ALLAHABAD HIGH COURT

Sri Nath Agrawal

Vs.

antosh Kumar

Civil Revn. No.1537 of 1979

(N.N. Mithal, J.)

07.08.1981

ORDER

N. N. Mithal, J.

1. A suit for the ejectment of the revisionist was filed by the opposite party on 22nd August, 1978 after terminating his tenancy by means of a notice issued under Section 106 of the Transfer of Property Act. Along with the filing of the suit, by means of a separate application, the plaintiff prayed for attachment before Judgment of certain property belonging to the defendant revisionist. The Court ordered issue of notice on this application against the defendant and also issued interim attachment order. In the notice, 4th of September, 1978 was fixed for hearing of the application. In response to this application, the revisionist made an appearance through counsel and on 3-9-1978 prayed for time to file objections against the plaintiff's application for attachment before Judgment as his (defendant's) counsel was going out of station for some time. This application was allowed fixing 11-9- 1978 for filing objections. On 11-9-1978, the counsel for the defendant was present in Court and filed necessary, objections against the plaintiff's application for attachment before JUDGEMENT. The hearing of this application and objections thereon was, then, adjourned for 30th Sept. 1978. The Court further ordered on that very day that the defendant may file his written statement within one month and further the suit came up for final hearing on 24th October, 1978. In the original record, on the order sheet for 11-9-78 there are three dates written and there are signatures of the counsel also. The case could not, however, be taken up on 30th Sept., and was posted for disposal of applications on 14-10-1978. On 11-10-78, no written statement was filed but an application was moved later on 23rd October, 78 requesting for time to file written statement and also praying for

condonation of delay. The written statement was actually filed on 25-11-1978. On 24-10-78, the defendant deposited a sum of Rupees 12,000/- with the permission of the court. Admittedly this amount covers the entire dues payable to the plaintiff on that date.

2. In the Court below, the defendant's contention was that since he had deposited the entire amount before the first date of hearing, he was entitled to the protection of sub-Clause (4) of Section 20 of the U. P. Act XIII of 1972 and should be relieved against his ejectment by the court. This plea did not find favor with the Court below who decreed the suit against the defendant, hence this revision.

3. The only substantial point which has been urged in support of his contention by Sri Ravi Kant, learned counsel for the revisionist, is that in this case admittedly no summons had been issued and, therefore, the defendant has not been given an opportunity of taking benefit of Section 20 (4) of U. P. Act XIII of 72 by depositing the requisite money on or before the first date of hearing read with Explanation added in 1976. Admittedly, it is argued that the defendant has deposited the entire amount that could be legally due against him on 24th October, 78 which was the first date when the court applied its mind and this should be treated as the date of hearing of the suit. Prior to this date, no other date was fixed for hearing in the suit. In order to appreciate the argument that has been advanced, it is necessary to have the provisions of Section 20 (4) of the Act before us.

20. Bar of suit for eviction of tenant except on specified grounds :-
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> (4) In any suit for eviction on the ground mentioned in clause (a) of sub-section (2), if at the first hearing of the suit the tenant unconditionally pays or tenders to the landlord or deposits in Court the entire amount of rent and damages for use and occupation of the building due from him (such damages for use and occupation being calculated at the same rate as rent) together with interest thereon at the rate of nine per cent per annum and the landlord's costs of the suit in respect thereof, after deducting therefrom any amount already deposited by the tenant under

sub-section (1) of Section 30, the Court may, in lieu of passing decree for eviction on that ground, pass an order relieving the tenant against his liability for eviction on that ground.

Provided that nothing in this subsection shall apply in relation to a tenant who or any member of whose family has built or has otherwise acquired in a vacant state, or has got vacated after acquisition, any residential building in the same city, municipality, notified area or town area."

4. An Explanation to this section was added by means of an amendment in 1976, i.e., prior to the matter in dispute. The Explanation runs in the following language."

Explanation :- For the purposes of this sub-section,-

(a) the expression 'first hearing' means the first date for any step or proceeding mentioned in the summons served on the defendant;

(b) the expression 'cost of the suit' includes one half of the amount of counsel's fee table for contested suit."

According to the Explanation, the first hearing of the suit has been assigned a certain meaning. It is legal fiction which has been created by the statute and, therefore, we cannot assign any other meaning to the words 'first hearing' when used in connection with Section 20 (4) of the Act. For all practical purposes while dealing with the concerning Section 20 (4) of the Act, therefore, the words 'first hearing' must mean that which is defined in the Explanation.

5. According to the learned counsel for the revisionist since no summons was served, therefore, the Explanation would not be at all attracted in the instant case, and, therefore, his right to deposit the amount continues and cannot in any way be cut down by any other consideration. This leads us to an enquiry as to what is meant by the words "summons of the suit". The summons is issued by the court after institution of a suit requiring the defendant to appear before it on a particular date mentioned therein either for filing the written statement and appearance or for final disposal of the suit (see Order V, Rule 1, Civil Procedure Code). It is based on the maxim audi alteram partem i. e., hear the other side or no one should be condemned unheard. The policy appears to be that some method should be evolved to inform the defending party about the claim made

by the plaintiff and the date fixed for the appearance of the defending party. It is with this object that provision has been made for issue of summons in Order 5, Rules 1 to 8 of the Civil Procedure Code Rule 1 of O.V of the Code reads as under :-

> "An appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader appearing, applying or acting, as the case may be on his behalf :Provided that any such appearance shall, if the Court so, directs, be made by the party in person."

