

(2017) 11 BOM CK 0049
In the Bombay High Court
Case No : 84 of 2017

Shri Ranjitsingh s/o Dadusingh Suryawanshi

APPELLANT

Vs

Shri Narayan Dhondbaji Deshmukh

RESPONDENT

Date of Decision : 02-11-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Order 9 Rule 13](#) -

[Provincial Small Cause Courts Act, 1887](#), [Section 17\(1\)](#), [Section 17](#) - Application of the

Citation : (2017) 11 BOM CK 0049

Hon'ble Judges : P.N.Deshmukh

Bench : SINGLE BENCH

Advocate : S.S.Sitani

Final Decision : Allowed

Judgement

1. Heard Shri S.S.Sitani, learned counsel for the applicant. None for respondent though appears to be served. In fact, matter was adjourned for today with a view to give an opportunity to respondent to defend the application on merits, inspite of that none present for respondent.

2. This Civil Revision Application is directed against the judgment and order dated 13th April, 2017 passed on application, Exh.8 in M.J.C.No.106 of 2016 by the learned Small Causes Court Nagpur, whereby application moved by applicant for noncompliance of Section 17(1) of the Provincial Small Cause Courts Act, 1887 (hereinafter referred to as "Act of 1887") in the proceedings initiated by nonapplicant under Order 9, Rule 13 of the Code of Civil Procedure for setting aside ex parte decree, came to be rejected. It is thus specific case of applicant that he had filed a suit for eviction from residential house vide Reg.Civil Suit No.113 of 2016 which came to be decreed and had initiated execution proceedings against the nonapplicant who filed application under Order 9, Rule 13 of C.P.C., for setting aside ex parte judgment and decree by filing

M.J.C.No.106 of 2016. In the said M.J.C. applicant herein filed an application, Exh.8 praying for dismissal of proceedings contending that same is taken out without compliance of Section 17(1) of the Act of 1887, which is stated to be mandatory in nature. However, the learned trial Court rejected the application. Hence, this appeal.

3. Learned counsel for the applicant in support of present application has relied upon judgment in the case of Kedarnath ..vs.. Mohan Lal Kesarwari and ors. reported in (2002) 2 SCC 16. It is noted that the applicant is original landlord while nonapplicant is tenant in the suit premises being residential house situated at Nagpur and the suit came to be decided ex parte for which nonapplicant has initiated civil proceedings wherein applicant moved an application for rejection of said proceedings for noncompliance of mandatory provisions of Section 17(1) of the Act of 1887. Having considered facts as aforesaid, it is necessary to deal with the procedure and scheme stipulated in Section 17 of 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 provision of section 17 is not relevant for the controversy in question, the same is not incorporated. The proviso to subsection (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.

4. In the instant case it is not in dispute that the ex parte decree was passed and was also executed and due to passing of ex parte decree, nonapplicant had filed application under Order 9, Rule 13 of the Civil Procedure Code for setting aside same which is found to be filed without compliance of Section 17(1) of the Act of 1887. The Hon'ble Apex Court in the case of Kedarnath (cited supra) in para no.8 of its judgment has observed as follows -

" 8. A bare reading of the provision shows that the legislature has 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."

5. It is evident from the above referred observations of the Apex Court that the procedure prescribed in the proviso to subsection (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.

6. In the instant case, trial Court has completely misconceived the provisions of Section 17 of the Act and as such the impugned order cannot be sustained in law and is therefore liable to be quashed and set aside. In the result, Civil Revision Application is allowed in above terms. No order as to costs.