Banarsi Lal

Vs

Saghiran Begum

Civil Appeal No. 5858 of 1983

(M.H. Kania, N.D. Ojha JJ)

03.05.1988

JUDGMENT

OJHA, J. –

1. This is a tenant's appeal by special leave against the judgment of the Allahabad High Court dismissing his second appeal arising out of a suit for ejectment of the appellant filed by the landlord-respondent in respect of a shop. One of the questions which came up for consideration in the suit was as to whether the U. P. (Temporary Control of Rent and Eviction) Act, 1947 (U. P. Act 3 of 1947) was or was not applicable to the shop in question. The trial court held that the said Act was not applicable. Other pleas raised in defence by the appellant having failed, a decree for eviction and for recovery of damages foe use and occupation was passed against him on August 19, 1971. The trial court, however, directed the parties to bear their own costs. Against that decree an appeal was preferred by the appellant. During the pendency of the appeal, the U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (U. P. Act 13 of 1972), hereinafter referred to as the Act, was enforced with effect from July 15, 1972. The appellant made deposit contemplated by Section 39 read with Section 40 of the Act on July 19, 1972, that is, within one month from July 15, 1972, which was the date of the commencement of the Act, in the lower appellate court and asserted that in view of the deposit so made he was entitled to be absolved from his liability for eviction from the disputed shop. The amount so deposited, however, did not include the costs of the suit. Subsequently, the appellant was permitted to deposit even the costs of the suit by the lower appellate court but at his own risk.

2. In regard to the claim of the appellant that he was entitled to be absolved from his liability for eviction on account of the deposit made by him on July 19, 1972, it was urged on behalf of the landlord-respondent that since the costs of the suit had not been deposited and the subsequent deposit thereof was beyond one month contemplated by Section 39 of the Act, the appellant was not entitled to the benefit of the said section read with Section 40. For the appellant, on the other hand, it was urged that since the trial court had directed the parties to bear their own costs the benefit of the aforesaid sections could not be denied to him for non-deposit of the costs of the suit. In the alternative, it was asserted by him that since the costs even of the suit were deposited subsequently the delay in the deposit was liable to be condoned. However, neither the main plea nor the alternative plea found favour with the lower appellate court and it dismissed the appeal with costs. It further passed a decree for the costs of the suit also in favour of the landlord-respondent by allowing the cross-examination filed by her in this behalf.

3. Aggrieved by the decree passed by the lower appellate court the appellant preferred a second appeal which was dismissed by the High Court by the Judgment appealed against. The pleas which

were raised by the appellant before the lower appellate court and the High Court in regard to the scope of Section 39 read with Section 40 of the Act have been reiterated before us by his learned counsel. In support of his alternative submission that the delay in depositing the costs of the suit deserved to be condoned, the learned counsel for the appellant placed reliance on a decision of this Court in Krishna Kumar Gupta v. Addl. District Judge IV [(1987) 2 RCR 638]. On the facts of the instant case, however, we do not find it necessary to go into the question as to whether the delay in making deposit contemplated by Section 39 can be condoned or not because in our opinion the appeal deserves to be allowed on the main submission made by the learned counsel for the appellant, namely, that since the trial court had directed the parties to bear their own costs as a result of which the costs of the suit were not payable by the appellant on the date of the deposit, the non-deposit of the said costs within one month from July 15, 1972 as contemplated by Section 39 of the Act could not deprive him of the benefit of the said section. What was the true import of the expression 'full costs' used in Section 39 of the Act, came up for consideration before a Division Bench of the Allahabad High Court in R. D. Ram Nath & Co. v. Girdhari Lal [1975 All LJ 1]. Insofar as is relevant for the present case it was held :

> The expression 'full costs of the suit' in respect of a pending suit will represent the amount of court fee paid on the plaint and on other documents and other taxable expenses incurred by the landlord by the date of deposit together with such amount of the advocate's fee and the fee of his clerk as is taxable on the contested scale whether any certificate of fee has or has not been filed by the date of deposit.

In case of a first appeal or revision filed against a decree or order of the trial court it will represent the costs awarded to the landlord in the decree or order together with the amount paid as court fee on the memorandum of appeal or revision and other documents and other taxable expenses incurred in the first appellate or revisional court including the advocate's fee and the fee of his clerk which are to be computed in the manner stated above.

4. This decision was cited before the learned Judge who decided the appellant's second appeal with particular emphasis on the words 'the costs awarded to the landlord in the decree or order' with regard to the deposit or to be made in case of a first appeal or revision filed against a decree or order of the trial court. The learned Judge, however, took the view that since an appeal was a continuation of the suit the aforesaid words appear to have been mentioned by the Bench rather loosely. He also pointed out that in case the cross-objection filed by the landlord was ultimately allowed the costs of the trial court would become payable and in this view of the matter also the costs of the suit had to be deposited notwithstanding the fact that the trial court had directed the parties to bear their own costs. According to the learned Judge the word 'landlord's full costs of the suit' were not the same thing as the costs awarded to the plaintiff in a suit and that the word 'landlord' had been used in Section 39 purposely in order to distinguish it from the plaintiff of the suit. He further took the view that 'landlord's full cost of the suit' in Section 39 really meant all those taxable costs which were capable of being ascertained on the date of the deposit.

