SUPREME COURT OF INDIA

Bal Gopal Maheshwari

Vs.

Sanjeev Kumar Gupta

C.A.No.7279 of 2013

(Sudhansu Jyoti Mukhopadhaya and Kurian Joseph JJ.)

30.08.2013

JUDGMENT

SUDHANSU JYOTI MUKHOPADHAYA, J.

1. Leave granted. This appeal is preferred by the appellants against the judgment and order dated 17th September, 2007 passed by the learned Single Judge, High Court of Judicature at Allahabad in Civil Miscellaneous Writ Petition No. 44387 of 2007. By the impugned judgment, the High Court exercised its revisional jurisdiction under Article 227 of the Constitution of India and set aside the orders dated 31st May, 2007 and 9th January, 2006 passed by the District Judge, J.P. Nagar in S.C.C Revision No.1 of 2006 and Civil Judge, (S.D.), J.P. Nagar in Suit No. 17 of 1998 respectively. Thus, defence of the respondent which was struck off by the Courts below was restored by the High Court.

2. The appellants filed Suit No. 17 of 1998 on 21st September, 1998 before Civil Judge (S.D.) for eviction of the respondent-defendant-tenant from the suit premises, the shop located at Mohalla Raju Sarai Kanth Road, Amroha Distt., J.P. Nagar on the ground of arrears of rent and default.

3. Inspite of receipt of notice, the respondent did not choose to file written statement within the specified period. After long delay, the respondent filed his written objection on 3rd April, 1999 against which the appellant-plaintiffs filed an application for striking off the defence on the ground that the respondent failed to deposit the rent, the damages due and the cost of the suit inspite of order dated 16th December, 1998, the first date of hearing and also failed to deposit water tax and

house tax and thereby not complied with the provisions under Order XV Rule 5 of the Code of Civil Procedure ('CPC' for short).

4. The learned Civil Judge (S.D), J.P. Nagar by order dated 9th January, 2006 allowed the application of the appellant-plaintiffs and struck off the defence of the respondent.

5. Against the said order, the respondent filed revision application in S.C.C R.No.1 of 2006 before the District Judge, J.P. Nagar in February, 2006. The District Judge, J.P. Nagar by impugned order dated 31st May, 2007 dismissed the same and affirmed order dated 9th January, 2006 passed by the Trial Court.

6. The respondent thereafter filed a petition under Article 227 of the Constitution of India before the High Court of Judicature at Allahabad registered as Civil Miscellaneous Writ Petition No. 44387 of 2007. The learned Single Judge passed the following order:

> " Heard learned counsel for the parties.
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> This is tenant's writ petition directed against the order striking off his defence. The Trial Court/JSCC/Civil Judge (S.D.), J.P. Nagar passed the order striking off the defence on 9.1.2006 in SCC Suit No.17 of 1998. Against the said order, petitioner filed SCC Revision No.1 of 2006 before the District Judge, J.P. Nagar and the same was dismissed on 31.5.2007.
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> Defence has been struck off due to some irregularity in deposit of the monthly rent, under the provisions of Order 15 Rule 5 C.P.C. The provision of Order 8 Rule 1 C.P.C. is also mandatory in nature. However, the Supreme Court has held that still the Court has got jurisdiction and discretion to accept the written statement even after expiry of 90 days from the date of service of summon on payment heavy cost. The same principle may apply to the cases under Order 15 Rule 5 C.P.C.
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> Accordingly, the writ petition is allowed, both the impugned orders dated 31.5.2007 and 9.1.2006 are set aside. The petitioner shall pay Rs.10,000/- as costs and the same shall be deposited by the petitioner before the Trial Court within 6 weeks from today. In case of default, this order shall stand automatically vacated. It is further directed that the Civil Judge (S.D.), J.P.Nagar shall make all efforts to decide the aforesaid suit within six months."

7. Learned counsel for the appellants submitted that the High Court committed a mistake in exercising its jurisdiction under Article 227 to set aside concurrent findings of the two Courts below against the wilful, habitual, consistent, persistent, regular and stubborn defaulter-tenant. The High Court exceeded its jurisdiction going beyond the pleadings and facts and erred by comparing Order XV Rule 5 CPC with Order VIII Rule 1 CPC and wrongly gave benefit to the respondent. It was further contended that the High Court completely ignored the well reasoned finding of the Courts below which struck off the written statement.

8. Per contra, according to counsel for the respondent, the lower courts wrongly interpreted Order XV Rule 5 CPC that it is mandatory in nature whereas the court has jurisdiction and discretion to accept the written statement even after expiry of 90 days from the date of service of summon on payment of heavy cost as per decision of this Court. It was further contended that by the impugned judgment the said mistake committed by the lower courts was corrected by the learned Single Judge of the High Court.

9. We have heard the learned counsel for the parties and perused the record. Both the parties relied upon one or the other decision of this Court which will be referred at an appropriate stage.

