Section 5 reads as under:

5. Extension of prescribed period in certain cases: any appeal or any application,

other than an application under any of the provisions of O.XXI of the CPC 1908, may be admitted after the prescribed period if the Appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.

21. Paragraph Nos. 5, 8 and relevant portion of paragraphs No. 10, 11 and 12 are quoted herein below:

5. In (Sher) Ahmad Khan Vs. Ali Bux Section 17 was held to be mandatory. In Ram Bharose Vs. Ganga Singh a Full Bench explained the various methods of complying with Section 17. The Full Bench gave a reasonable and practical interpretation of the Proviso.

8. Unlike the old section which covered only applications for review of judgment or for leave to appeal and applications to which the section was made expressly applicable by some enactment, the present section of its own force applies to all applications except those under O. XXI CPC It is no longer necessary to extend Section 5 to any category of applications by any enactment before its provisions are attracted.

10. In view of this changed legal position, the view that the two necessary conditions required by Section 17, namely, a direction of the Court for the furnishing of security and the actual furnishing of the security should be complied with within the prescribed period of limitation, otherwise the application will not be a proper application, does not represent an accurate position in law. It is well settled that if the two conditions are not fulfilled at the time when the application is actually presented, there would be substantial compliance with the proviso if the conditions are satisfied before the expiry of the period of limitation, because-.....

11. The same principle would be applicable even if the condition is fulfilled after the expiry of the period of limitation.

22. The result will be that the application can be deemed to have been presented on that day even though by that time the period of limitation may have expired. In that even the question for determination would be whether there was sufficient cause within meaning of Section 5 of the Limitation Act, because under the 1963 Act Section 5 does become applicable. Previously in this State Section 5 was not applicable at all.

12. The applicant had moved an application for condonation of delay. It is true that it was not specifically headed to be u/s 5 of the Limitation Act. It is further true that the prayer was not quite accurate inasmuch as it did not specifically ask for condonation of delay in filing the application but only for depositing the money. But the substance of the matter was that the court had jurisdiction to entertain an application u/s 5 of the Limitation Act. The defects in it could easily be cured. Evidently, the District Judge being of the view that Section 5 was not applicable at all did not consider the merits of the application.

23. Similarly, he relied upon another decision of this Court in the case of Jasbir Singh v. Smt. Vijai Nigam reported in Allahabad Rent Cases, 1984 page 134 wherein the Hon''ble Single Judge while relying upon the case of Ram Bharose (supra) and Hukam Khan (supra) has held that the trial court had jurisdiction to extend time for furnishing security and where it did so, no error was committed by it. In another decision of this Court in the case of Surendra Nath Mittal v. Dayanand Swarup and Anr. reported in 1986 (12) ALR 14 the Hon''ble Single Judge of this Court has held that " the only object behind this proviso is that the unscrupulous tenants against whom rent is due and who do not appear on the date fixed by the court, may not take advantage of not paying the rent and thereby causing harassment to the landlord. It is often found that the Defendants to a suit do not appear with a purpose that an ex parte decree would be passed and then an application for setting aside the exparte decree would be made, thereby prolonging the litigation. This proviso, consequently, protects the landlord from further harassment and secures the payment of rent.

24. It is well settled that this proviso has to be liberally construed. In the circumstances, the delay in depositing the amount should also be liberally construed in order to enable the person, who has bona fide deposited the amount gets an opportunity of being heard by a court of law on the merits of the case.

It is true that a person coming to the court after the prescribed period is required to explain the delay and he can succeed in getting the delay condoned only when he satisfactorily explains it. But a Court of law cannot require such a person to explain the delay with mathematical precision.

25. Upon the aforesaid facts and circumstances and opinion expressed by various Hon''ble Judges of this Court as well as the Hon''ble Supreme Court, in my view, proviso to Section 17 of the said Act is an enabling provision for procedural application and should be complied liberally. The object of the provision is fulfilled when it is complied with substantially. The proviso is intended to serve the parties in the interest of justice and in no circumstances it denies its dispensation to all those who are to seek its refuge u/s 17 of the Act.

