

(2012) 09 AHC CK 0021

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 23868 of 2011

Smt. Rani Awasthi and Another

APPELLANT

Vs

First Additional Judge, Small Causes Court, Kanpur and
Others

RESPONDENT

Date of Decision : 03-09-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 12, Order 9 Rule 13
Provincial Small Cause Courts Act, 1887 — Section 17, 17(1)

Citation : (2012) 10 ADJ 70 : (2013) 2 ALJ 22

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Advocate : V.P. Mishra, J. Nagar, Smt. Supriya P. Nagar and Pratik J. Nagar, for the Appellant; Saurabh Jain and P.K. Jain, for the Respondent

Judgement

Hon"ble Sudhir Agarwal, J.—This writ petition is directed against the order dated 18.11.2010 passed by First Additional Small Cause Judge, Kanpur Nagar rejecting petitioners" application No. 4C under Order IX Rule 13 C.P.C. for recall of ex parte decree and judgment dated 24.8.1993 passed in S.C.C. Suit No. 78 of 1991 decreeing the suit with cost, ex parte. Learned counsel for the petitioners submitted that he had deposited Rs. 2350/- in purported compliance of Section 17 of Provincial Small Cause Court Act, 1887 (hereinafter referred to as "Act, 1887") and also filed an application for furnishing security of entire amount but without considering said application of petitioner the Trial Court held that petitioners have not complied with Section 17 of Act, 1887 and, therefore, benefit thereof is not available. He said that this approach is illegal. He submitted that Revisional Court has also failed to exercise its jurisdiction in this matter by dismissing petitioners" revision vide judgment dated 5.4.2011. He placed reliance on a decision of this Court in Mohd. Hafeex v. Chandra Mohan Srivastava, 2010 (2) ARC 356, in support of contention that an application made before Trial Court seeking direction to furnish security alongwith an application for setting aside ex parte decree should be taken up by Trial Court, firstly, by

considering application submitted for furnishing security.

2. The issue of Section 17 of Act, 1887 of Act, 1972 is now covered by this Court's decision in Prem Chandra Mishra v. IInd Additional District Judge, Etah and others, 2008(3) ARC 928, where this Court, following earlier decision in Lachhi Ram v. First Additional District Judge, Meerut and others, 1984(1) ARC 4; Shiv Shankar Singh v. IVth A.D.J. Kanpur, 1997 (1) ARC 491, in paras 18, 22 and 24 of the judgment held as under:

18. The object behind proviso of Section 17(1) of Provincial Small Causes Courts Act 1887 is that unscrupulous tenants against whom rent is due, who do not appear on the date fixed may not take advantage of not paying rent and thereby causing harassment of the landlord. The purpose of adding this proviso to Section 17 is to protect the interest of landlord from further harassment and to secure and ensure payment of rent and to put tenant to term to legally make said deposits. Idea behind said provision is to strike a balance between rival interests so as to be just to law. In case of ex parte decree tenant has been given liberty to move application under Order IX Rule 13 of CPC on the ground provided therein but under proviso to Section 17 (1) of Provincial Small Cause Courts Act 1887 condition has been imposed so that tenant does not take undue advantage for non-appearance and in this background as condition precedent is it has been made obligatory on the part of the tenant to deposit the amount which is due so that in the event an application for setting aside decree is dismissed the decree in question may be satisfied from the amount deposited or from the security furnished by the judgment debtor.

22. As already discussed above, deposits made under sub-Section (4) of Section 20 and Section 30 of U.P. Act No. XIII of 1972 and under Order XV Rule 5 of C.P.C. are in custody of Court, and said amount at any point of time can be withdrawn by the landlord. Said amount already deposited and lying with the Court at the point of time of presenting application, can be treated as deposit in the Court, the amount due from him under the decree or in pursuance of the judgment and mere information is good enough on this score, as records of deposit are already with the Court, and can be very well verified by the Court. If the deposits already made are of amount due and over and above the amount due, the application under Order IX Rule 13 will not be non-suited for non compliance of proviso of Section 17(1) of Provincial Small Causes Courts Act and in case it is short of the amount due application will have to be necessarily dismissed as not competent and maintainable provided at the point of time of presenting application entire amount has not be deposited. In other category of cases, i.e. where tenant intends to furnish security, therein prior application has to be there as per Kedarnath's case (supra).

24. In the present case admitted position is that after ex parte decree has been passed application to recall ex parte decree was made on 24.5.1993 and alongwith the same application under the proviso to Section 17(1) has not at all been moved. Said application was admittedly moved subsequent to the same on

25.2.1994 and in the said application mention was made by him that he has already deposited the rent, cost of suit and interest of JSCC suit much earlier before passing of ex parte decree. Said application which has been moved on behalf of tenant was not stating any thing new rather it was sought to be stated by the tenant that in the present case decretal amount is already with the Court as he has already paid arrears of rent, cost of suit and interest of JSCC suit much before passing of ex parte decree and same may be taken into consideration while entertaining application. Distinction will have to be drawn qua the cases wherein entire amount as mentioned in the proviso to Section 17 of Provincial Small Cause Courts Act 1887 already stands deposited even before passing of ex parte decree. In the said event of entire amount in question being prior deposited, information has to be furnished before Judge Small Causes Court, then said fact on verification can be treated as sufficient compliance as provided under the proviso to Section 17 (1) of Provincial Small Cause Courts Act 1887, inasmuch as nothing new has been sought to be done after expiry of the period rather only information has been furnished that said condition has already been complied with and interest of landlord is fully protected as per object and the purpose of Section 17. Tenant cannot be asked to make deposit for second time and furnish security for the second time in the backdrop that prior to passing of decree entire amount due under decree or judgment has already been deposited. Judge Small Causes can make inquiry in the matter of this fact on being apprised as to whether decretal amount is there or not but where decree in question has been passed and decretal amount mentioned as above is not at all there then law laid down by Hon'ble Apex Court in Kedarnath's case (supra) has to be followed in its word and spirit. Facts narrated above clearly makes Kedarnath's case (supra) distinguishable. In the facts of the present case as finding of fact is that entire amount has been deposited which was over and above to the decretal amount and Revisional Court has allowed the same then there being no failure of justice, then there is hardly any scope of interference.

3. Sri P.K. Jain, learned Senior Advocate appearing for respondent No. 3, however, drew attention of this Court to para 7 of the counter-affidavit stating that on the application filed by petitioners the Trial Court had already passed following order on 28.9.1994:

Application moved under Order 9 Rule 13 C.P.C. decree is ex parte, therefore, appellant should deposit entire amount u/s 17. Dispossession stayed.

4. The suit was filed before Small Cause Court, therefore, before asking the Court to set aside an ex parte decree the requirement of Section 17 had to be observed and it was mandatory. It is not the case of petitioners that they had deposited the amount. What they submit is that an application was made seeking permission of Court to permit security and that being so unless that application has been decided, petitioners' application filed under Order 9 Rule 12 ought not to have been dismissed. In my view when the application came up before the Trial Court on 28.9.1994 and Trial Court passed order directing the applicants to

deposit entire amount u/s 17, it shall mean that his request for furnishing security stood rejected and he was under an obligation to deposit entire amount. The Trial Court having passed a positive order directing the applicants to deposit entire amount u/s 17 would necessarily have made it clear that the request made otherwise has not been accepted. Yet it is admitted case of petitioners that they did not comply with aforesaid order. In my view, petitioners had no option but to comply the said order by depositing entire amount which admittedly they failed.

5. In view thereof, I do not find any error apparent on the face of record in the impugned orders warranting any interference.

6. Dismissed. Interim order, if any, stands vacated.