10. In the present case, we find that both the courts below noticed several defaults committed by the respondent in depositing the monthly rent. The aforesaid fact was noticed by the District Judge, J.P. Nagar, as mentioned in paragraph 11 of the order dated 31st May, 2007 and the same is reproduced below:

> "11. In the present case there are several defaults committed by the revisionist in depositing the monthly rent as under. The rent of April 1999 must be deposited upto 7th May 1999, it has been deposited by delay of 20 days on 27/05/1999. No representation in this behalf has been given by the tenant explaining the delay. Further the rent of June 1999 has not been deposited upto 7th of July 1999 nor the rent of month of July 99 was deposited upto 07/08/99, on the contrary rent of both the months i.e. June & July 99 has been deposited after a considerable delay on 23/08/99, although including the rent of August 99, as well, but no explanation/representation regarding the delay in deposit of the month of June and July 99 has been furnished. In the same way, the rent of the month of September, October-99 has been deposited after considerable delay on 08/12/1999 although the rent of November and December-99 has been included therein but no explanation

of such delay in deposit of rent of September and October 99, has been furnished, similarly the rent of Jan, 2000 was deposited on 07/03/2000, and no explanation/representation was furnished explaining the delay in deposit, although the rent of February, March and April 2000 has been included therein similarly, the rent of May and June – 2000 has been deposited on 27/07/2000 including the rent of Month of July and August 2000 but no explanation/representation regarding the delay deposit of the month of May and June-2000 was given by the tenant. Further the rent of Sep.2000 was deposited on 06/11/2000 in which the rent of October, November and December-2000, was included. The delay deposit of rent of the month of September has not been explained. The rent of January,2001 was deposited after a considerable delay on 22/03/2001 in which the rent up to April 2001 has been deposited the rent of May, June, July, August, September, October and November 2001, total 7 months of rent was deposit on 5/12/2001 including the month of December 2001, there is no explanation/representation regarding this huge delay of deposit of the rent of month May, June, July, August, September and October, 2001. The rent of January and February was deposited on 11/03/2002 no representation/explanation of this delay, too has been given, the rent of September, October, November and December 2002 was deposited for the first time on 11/12/2005 by tender 122/C after moving the application for striking off the defence. In this deposit as well there is no representation/explanation of this delay of more than two years. The rent of Jan 2003 was deposited on 18/02/03, rent of September, October, November and December 2003 and Jan 2004 was deposited on 04/03/2004 in this deposit as well no representation/explanation of any kind has been given by the tenant. The rent of May, June, July 2004 has been deposited on 25/08/2004 in this deposit as well no delay has been explained........................ The tenant in this case only made representation that he had deposited the correct money rent but he did not file any application for extension of time. In the circumstances, therefore, the courts below were right in holding that there was a default in payment of the monthly rent and since there was also no application for extension of time under sub rule (2) of Rule 5 of Order XV C.P.C. the defence was liable to be struck off. The order of the High Court in the writ petition is therefore not sustainable."

11. Rule 5 of Order XV, Code of Civil Procedure, was enacted by the U.P. Civil Laws (Amendment) Act, 1972 and the said Rule reads as follows: "5. Striking off defence for failure to deposit admitted rent.—

(1) In any suit by a lessor for the eviction of a lessee after the determination of his lease and for the recovery from him of rent or compensation for use and occupation, the defendant shall, at or before the first hearing of the suit, deposit the entire amount admitted by him to be due together with interest thereon at the rate of nine per cent per annum and whether or not he admits any amount to be due, he shall throughout the continuation of the suit regularly deposit the monthly amount due within a week from the date of its accrual and in the event of any default in making the deposit of the entire amount admitted by him to be due or the monthly amount due as aforesaid, the Court may, subject to the provisions of sub-rule (2) strike off his defence.

Explanation 1-3 * * * *

(2) Before making an order for striking off defence, the court may consider any representation made by the defendant in that behalf provided such representation is made within ten days of the first hearing or, of the expiry of the week referred to in sub-section (1), as the case may be.

(3) The amount deposited under this rule may at any time be withdrawn by the plaintiff:

Provided that such withdrawal shall not have the effect of prejudicing any claim by the plaintiff disputing the correctness of the amount deposited:

Provided further that if the amount deposited includes any sums claimed by the depositor to be deductible on any account, the Court may require the plaintiff to furnish the security for such sum before he is allowed to withdraw the same."

