

(1993) 03 AHC CK 0056

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 4268 of 1990

Surjeet Kumar

APPELLANT

Vs

Prescribed Authority, under U.P. Act No. 13 of 1972 and
Another

RESPONDENT

Date of Decision : 18-03-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, Order 9 Rule 7
Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 —
Section 21, 34(1), 38

Citation : (1993) 3 AWC 1517

Hon'ble Judges : S.P. Srivastava, J

Bench : Single Bench

Advocate : Prakash Krishna, for the Appellant;

Final Decision : Disposed Of

Judgement

S.P. Srivastava, J.—Feeling aggrieved by an order passed by the Prescribed Authority whereunder it refused to set aside the exparte order passed by it, granting release of the accommodation in dispute in favour of the landlord Respondent No. 3, the Petitioner has approached this Court by means of this writ petition for redress seeking reversal of the said order.

2. The brief facts, shorn of details and necessary for the disposal of the case are that in the proceedings for release of the accommodation in dispute initiated by the landlord Respondent No. 3 against the present Petitioner, the prescribed authority had passed an order on 18th October, 1989 fixing 24th October, 1989 for filing written statement. On this date, the presiding officer was on leave. In this circumstance, the matter appears to have been put up before the Incharge prescribed authority who passed an order where under the tenant opposite party could file written statement by 6-11-1989 on which date the Petitioner tenant did not appear and written statement was not filed. The Prescribed Authority ia these circumstances, passed on order directing that the case shall proceed exparte

against the Petitioner and fixed 6-12-1989 for exparte evidence.

3. It is surprising to note that without there be{ng any order fixing 16-11-1989 as the date for evidence,, the prescribed authority took up the case on that date and after accepting the evidence in the shape of affidavit tendered by the landlord Respondent No. 3, fixed 6-12-1989 as the date for arguments. As noted above, on 6-11-1989 the prescribed authority had fixed 6-12-1989 for exparte evidence. Now the date 6-12-1989 stood altered from being the date for filing exparte evidence to a date fixed for hearing arguments."

4. It appears that the prescribed authority heaid the arguments of landlord Respondent No. 3 on 6-12-1989 and fixed 11-12 1989 for delivery of judgment. It was at this stage that the Petitioner tenant appeared before the prescribed authority and moved an application praying for the recall of the order dated 6-11-1989 whereunder the said authority had ordered that the case shall proceed exparte against him. The reason disclosed in the aforesaid, application for the non appearance on 6-11-1989 was that instead of 6-11-1989, the clerk of the counsel for the Petitioner had noted 16-11-1989 and had communicated this date to be the date fixed for filing the written statement,

5. The prescribed authority fixed 7-12-1989 for disposal of the aforesaid application on which date observing that since the application had been filed after the judgment in the case had been reserved, it was not entertainable and that the tenant could file an application only after pronouncement of the judgment, rejected the said application.

6. The judgment which had been reserved on-6~ 12-1989 was pronounced on 11-12-1989 whereunder the application filed by the landlord. Respondents seeking release was allowed and the accommodation in dispute was released in his favour. It was thereafter on 20-12-1989 that the Petitioner moved an application supported by an affidavit for setting aside of the exparte judgment order dated 11-12-1989 as well as the earlier order proceeding exparte against him which had been passed on 6-11-1989.

7. I have heard Sri Prakash Krishna, the learned Counsel for the Petitioner tenant and Sri Tarun Verma, the learned Counsel representing the landlord Respondent.

8. The Prescribed Authority, while rejecting the application dated 20-12-1989 has observed that in the circumstances of the present case, the Petitioner ought to have filed an application for recalling the order dated 6-11-1989 either on 16-11-1989 or on 17-11-1989 and since the application for such propose was filed on 6-12-1989" such an application could not be entertained. It appears that in this view of the matter, the prescribed authority was not inclined to set aside the order dated 6-11-1989. So far as the setting aside of the order dated 11-12-1989 was concerned, the only basis for rejecting the application for setting aside the said order which is disclosed is that it had been filed ten days after 11-12-1989. The Prescribed authority therefore, refused to set aside the exparte order dated 16-11-1989 only on account of the failure.of the Petitioner

tenant to move an application for recall of the order dated 6-11-1989 on 16-11-1989 itself and also on account of the failure of the tenant for filing the written statement inspite of the sufficient opportunities having been afforded for the purpose.

9. The learned Counsel for the Petitioner has urged that the prescribed authority has completely misdirected itself and has rejected the application for setting aside the *exparte* judgment/order dated 6-11-1989 passed against him on extraneous considerations without deciding the real controversy involved in the case.

