Kedarnath vs Mohan Lal Kesarwari & Ors on 10 January, 2002

Equivalent citations: AIR 2002 SUPREME COURT 582, 2002 (2) SCC 16, 2002 AIR SCW 170, 2002 ALL. L. J. 351, (2002) 1 BLJ 790, 2002 (1) BLJR 499, 2002 (2) SRJ 456, (2002) 1 JT 82 (SC), 2002 (1) SLT 144, 2002 BLJR 1 499, 2002 SCFBRC 77, (2002) 1 ALLMR 968 (SC), (2002) 1 ALL WC 502, (2002) 1 JCR 494 (SC), 2002 (1) ALL CJ 145, 2002 BLJR 1 608, (2002) 93 FACLR 938, 2002 (1) JT 82, (2002) 1 ALL RENTCAS 186, (2002) 1 RENCR 137, (2002) 1 SCJ 239, (2002) 1 RENCJ 100, (2002) 2 GUJ LR 1707, (2002) WLC(SC)CVL 148, (2002) 1 RENTLR 78, (2002) 1 BLJ 520, (2002) 1 UC 330, (2002) 46 ALL LR 377, (2002) 3 GUJ LH 406, (2002) 1 MAD LJ 189, (2002) 1 SCALE 87, (2002) 1 SUPREME 72, (2002) 2 PAT LJR 46

Author: R.C. Lahoti

Bench: R.C. Lahoti, Brijesh Kumar

CASE NO.:
Appeal (civil) 5109 of 1999

PETITIONER:
KEDARNATH

Vs.

RESPONDENT:
MOHAN LAL KESARWARI & ORS.

DATE OF JUDGMENT: 10/01/2002

BENCH:
R.C. Lahoti & Brijesh Kumar

JUDGMENT:

R.C. Lahoti, J.

The landlord-appellant filed a suit for recovery of arrears of rent and for eviction against the tenant-respondents on the ground available under Clause (a) of sub-Section (2) of Section 20 of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, hereinafter U.P. Urban

Buildings Act, for short. A suit of the nature filed by the appellant being triable by a court of small causes, as provided by the U.P. Civil Laws Amendment Act, 1972 was filed in the Court of Small Causes, Allahabad. On 9.8.1996, the suit came to be decreed ex-parte. The decree directed the tenant-respondents to pay an amount of Rs.8500/- as pre-suit arrears of rent and a further amount calculated at the rate of Rs.250/- per month from the date of institution of suit to the date of recovery of possession. A decree for eviction was also passed. The decree was put to execution and on 21.2.1998 the decree-holder obtained possession over the suit premises with police help. The court amin certified the delivery of possession to the executing court. On 26.2.1998, the tenant-respondents moved an application under Order 9 Rule 13 of the C.P.C. seeking setting aside of the ex-parte decree. Neither the amount due under the decree was deposited nor an application was filed seeking direction of the court to give security for the performance of the decree in lieu of depositing the decretal amount. On 14.10.1998, arguments were heard on the application under Order 9 Rule 13 of the C.P.C.. The court appointed 16.10.1998 for orders.

It appears that during the course of hearing the appellant decree-holder pointed out to the court that the application seeking setting aside of the ex-parte decree was not maintainable and was liable to be dismissed in limine for non-compliance with proviso to Section 17 of the Provincial Small Cause Courts Act, 1887 (hereinafter, 'the PSCC Act', for short). On 15.10.1998, the tenant- respondents filed an application praying that they may be permitted to furnish security for payment of decretal amount. The reason assigned for failure to deposit the amount due under the decree or to furnish security alongwith the application seeking setting aside of the ex-parte decree is somewhat oscillating. At one place at is stated that their advocate had never advised them to deposit the decretal amount as the advocate himself was not aware of the provision. Then, at another place, it is stated that the rent was already paid to the landlord decree- holder and there were no arrears required to be deposited. At yet another place it is stated that their advocate had advised them that on the application seeking setting aside of the ex-parte decree being allowed and the suit being restored to file, on the first date of hearing the tenant has to deposit the rent in arrears which would be done at that stage only. Vide order dated 15.11.1998, the learned Judge, Small Causes, rejected the application filed by the tenant-respondent forming an opinion that ignorance of law was not excusable and the application under Order 9 Rule 13 of C.P.C. filed without complying with proviso to Section 17 of the PSCC Act was not maintainable.