26. It is well settled principle that procedural prescriptions are the handmaid and not the mistress of the justice as has been observed by V.R. Krishna Iyer and A.C. Gupta, JJ. in the case of The State of Punjab and Another Vs. Shamlal Murari and Another, Relevant portion of paragraphs-8 of the said judgment is herein below:

.....We must always remember that the processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. It has been wisely observed that procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice. Where the non-compliance, tho'' procedural, will thwart fair hearing or prejudice doing of justice to parties, the rule is mandatory. But, grammer apart, if the breach can be corrected without

injury to a just disposal of the case, we should not enthrone a regulatory requirement into a dominant desideratum. After all, courts are to do justice, not to wreck this end product on technicalities. Viewed in this perspective, even what is regarded as mandatory traditionally may, perhaps, have to be moderated into wholesome directions to be complied with in time or in extended time.....

27. In the present case, the application under Order IX Rule 13 CPC as well as u/s 17 of the said Act was moved within time from the date of knowledge of the ex parte decree and the Court had also passed the tender of cash deposit as well as allowed the security for the remaining amount after calling a report from the office. Apparently, on being satisfied that the decretal amount has been deposited, proceeded to hear the application under Order IX Rule 13 CPC on merit. But during the hearing upon a written argument filed on behalf of the landlord the applicant-tenant realized that an error has occurred on his part in calculating the amount under the decree and to avoid any further technical objection filed an application for making good the deficiency so occasioned on account of error of calculation by moving an application along with the delay condonation application u/s 5 of the Limitation Act, 1903.

28. Under these circumstances, in my view, the Trial Court could have been perfectly justified in allowing the application of the tenant to make good the deficiency so occurred. However, the court below was confronted with the decision of this Court in the case of Shahjahan Begum (Smt.) (supra) wherein this Court has held that if the whole of the decretal amount was not deposited on the first date of hearing, the subsequent application filed by the applicant desiring to rectify non compliance of the mandatory provisions of the proviso to Section 17 of the said Act could not be maintained and the trial court in view of the aforesaid decision rejected the application of the tenant.

29. After considering the provisions of Order IX Rule 13 CPC and the application of Section 5 of the Limitation Act, 1963 as against Section 5 of the Limitation Act, 1908 and also considering the provisions of the proviso to Section 17 of the said Act and its interpretation by the Hon'ble Apex Court in the cases of Kedarnath (supra), Full Bench of our Court in Ram Bharose (supra), and Division Bench in Hukam Khan (supra), the cases of Smt. Ram Piyari and Surendra Nath Mittal (supra), with due respect I find myself in difficulty to agree with the view expressed by Hon'ble Single Judge in the case of Shahjahan Begum (Smt.) (supra), which in my opinion and upon the discussions made herein above, requires re-consideration by a Larger Bench.

30. Accordingly, let this matter be placed before Hon'ble the Chief Justice for passing appropriate orders for constituting a Larger Bench to consider:

Whether the proviso to Section 17 of the Provincial Small Causes Courts Act completely bars any rectification or removal of a bona fide error after the expiry of the period of limitation when substantial compliance by way of deposit of the decretal amount and furnishing security has been made within the period of

limitation particularly when Section 5 of the Limitation Act, 1963 has been made applicable to Order IX Rule 13 of the Code of Civil Procedure?

31. List this matter after the opinion of the Larger Bench so constituted.

32. As an interim measure, the further proceedings in Execution Case No. 1 of 2010 and Misc. Case No. 65 of 2010 (Sri Raj Kumar Makhija and Ors. v. S.K. & Company and Ors. arising out of JSCC Suit No. 8 of 2000 pending before the Court of Additional District & Sessions Judge, Court No. 17, Agra shall remain stayed until further orders of this Court.