

(2012) 02 AHC CK 0205

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 4823 of 2004

Surendra Kumar

APPELLANT

Vs

Upper Sessions Judge (Fast Tract) Court No. 4, Aligarh and
Others

RESPONDENT

Date of Decision : 01-02-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, 145
Provincial Small Cause Courts Act, 1887 — Section 17, 17(1)

Citation : (2012) 02 AHC CK 0205

Hon'ble Judges : Dilip Gupta, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Hon''ble Dilip Gupta, J.—This petition seeks the quashing of the judgment and order dated 12th August, 1994 passed by the Judge, Court of Small Causes by which SCC Suit No. 128 of 1993 filed by Radha Rani-respondent no. 2 against Surendra Kumar (petitioner) and Sukhpal-respondent no. 3 for ejectment and recovery arrears of rent was decreed. The petitioner has also sought the quashing of the judgment and order dated 18th November, 2000 by which the suit was again decreed since the earlier decree dated 12th August, 1994 was recalled on an application moved by the petitioner. The petitioner has also sought the quashing of the judgment and order dated 19th September, 2003 by which the application filed by him for setting aside the ex-parte decree dated 18th November, 2000 has been rejected as also the judgment and order dated 31st January, 2004 by which the Revision filed by the petitioner for setting aside the order dated 19th September, 1993 was dismissed.

2. It transpires from the records of the writ petition that SCC 128 of 1993 was filed by Radha Rani for ejectment of the petitioner Surendra Kumar and recovery arrears of rent. As the defendants did not appear despite service of notice, the Court passed an order on 9th December, 1993 that the suit shall proceed ex-

parte and the suit was ultimately decreed ex-parte on 12th August, 1994. An application was, however, filed by the petitioner for setting aside the ex-parte decree which application was rejected on 25th August, 1995 as the petitioner did not appear to press the application. Another application was filed by the petitioner which was allowed and ultimately by the order dated 12th October, 1995 the ex-parte decree was set aside. Again an order was passed to proceed ex-parte, as the petitioner did not appear but it was set aside by the order dated 14th July, 1996 and thereafter the defendants took as many as 17 adjournments. The suit was, however, again decreed ex-parte on 18th November, 2000. The decree holder put the decree into the execution which was registered as Execution Case No. 18 of 2003.

3. On 1st December, 2000, the petitioner again moved an application under Order 9 Rule 13 of the CPC for setting aside the ex-parte decree dated 18th November, 2000. This application was rejected by the Judge, Court of Small Causes by the order dated 19th September, 2003 against which the petitioner preferred Civil Revision which was dismissed by the order dated 31st January, 2004.

4. A preliminary objection has been raised by the learned counsel for the respondents that the writ petition should be dismissed as the condition stipulated in the proviso to section 17(1) of the Provincial Small Cause Courts Act, 1887 (hereinafter referred to as the "Act") had not been complied by the petitioner while filing the application for setting aside the ex-parte decree dated 18th November, 2000 inasmuch as the applicant did not deposit the amount due under the decree at the time of presenting the application.

5. It needs to be noticed that on 9th February, 2004 when the petition was presented, the Court directed the petitioner to file supplementary affidavit as to whether compliance of the condition stipulated in the proviso to Section 17 of the Act had been made while moving the restoration application. A supplementary affidavit has been filed by the learned counsel for the petitioner.

6. It is the contention of the learned counsel for the petitioner that compliance of the condition stipulated in the proviso to Section 17 of the Act had been made by the judgment debtor.

7. It is not possible to accept the contention of the learned counsel for the petitioner that the condition stipulated in the proviso to Section 17 of the Act had been complied with by the petitioner.

8. Section 17 of the 1887 Act which deals with the applicability of CPC for the procedure to be followed by Small Cause Courts and the conditions under which ex-parte decree can be set aside is as follows:

17. Application of the Code of Civil Procedure.-(1) The procedure prescribed in the Code of Civil Procedure, 1908 (5 of 1908), shall save in so far 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 his 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 or compliance with the judgment as the Court may, on a previous application made by him in this behalf, have directed.

(2) Where a person has become liable as surety under the proviso to sub-section (1), the security may be realised in manner provided by section 145 of the Code of Civil Procedure, (1908) (5 of 1908)

9. It is, therefore, clear that the applicant who moves an application for setting aside the ex parte decree has to, at the time of presenting the application, either deposit in the Court the amount due from him under the decree or give such security for the performance of the decree as the Court may, on a previous application made by him in this behalf had directed.