The tenant-respondents preferred a revision in the court of Additional District Judge, which was allowed. The learned Additional District Judge vide order dated 22.4.1999, condoned the delay in moving the application dated 15.10.1998 and directed the trial court to accept security as proposed and hear and decide the application under Order 9 Rule 13 of the C.P.C. on merits. The abovesaid revisional order was put in issue by the landlord-appellant by filing a writ petition under Article 226 and 227 of the Constitution before the High Court, which has been rejected. The landlord has filed this appeal by special leave.

Mr. Gourab K. Banerji, the learned counsel for the appellant has made two submissions: firstly, that the proviso to Section 17 of the Act is mandatory in its character and non-compliance therewith cannot be condoned; and secondly, assuming that the court has power to condone the delay in making the deposit or furnishing the security on the principles deducible from Section 5 of the

Limitation Act, even then no sufficient cause was made out for belated offer to make compliance and in as much as the landlord has already secured possession of the premises, the tenant-respondents' application was liable to be rejected.

It is not disputed at the Bar that such a suit as was filed by the landlord-appellant is, in the State of U.P., to be heard and disposed of by a court of small causes and hence would be governed by the provisions of the PSCC Act. Section 17 thereof provides as under:

> "7. Application of the Code of Civil Procedure.- (1) The procedure prescribed in the Code of Civil Procedure, 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 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 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 realized in manner provided by Section 145 of the Code of Civil Procedure, 1908."

It is relevant to note that the proviso to sub-Section (1) of Section 17 has undergone a material change through an amendment brought in by Act No.IX of 1935. Earlier there were the words- "security to the satisfaction of the Court for the performance of the decree or compliance with the judgment, as the court may direct" which have been deleted and substituted by the present words - "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". The Statement of Objects and Reasons for the 1935 amendment was set out as under:

> "The Act is designed to remove certain doubts which have arisen in the interpretation of the proviso to sub-section (1) of Section 17 of the Provincial Small Cause Courts Act, 1887. As the section stands, an applicant is required to give security to the satisfaction of the Court at the time of presenting his application. It follows that, in order to ascertain what security satisfies the Court, the applicant must already have made an application in that behalf. There is some doubt whether the words "as the Court may direct" apply to the deposit of the whole decretal amount as well as to the giving of approved security. The Act is intended to make it clear that the preliminary application to ascertain what security will satisfy the Court must be made and decided before the substantive application for the order to seet aside the decree, and that it always is open to the applicant to adopt the alternative course of depositing the total decretal amount. (Vide Statement of Objects and Reasons, Gazette of India,

1935, Pt. V, p.90)."