12. In Bimal Chand Jain v. Sri Gopal Agarwal (1981) 3 SCC 486, this Court having noticed the aforesaid provision held as follows:

"6. It seems to us on a comprehensive understanding of Rule 5 of Order XV that the true construction of the Rule should be thus. Sub-rule (1) obliges the defendant to deposit, at or before the first hearing of the suit, the entire amount admitted by him to be due together with interest thereon at the rate of nine per cent per annum and further, whether or not he admits any amount to be due, to deposit regularly throughout the continuation of the suit the

monthly amount due within a week from the date of its accrual. In the event of any default in making any deposit, "the court may subject to the provisions of sub- rule (2) strike off his defence". We shall presently come to what this means. Sub-rule (2) obliges the court, before making an order for striking off the defence to consider any representation made by the defendant in that behalf. In other words, the defendant has been vested with a statutory right to make a representation to the court against his defence being struck off. If a representation is made the court must consider it on its merits, and then decide whether the defence should or should not be struck off. This is a right expressly vested in the defendant and enables him to show by bringing material on the record that he has not been guilty of the default alleged or if the default has occurred there is good reason for it. Now, it is not impossible that the record may contain such material already. In that event, can it be said that sub-rule (1) obliges the court to strike off the defence? We must remember that an order under sub-rule (1) striking off the defence is in the nature of a penalty. A serious responsibility rests on the court in the matter and the power is not to be exercised mechanically. There is a reserve of discretion vested in the court entitling it not to strike off the defence if on the facts and circumstances already existing on the record it finds good reason for not doing so. It will always be a matter for the judgment of the court to decide whether on the material before it, notwithstanding the absence of a representation under sub-rule (2), the defence should or should not be struck off. The word "may" in sub- rule (1) merely vested power in the court to strike off the defence. It does not oblige it to do so in every case of default. To that extent, we are unable to agree with the view taken by the High Court in Puran Chand1. We are of opinion that the High Court has placed an unduly narrow construction on the provisions of clause (1) of Rule 5 of Order XV."

13. The same very provision of Rule 5 of Order XV fell for consideration before this Court in Smt. Satya Kumari Kamthan v. Noor Ahmed and others 1992 (2) Allahabad Rent Cases 82 (SC). That was the case when the plaintiff filed an application for striking off, the tenant filed a written statement objecting to the striking off on the ground that there was no default in payment of the monthly rent as provided under Rule 5(1) of Order XV. The Courts below did not accept the said contention and found as a fact that there was a default in payment of the admitted rent. The Courts below also noticed that though there was a default there was no "representation" by the tenant giving any excuse for not depositing the correct amount or praying for extension of time for deposit for valid reasons and that, therefore, the plaintiff of the said case was held to be entitled to get the

defence struck off. This Court referring to the provisions of Rule 5 of Order XV and relying on decision of this Court in Bimal Chand Jain (supra) held that if the tenant has not made any representation under Rule 5 of Order XV and there is a default in payment of rent, it is open to the court to strike off the defence. The word "representation" may cover a "representation" in answer to an application for striking off or a "representation" praying for an extension of time for making the deposit on sufficient grounds.

14. In Mangat Singh Trilochan Singh v. Satpal (2003) 8 SCC 357 this Court noticed the discretionary power of the Trial Court in the matter of striking off defence under Order XV of Rule 5 as in the said case Trial Court refused to strike off the defence of the tenant on the ground that a substantial question of jurisdiction was involved. The Trial Court also came to the conclusion that as arrears of rent having been deposited in Bank there were no mala fide on the part of the tenant and that the arrears were thereafter deposited in court with an application or representation made in accordance with sub-rule (2) of Rule 5. This Court held that refusal to strike off defence and acceptance of deposit of arrears of rent was justified.

15. In the present case, the Trial Court fully applied its mind while exercising its discretionary power to strike off the defence. The grounds were noticed, as mentioned at Paragraph 11 of the judgment passed by the District Judge and is quoted above. Learned District Judge exercising its revisional jurisdiction, affirmed the order passed by the Trial Court. The aforesaid judgment(s) cannot be said to be perverse nor can it be said that the courts below have exceeded or failed to exercise their jurisdiction. The power to strike off the written statement vested under Rule 5 of Order XV was exercised by the lower courts after going through the facts of the case.

16. Inspite of the aforesaid fact, we find that the High Court failed to give any ground while exercising its inherent power under Article 227 of the Constitution of India. Learned Single Judge by impugned judgment observed that the Supreme Court has held that the Court has jurisdiction and discretion to accept the written statement even after expiry of 90 days from the date of service of summons on payment of heavy cost. Defendant has neither cited any decision nor shown any ground for acceptance of written statement even after expiry of 90 days from the date of service of summons on payment of heavy cost. The order passed by the Trial Court by exercising its discretionary power and the order passed by the Revisional Court affirming the Trial Court order were not perverse and both the courts below have not exceeded their jurisdiction. Hence, it was not open to the

High Court to sit in appeal under Article 227 of the Constitution of India to alter such finding of facts and to accept the written statement without any ground.

17. For the reasons aforesaid, we have no option but to set aside the impugned judgment dated 17th September, 2007 passed by the learned Single Judge, High Court of Judicature at Allahabad in Civil Miscellaneous Writ Petition No.44387 of 2007 and allow the appeal. The Trial Court is expected to decide the Suit No.17 of 1998 expeditiously as the matter is pending since long. No costs.