5. Having heard learned counsel for the parties we find it difficult to agree with the view that the words 'the costs awarded to the landlord in the decree or order' were used loosely. Irrespective of the actual amount of costs that may have been incurred by the landlord prosecuting a suit he is entitled to recover from the tenant only such costs which in law are known as taxable costs and are made payable by the tenant to the landlord. The matter may be clarified by an illustration. Take a case where court fee in excess of what is prescribed has been actually paid by the landlord. Notwithstanding such payment the tenant, even on the suit being decreed with costs, will not be

liable to pay the excess amount of court fee, inasmuch as law does not permit it to be taxed. The same would be the position in regard to the fee paid by the landlord to his counsel in excess of such fee as is taxable. For this reason even though the word 'taxable' has not been prefixed to the words 'costs of the suit' in Section 39 of the Act, the concept of taxable costs has been introduced therein in the process of interpretation of the said section. On principle, we do not find much difference in a case where the costs incurred by the landlord have been made specifically not payable by the tenant to the landlord by a decree or order of the court. In our opinion non-deposit of such costs which, either on account of the relevant rules or some specific order of the court are not payable by the tenant to the landlord on the date of deposit contemplated by Section 39 or 40, as the case may be, cannot deprive the tenant of the benefit of these two sections. The fact that in appeal there was a possibility of costs of the suit also being awarded to the landlord by reversing the decree of the trial court in this behalf will, in our opinion, not be material.

6. As regards the use of the word 'landlord' in place of the word 'plaintiff' in Section 39 of the Act suffice it to point out that since the Act deals with landlords and tenants the word 'landlord' was used in Section 39 also as it was used in various other sections. This circumstance, in our opinion, could not be used for holding that even if costs are not payable to the landlord on the date of deposit because of some specific order of the court it would still be payable.

7. We would, however, like to emphasise that since Section 39 contemplates deposit of full costs of suit also, in cases falling under this category, namely, where because of a decree or an order passed by the court below depriving the landlord of his costs, the tenant is not liable to pay the amount of costs on the date when the deposit contemplated by Section 39 read with Section 40 of the Act is made in an appellate or revisional court, such court in order to safeguard the interests of the landlord and to give effect to the intention of the legislature expressed in Section 39 read with Section 40 of the Act will require the tenant to deposit such costs also in supersession of the decree or order of the subordinate court in this behalf, if the other conditions of these two sections have been complied with, before passing an order giving him the benefit of these sections, namely, of absolving him from his liability for eviction from the premises in question. Such a course would meet the ends of justice and safeguard the interests of both the parties. In doing so, in cases falling under the aforesaid category, the court will neither be condoning any default nor extending the time for depositing costs of the suit beyond the date contemplated by Section 39, inasmuch as on that date such costs were not payable by the tenant because of an order of court passed in this behalf. In the instant case the costs of the suit had already been deposited by the tenant and only an order permitting the landlord to withdraw the same was needed.

8. The learned counsel for the landlord-respondent while supporting the judgment appealed against placed reliance on a subsequent decision by Division Bench of the Allahabad High Court in Smt. Phoolwati v. Gyan Chand Verma [1985 All LJ 1]. It was pointed out by him that there judgment under appeal in the instant case on the point in question, has been approved in the case of Smt. Phoolwati [1985 All LJ 1]. In our opinion, the decision in the case of Smt. Phoolwati [1985 All LJ 1] is distinguishable on facts. That was a case where during the pendency of the suit the landlord had sought permission to file some papers but her application, made in this behalf, was rejected by the trial court. Against that order the landlord preferred a revision which was allowed with costs which amount, as quantified in the former order, came to Rs. 132.10. The amount which was deposited by the tenant in order to claim the benefit of Section 39 of the Act, however, did not include this sum. It was urged on behalf of the tenant that since the sum of Rs. 132.10 represented costs awarded in a revision arising not out of the main decree but out of an interlocutory order it was not necessary to be deposited. This plea was repelled and in doing so reliance was indeed

placed on the decision in the case of R. D. Ram Nath & Co. [1975 All LJ 1] Emphasis was placed on the words 'other taxable expenses incurred' occurring in that part of the judgment in the case of R. D. Ram Nath & Co. [1975 All LJ 1] which has been extracted above. Another circumstance which was relied on by the tenant in that case was that even though the revision against the interlocutory order had been dismissed with costs, the amount of Rs. 132.10 even though mentioned in the formal order was not included in the ultimate decree which was passed in the suit. It is in this background that it was held that the said amount of Rs. 132.10 fell within the expression of 'landlord's full costs of the suit' notwithstanding the fact that it was not shown in the decree. It was thus a case where the sum of Rs. 132.10 had specifically been made payable by the tenant to the landlord in the revision against the interlocutory order but for some reason was omitted to be included in the ultimate decree. It was not a case where the costs of the revision had been directed to be borne by the parties so that it was rendered not payable by the tenant. Since the question in regard to the effect of costs not being allowed by a decree or order did not arise in the case of Smt. Phoolwati [1985 All LJ 1] there was really no occasion to approve in that case the judgment appealed against in the instant case.

9. In view of the forgoing discussion we are of the opinion that on the facts of the instant case the appellant was entitled to the benefit of Section 39 read with Section 40 of the Act and to be absolved from his liability to be evicted from the shop in question on account of the deposit made by him on July 19, 1972 referred to above. In the result, this appeal succeeds and is allowed and the suit of the plaintiff-respondent insofar as the eviction of the appellant from the shop in question is concerned, is dismissed. The landlord-respondent shall be entitled to withdraw the various amounts including costs of suit deposited by the tenant-appellant in the courts below. In the circumstances of the case, however, the parties shall bear their own costs of this appeal.

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