The object behind establishing Small Cause Courts conferred with jurisdiction to try summarily such specified category of cases which need to be and are capable of being disposed of by adopting summary procedure of trial is to secure an expeditious disposal and to curtail the lengthy procedure of litigation. Excepting an order for compensatory costs in respect of false or vexatious claims or defences or an order imposing fine or directing the arrest or detention in the civil prison of any person (except where such arrest or detention is in execution of a decree), orders and decrees of courts of small causes are not appealable: they are only revisable by the High Court (or by District Court under Section 115 of CPC as amended in its application to State of U.P.). The jurisdiction to entertain and hear an application to set aside a decree passed ex-parte or for a review of judgment by courts of small causes is sought to be qualified and narrow down by imposing condition as to deposit or giving security for performance or compliance by enacting proviso to sub-section (1). Such a provision fits in the scheme of the PSCC Act. Although there is no authoritative pronouncement by this Court (none brought to our notice) interpreting the nature and scope of the proviso however, the learned counsel for the appellant brought to our notice a number of decisions delivered by the High Courts of Allahabad, Oudh, Madras, Orissa, Rajasthan and Lahore which have taken the view that the proviso is mandatory and non-compliance therewith would entail dismissal of the application because such non-compliance cannot be condoned or overlooked by the court. They are, to wit : Mohammad Ramzan Khan Vs. Khubi Khan AIR 1938 Lahore 18 (DB), Murari Lal Vs. Mohammad Yasin AIR 1939 Allahabad 46, Mt. Shikhani Vs. Bishambhar Nath AIR 1941 Oudh 103, Jagdamba Prasad & Ors. Vs. Ram Das Singh & Anr. AIR 1943 Allahabad 288, Roshan Lal Vs. Brij Lal Amba Lal Shah- AIR 1944 Oudh 104, Vembu Amal Vs. Esakkia Pillai AIR 1949 Madras 419, Khetra Dolai Vs. Mohan Bissoyi AIR 1961 Orissa 37, and Dhanna Vs. Arjun Lal AIR 1963 Rajasthan 240. As the present case arises from the State of Uttar Pradesh, the learned counsel for the appellant cited a series of decisions delivered by Allahabad High Court so as to show the view of the law being consistently taken there. These are : Krishan Kumar Vs. Hakim Mohd. 1978 ALJ 738, Sharif Vs. Suresh Chand & Ors. 1979 AWC 256, Roop Basant Vs. Durga Prasad & Anr. 1983 1 ARC 565, Mohd. Islam Vs. Faquir Mohammad 1985 1 ARC 54, Krishan Chandra Seth Vs. Dr. K.P. Agarwal & Anr. - 1988 1 ARC 310, Mamta Sharma Vs. Hari Shankar Srivastava & Ors.- 1988 1 ARC 341, Mohd. Yasin Vs. Jai Prakash 1988 2 ARC 575, Purshottam Vs. Special Additional Sessions Judge, Mathura & Ors. 1991 2 ARC 129, Ram Chandra (deceased L.Rs.) & Ors. Vs. IXth Additional District Judge, Varanasi & Ors.- AIR 1991 Allahabad 223, Sagir Khan Vs. The District Judge, Farrukhabad & Ors. - 1996 27 ALR 540, Mohammad Nasem Vs. Third Additional District Judge, Faizabad & Ors. AIR 1998 Allahabad 125, and Beena Khare Vs. VIIIth Additional District Judge, Allahabad & Anr. 2000 2 ARC

616. The learned counsel for the respondent brought to our notice Surendra Nath Mittal Vs. Dayanand Swarup and Anr. AIR 1987 Allahabad 132, Chigurupalli Suryanarayana Vs. The Amadalavalasa Co-operative Agricultural Industrial Society Ltd. AIR 1975 A.P. 196 and Tarachand Hirachand Porwal Vs. Durappa Tavanappa Patravali AIR 1943 Bombay 237. All the three decisions are single Bench decisions. Suffice it to observe that the first two decisions are more or less ad hoc decisions which do not notice other decisions and the general trend of judicial opinion. The view propounded therein does not appeal to us. The Bombay decision does not lay down any general proposition of law and proceeds on its own facts.

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 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.

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

The trial court was therefore right in rejecting the application. The District Judge in exercise of its revisional jurisdiction could not have interfered with the order of the trial court. The illegality in exercise of jurisdiction by the District Court disposing of the revision petition was brought to notice of the High Court and it was a fit case where the High Court ought to have in exercise of its supervisory jurisdiction set aside the order of the District Court by holding the application filed by the respondent as incompetent and hence not entertainable. We need not examine the other question whether a sufficient cause for condoning the delay in moving the application for leave of the court to furnish security for performance was made out or not and whether such an application moved at a highly belated stage and hence not being a 'previous application' was at all entertainable or not.

The appeal is allowed. The impugned orders of the District Court and the High Court respectively dated 22.4.1999 and 18.5.1999 are set aside and the order of the trial court dated 15.11.1998 is restored. No order as to the costs.

.....J (R.C. LAHOTI) ...J (BRIJESH KUMAR) January 10, 2002