10. The provisions of Section 17 of the Act have been elaborately analysed by the Supreme Court in *Kedarnath Vs. Mohan Lal Kesarwari and Others*, . In the said case, the suit had been decreed ex parte on 9.8.1996. On 26.2.1998 the tenants moved an application under Order 9 Rule 13 CPC for setting aside the ex parte decree but neither the amount due under the decree was deposited and nor an application was filed seeking direction of the Court to furnish security for the performance of the decree in lieu of depositing the decretal amount. It is only on 15.10.1998 that the tenants filed an application with a prayer that they may be permitted to furnish security for payment of the decretal amount. The learned Judge Small Cause Courts rejected the application as the application filed under Order 9 Rule 13 CPC did not comply with the condition contained in Section 17 of the Act. The Revisional Court, however, condoned the delay in moving the application dated 15.10.1998 and directed the Trial Court to accept the security and hear and decide the application under Order 9 Rule 13 CPC on merits. The High Court dismissed the writ petition filed by the landlord. The landlord preferred a SLP in the Supreme Court which was allowed and the order passed by the Trial Court was restored. The Supreme Court observed:

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 cause 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 pursuant 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 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.

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

(emphasis supplied)

11. It is, therefore, clear from the aforesaid decision that the language of the proviso contained in Section 17 of the 1887 Act is mandatory in nature and an application for setting aside the ex parte decree must be accompanied by a deposit in the Court of the amount due under the decree and that this deposit can be dispensed with by the Court in its discretion on a previous application by the applicant seeking direction of the Court for leave to furnish security. This application can be filed at any time up to the time of the presentation of the application for setting aside the ex parte decree. If the application under Order 9 Rule 13 CPC is not accompanied with a deposit and if an application has also not been moved for furnishing security in lieu of the deposit up to the time of the presentation of the application under Order 9 Rule 13 CPC, then the application under Order 9 Rule 13 CPC is incompetent and cannot be entertained and allowed.

12. The suit was decreed ex-parte on 18th November, 2000. The application for setting aside the ex-parte was filed by the petitioner on 4th December, 2000. The amount due under the proviso to section 17 of the Act was deposited by the petitioner on 20th December, 2000. It is, therefore, clear that the condition stipulated in the proviso to Section 17 of the Act had not been complied with since the amount was not deposited by the petitioner at the time of filing of the application.

13. Even otherwise, it is seen from the records that the Courts have considered the application filed by the petitioner under Order 9 Rule 13, CPC on merits but have not found the explanation given by the petitioner for setting aside the ex-parte decree to be satisfactory.

14. The Judge, Court of Small Causes in the order dated 19th September, 2003 noticed that even after the ex-parte decree dated 12th August, 1994 was set

aside, the defendants took as many as 17 adjournments from 26th February, 1997 to 16th December, 1999. The Revisional Court found that the explanation offered by the petitioner for not appearing before the Court on 15th November, 2000 was not satisfactory. In this connection, it noticed that an application had been filed by the lawyer for adjournment of the case on 15th November, 2000 but no one appeared to press the application and P.W.-1 was examined and 16th November, 2000 was fixed for remaining examination but the applicant or his counsel did not also appear on the next date. The Court fixed 19th September, 2003 for delivery of judgment. The Revisional Court has observed that the applicant had not been able to prove that he was ill on 15th November, 2000 and even if it is assumed that he was ill on 15th November, 2000 then too there was no explanation as to why he did not appear on 16th/18th November, 2000 and nor is there any explanation as to why his counsel also did not appear on 16th/18th November, 2000.

15. Learned counsel for the petitioner has submitted that there was good and sufficient reason for the petitioner not to appear before the Court on 15th November, 2000 as he fell ill and his counsel had moved an application for adjournment on 15th November, 2000.

16. Learned counsel for the petitioner has not been able to satisfy the Court as to why the applicant or his counsel did not appear before the Court of Small Causes on 15th November, 2000. The Courts below have not accepted the version of the petitioner that he fell ill as medical certificate was not filed to support this plea. Even if it is assumed that the petitioner was ill on 15th November, 2000 then too, there is no reason as to why the petitioner did not appear before the Court on the next date to find out what had happened on 15th November, 2000 and nor has any explanation been offered as to why his counsel did not appear on the next date because the order also mentions that the petitioner or his counsel did not appear even on 16th November, 2000. The explanation offered by the petitioner has not been found to be satisfactory by the Courts below and the Courts below have also noticed that the petitioner had been adopting methods to delay the hearing of the suit and indeed this is also apparent from the facts stated above.

17. Thus, even on merits it cannot be said that impugned orders suffer from any illegality.

18. The writ petition is, accordingly, dismissed.