10. The learned Counsel for the landlord Respondent on the other hand has urged that the conduct of the Petitioner clearly disentitled him for getting any relief and the prescribed authority was fully justified in refusing to set aside the *exparte* order of release when inspite of several opportunities, the tenant had not filed the written statement and inspite of his having notice of the fact that 16-11-1989 was the date fixed in the case had failed to move any application on that date for recalling of the order dated 6-11-1989. The learned Counsel contends that in these circumstances no sufficient ground can be said to have been made out which could justify the recall/setting aside of the order granting the release of the accomodation in dispute and no interference is therefore, called for by this Court.

11. I have given my anxious consideration to the respective submissions made by the learned Counsel for the parties and have carefully perused the record.

12. The proceedings u/s 21 of the U.P. Urban Buildings (Regulation of Letting & Eviction) Act, 1972 (hereinafter referred to as "Act") have "to be conducted in accordance with the procedure prescribed under the aforesaid Act and Rules framed thereunder. The provisions contained in Section 38 of the aforesaid Act ensures that the provisions of the Act and the Rules framed thereunder have to prevail and overhide the provisions contained in the Code of Civil Procedure, to the extent of inconsistency. A perusal of Section 34(1) of the Act however, indicates that the Act itself has borrowed the procedure provided for in the CPC in respect of certain specific matters. Rule 22 of the Rules framed under the Act provides that the prescribed authority for the purposes of holding any enquiry under the Act shall have the same powers as are vested in the civil court under the CPC of 1908 when trying a suit in respect of the matter relating to the power to proceed *exparte* and to set aside for sufficient cause, an order passed *expartc*.

13. Under the Code of Civil Procedure, the provisions contained in Order IX Rule 7 provide that where the Court has adjourned the hearing of the suit *exparte* and the Defendant, at or before such hearing, appears and assigns good cause for his previous non appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance. The provisions contained in Order IX Rule 13 of the CPC provide that in any case in which a decree is passed *exparte* against a

Defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court, shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

14. A perusal of the aforesaid provisions indicate that while for setting aside an *ex parte* order, the Defendant is required to assign "good cause" for his previous non appearance, the provisions contained in Order IX Rule 13 of the CPC provide that in order to set aside an *ex parte* decree, the Defendant has to establish that he was prevented by any "sufficient cause" from appearing when the suit was called on for hearing. The distinction is obvious. While, in the proceedings under Order IX Rule 7 the Defendant has to make out a "good cause", in the proceedings under Order IX Rule 13 he has to make out a "sufficient cause". While noticing this distinction, the Apex Court in its decision in the case of Arjun Singh Vs. Mohindra Kumar and Others, , had observed that the only difference between the two can be that the requirement of "good cause" is complied with on a lesser degree of proof than that of "sufficient cause". This distinction however, is not maintained in the proceedings before the prescribed authority under the provisions of the U.P. Act No. 13 of 1972 as is apparent from the fact that in Rule 22 (b) of the Rules framed under the said Act an *ex parte* order of whatever nature, it may be, can be set aside only for "sufficient cause". To this extent therefore, the provisions contained in Order IX Rule 7 of the CPC stand modified in their application to the proceedings under the U.P. Act No. 13 of 1972.

15. The *ex parte* order granting the release and thereby terminating the proceedings u/s 21 of the Act can be set aside in the proceedings of the nature contemplated under Order IX Rule 13 of the CPC which applies *mutatis mutandis* to such a proceeding. Thus, if the prescribed Authority is satisfied that the tenant was prevented by any sufficient cause from appearing when the case was called on for hearing it has to make an order setting aside the *ex parte* order of release passed against the tenant upon such terms as to costs, payment before it or otherwise, it thinks fit and has to appoint a day for proceeding with the case. The second proviso to Order IX Rule 13 of the CPC specifically prohibits the setting aside of *ex parte* order if the prescribed authority is satisfied that the tenant had notice of the date of hearing and had sufficient time to appear and answer the application for release.

16. In the aforesaid circumstances, it is apparent that sufficient cause has to be made out for non appearance when the case was called for hearing. Further in case, the tenant had notice of the date of hearing he has to establish that he did not have sufficient time to appear and answer the landlord's claim.

17. A look at the various provisions in the CPC establishes one fact that the word "hearing" has not been used in the same sense throughout in the Code. It is in this view of the matter, that this Court in its decision in the case of Kalloo Vs. Mt.

