

(2006) 03 BOM CK 0085

In the Bombay High Court

Case No : Civil Revision Application No. 901 of 2001

Shailesh Joglekar

APPELLANT

Vs

Nirmal Kumar Jain

RESPONDENT

Date of Decision : 24-03-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, 144
Provincial Small Cause Courts Act, 1887 — Section 17, 17(1)

Citation : (2006) 4 ALLMR 279 : (2006) 6 BomCR 325 : (2006) 4 MhLj 756

Hon'ble Judges : D.D. Sinha, J

Bench : Single Bench

Advocate : V.V. Bhangde, for the Appellant; None, for the Respondent

Final Decision : Allowed

Judgement

D.D. Sinha, J.—Heard Mr. Bhangde, learned Counsel for the Applicant. Respondent though served, none appeared for the Respondent.

2. Civil Revision Application is directed against the judgment and order dated 26th February, 1999, passed by the Additional Chief Judge, Small Cause Court, Nagpur, whereby the application moved by the Respondent/non-applicant under Order 9, Rule 13 and u/s 144 of CPC is allowed and ex parte decree passed in Civil Suit No. 558/91 was set aside. Similarly, against the appellate order dated 12-6-2001 passed by the Additional District Judge, Nagpur, whereby the appeal filed by the applicant came to be dismissed.

2-A. Mr. Bhangde, learned Counsel for the applicant has submitted that the applicant is the original landlord and the non-applicant was the tenant in the suit premises i.e. shop block No. 3, bearing House No. 293 situated at West High Court Road, Dharampeth, Nagpur. The applicant/landlord on 5-12-1990 filed application before the Rent Controller under Clause 13(3)(iii) and (v) of the C.P. and Berar Letting of Houses and Rent Control Order, 1949. On the basis of the said application, the case was registered as Revenue Case No. 726-

A/71(2)/90-91.

3. The counsel for the petitioner has further contended that on 15-1-1991 the Rent Controller granted permission under abover eferred clause of the Rent Control Order and therefore, on 24-4-1991 the applicant/landlord issued quit notice to the non-applicant. Since the non-applicant refused to vacate the premises in question, the applicant on 27-6-1991 filed a Civil Suit No. 558/91 in the Small Causes Court, Nagpur, against the non-applicant for ejectment, possession and damages along with mesne profit. On 24-7-1991 the applicant served non-applicant by registered post with A.D. notice regarding filing of civil suit. The said notice was refused by the non-applicant and therefore, on 14-8-1991 the case was ordered to be proceeded ex parte. On 28-9-1991 Civil Suit No. 558/91 was decreed ex parte. The non-applicant was ordered to pay Rs. 216/- as damages by way of occupation charges with effect from 1-6-1991 to 26-7-1991. learned Counsel for the petitioner further contended that on 11-7-1992 the decree was executed and the applicant took possession of the suit premises through Court bailiff by breaking open the locks. On 12-8-1992 the non-applicant filed an application for setting aside ex parte decree, which was registered as M.J.C. No. 31/92. The applicant on 20-10-1992 filed reply to the said application wherein preliminary objection about the maintainability of M.J.C. 31/92 was raised on the ground of non-compliance of proviso to Section 17(1) of the Provincial Small Cause Courts Act, 1887, by the non-applicant. The learned Counsel for the applicant further contended that the issue in this regard is concluded by the decision of the Supreme Court reported in Kedarnath Vs. Mohan Lal Kesarwari and Others,

4. learned Counsel for the applicant has submitted that both the Courts without taking into consideration the procedure prescribed and scheme stipulated in proviso to Sub-section (1) of Section 17 of the Act passed the impugned orders and therefore, the same are de hors of the provisions of law and cannot be sustained in law.

5. I have given anxious thoughts to the contentions canvassed by the learned Counsel for the applicant and perused the provisions of Section 17 of the Act as well as judgment of the Apex Court relied on and cited by the learned Counsel for the petitioner.

6. Before I consider the revision application on merits, I propose to deal with the procedure and scheme stipulated in Section 17 of the Provincial Small Cause Courts Act, 1887. Section 17 of the Act reads thus

17. (1) The procedure prescribed in the Code of Civil Procedure, 1908, shall save insofar 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 the 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 of compliance with the judgment as the Court may, on a previous application made by him in this behalf have directed.

Since the other part of the provision of Section 17 is not relevant for the controversy in question, the same is not incorporated. The proviso to Sub-section (1) implicitly makes it clear that in case of a decree which is passed ex parte and when the application to set aside the same is made, it is mandatory for the judgment debtor as per procedure stipulated in provision either to deposit in the court the amount due from him under the said decree or give such security for the performance of the decree on a previous application made by him in this behalf. This requirement is mandatory in nature.

7. In the instant case it is not in dispute that the ex parte decree was passed on 28-9-1991. The same was also executed and the applicant has also taken possession of the suit premises on 11-7-1992. The non-applicant for the first time made an application under Order 9, Rule 13, CPC for setting aside ex parte decree on 12-8-1992. It is not in dispute that either on 12-8-1992 or prior to that, the non-applicant has not deposited in the Court the amount due under ex parte decree dated 28-9-1991 nor any application was filed seeking permission to furnish security for the said amount under the decree. In such contingency, the application moved by the non-applicant for setting aside ex parte decree as per the procedure enumerated in proviso to Sub-section (1) of Section 17 of the Act is not maintainable.

8-9. This issue is no more res-integra and is also concluded by the judgment of Apex Court in case of Kedamath (supra). The relevant observations of the Supreme Court are in Para 8, which reads thus

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 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 the 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 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.

10. It is evident from the abover eferred observations of the Apex Court that the procedure prescribed in the proviso to Sub-section (1) of Section 17 of the Act is mandatory in nature and therefore application for setting aside ex parte decree must be accompanied by a deposit in the Court of the amount due under the decree if not deposited earlier. Similarly, the application for dispensation can be filed at any time up to the time of presentation of application for setting aside ex parte decree and is not maintainable thereafter.

11. In the instant case, trial court as well as lower appellate court completely misconceived the provisions of Section 17 of the Act and therefore, the findings recorded are devoid of substance and cannot be sustained in law. Hence the judgment and order dated 26th February, 1999 passed by the Additional Chief Judge, Small Cause Court, Nagpur, as well as judgment and order dated 12-6-2001 passed by 2nd Additional District Judge, Nagpur, are quashed and set aside.

The revision application is allowed in above terms. No order as to cost.