Imaman, , had pointed out that the first hearing in a suit commences when the court looks into the pleadings in order to formulate the points in controversy between the parties. However, this Court had pointed out that in cases in which the issues are framed, the hearing no doubt will be deemed to commence on that date. It was observed in that case that where issues had to be framed on a date fixed for that purpose, the hearing certainly commences when the court takes up a case to frame the issues. This is possible only after the tenant has filed his written statement.

18. In the case in hand, the prescribed authority itself had granted time to the tenant to file written statement by 6-11-1989. The order dated 24-10-1989 required nothing else except filing of the written statement on 6-11-1989. It is therefore, obvious that 6-11-1989 could not be taken as a date fixed for hearing of the case. On 6-11-1989, the prescribed authority had fixed 6-12-1989 for *ex parte* evidence. The prescribed authority had passed no order whatsoever fixing 16-11-1989 in the case. This date was neither a date fixed for leading evidence or for hearing. When a Court finds it necessary to postpone or *prcpone* a date of hearing in a pending suit it is a part of its duty to see that the date so postponed or preponed is communicated to the parties concerned or at any rate to such of them as are present or represented in the court in the case of any interrupted hearing on account of any circumstance like stay or transfer etc.

19. The record in the present case discloses as already noticed that the prescribed authority had not passed any order fixing 16-11-1989 as the date for evidence or for hearing. After taking up the case on 16-11-1989 what the prescribed authority, had done was that it had accepted affidavit evidence from the landlord and fixed 6-12-1989 for hearing the arguments. The application which had been filed on that date seeking setting aside of the order dated 6-11-1989 was rejected by the prescribed authority on the ground that such an application was not maintainable at the stage at which it had been filed. The prescribed authority had rejected the application seeking setting aside of the *ex parte* judgment/order dated 11th December, 1989 on the ground that the Petitioner had not moved any application seeking setting aside of the order dated 6-11-1989. This ground appears to be totally misconceived. It is to be noticed that 16-11-1989 was not a date fixed in the case according to the prescribed authority itself which fact is borne out from the certified copy of the order sheet of the case which has been produced for perusal of this Court. On 6-11-1989 the prescribed authority had fixed 6-12-1989 for *ex parte* evidence. There is nothing in the order sheet to indicate as to how 6-12-1989 was altered to 16-11-1989. Further there is nothing to indicate as to whether the prescribed authority had taken steps to communicate the tenant or his representative/counsel about this preponement of the date. The prescribed authority has further observed that the application for setting aside the judgment/order dated 11-12-1989 had been filed after ten days of the order. It is no body's case that this application had been filed after the expiry of the limitation. In such circumstances, this application could not be rejected as not maintainable on account of having been filed beyond

the prescribed time limit. Further in the facts and circumstances of the case, the order rejecting the application dated 6-12-1989 could not come in the way of hearing the application for setting aside the exparte judgment dated 11-12-1989 as the order rejecting that application passed in the present case was not of the kind which could operate as res-judicata so as to bar the hearing on the merits of the application under Order IX Rule 13 of the Code of Civil Procedure. This position is clear from the observations made by Hon"ble Supreme Court in its decision in the case of Arjun Singh v. Mohindra Kumar (Supra).

20. The Act is a self sufficient Act It lays down the procedure to be followed while dealing, with the various applications contemplated thereunder.

21. However, certain provisions from the CPC have been borrowed and are made applicable to the proceedings under the Act with some modifications. In the matters relating to procedure, the observations made by the Apex Court in its decision in the case of Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya, , can not go unnoticed. Taking into consideration these observations, it is clear that the procedure is designed to facilitate justice and further it"s ends, and is never designed to trip people up. Too technical a construction of section that leaves no room for reasonable elasticity of interpretation should therefore, be guarded against (Provided always that justice is done to "both sides") lest the very means designed for the furtherance of justice be used to frustrate it.

22. In view of what has been stated hereinbefore, I am clearly of (he opinion that the application filed by the Petitioner tenant for setting aside the exparte judgment/order dated 11-12-1989 has not been decided on merits and has been rejected on totally misconceived and extraneous considerations, ignoring the implications arising under the various provisions contained in the Act and the Rules which has further led to manifestly erroneous conclusions.

23. In the result, the writ petition succeeds in part and the impugned order dated 6-2-1990, passed by the Respondent No. 1 in P.A. Case No. 51 of 1989 is set aside with the direction to the Respondent No. 3 to decide the application 30 Ga on merits in accordance with the law and in the light of the observations made hereinabove.

24. Since, the release application had been filed on 5-9-1988 and the matter has become quite old, the prescribed authority is further directed to dispose of the aforesaid application within two months of the date a certified copy of this order is produced before him.

25. There shall be however, no order as to cost.