It is significant to note that in sub-clause (1) of Rule 1 the word 'may' has been used instead of the word 'shall'. It is because it is not necessary to issue summons in all cases. In cases covered by the proviso where the defendant makes his appearance at the presentation of the plaint and admits the claim, no summons need be issued. So, also if the defendant is a person of such rank as, in the opinion of the Court, requires service in the form of a letter, the Court can direct dispensing with issue of summons to him. A proviso now added in 1976 to Order 5, Rule 1, Civil Procedure Code as proviso to the existing proviso also shows that when a defendant appears after the summons has already been issued, he can be directed by the Court to file his written statement on the date of his appearance. This provision also authorizes the Court to dispense with the service of the summons. The entire scheme of the Civil Procedure Code in this regard aims at only one thing to obtain the presence of the defendant to a claim and to provide full information about the nature of the claim made against him and also of the date when he is supposed to appear in Court to answer the claim. If the defendant party appears before the court after the registration of the suit, and he is informed about the nature of the claim and the date fixed for reply thereto it must be deemed that the defendant has waived the right to have a summons served on him. This can be seen from the record and also from the subsequent conduct of that party. The same legal position will arise when a party suo motu appears before the Court before actual service of summons either himself or through the counsel. In such a case if some date is fixed for filing the written statement and for hearing of the suit it would rather be too

technical a view to take that service of summons in the ordinary course were still to be insisted upon and to hold that further proceedings in the suit would take place only thereafter. This is neither the purpose nor the way to look at various provisions of the Civil Procedure Code The whole basis on which the procedure laid down for the service of summons has very elaborately been dealt with by the Supreme Court in the case of Sangram Singh
Election Tribunal Kotah, (AIR 1955 Supreme Court 425). The matter arises out of an election petition. After review of various authorities, it was observed that the basic purpose of the procedure was that the defendant must be made aware of the date fixed for the hearing of the case and for steps which are to be taken by that party. It is not meant as a measure of punishment if he fails to appear but then it becomes the duty of the Court to see that the party is aware of the date fixed in the suit. If this be the intention of the law of procedure, the defendant cannot demand anything greater than this. As already narrated above the defendant had put in appearance in response to a notice on the application for attachment before JUDGEMENT. After that he sought time for filing objections and on 11-9-1978 his counsel was present when the court fixed for filing the written statement and for final hearing the case. The defendant, in fact, never protested against this, nor he ever requested the court for obtaining copy of the plaint. He never complained during the trial of the suit that he was not aware of the date fixed in the suit and therefore he could not deposit the amount on that date. In fact, on several dates he made applications praying for time and ultimately filed the written statement on 25-11-1978. In these circumstances, the least that can be said about the defendant is and it is also obvious from his conduct throughout that he had never felt the necessity of service of a summons on him and he never raised any objection about it. Thus even if he had a right to have summons served on him that right stood forfeited due to his waiver, writ so large in the proceedings and also reflected in his actions before the Court. If at any stage he had raised the least doubt about his rights being prejudiced in any manner, he would have protested to the court as he was duly represented by a counsel. He cannot now be allowed to take shelter behind a stale plea that summons had not been served on him. It is not possible for me to countenance a situation in which the defendant though present in the court and on all dates fixed therein, is still allowed to insist that unless proper summons be served upon him he should be deemed to be unaware of the proceeding. In this case, I am clearly of the opinion that the order sheet dated 11-9-1978 itself should be

treated to be a 'summons' to the defendant for the purposes of Explanation to Section 20 (4) of U. P. Act No. XIII of 1972, because from this he got intimation of filing of the written statement as also for the final hearing of the suit. It is this date which must be treated to be the date of 'first hearing' of the suit, within the meaning of Section 20 (4) read with Explanation to the Section.

6. It was urged by the learned counsel for the revisionist that waiver must be a conscious act but he has failed to show how this is not so in the instant case. On 11-10-1978, the written statement was not filed and, therefore, an application was moved on 23rd October, 78 in which it is clearly stated that the Court had granted him time to file written statement within a month on 11-9-78, that due to illness he could not file written statement in time and since his mistake was *bona fide* the delay should be condoned and further two weeks' time should be granted for filing the written statement. In the face of this statement, it is very difficult to say that he was not acting in the matter consciously or that he had not waived his right to get summons served upon him as provided for under O.V of the Civil Procedure Code In this connection, he has also tried to rely upon the case of Shambhoo Nath Mehrotra v. IX Addl. District Judge (1981 (UP) RCC 11) : (1981 All LJ 221) wherein a learned single Judge of this Court had occasion to deal with a similar matter but the parties there had not received the copy of the plaint along with the summons. On the date fixed, he appeared and requested for the copy of the plaint, which was allowed. In these circumstances it was held that the date mentioned in the summons could not be treated as the first date of hearing. It was held that the summons is "duly served" only when it is accompanied by a copy of the plaint. If the summons was not so served there can be no 'due service' on the party concerned. In that case therefore, the court was fully justified in holding that there was no service of summons in accordance with law as no copy of the plaint had been served and the date which was mentioned in the summons could not be said to be date of first hearing in the case. The position in the case in hand is slightly different. Here the defendant has not objected that he had not received the copy of the plaint. He has also not said that he was not aware of the date fixed for filing the written statement and for final hearing. The revisionist, therefore, cannot take any advantage from the case referred to above.

7. The learned counsel for the revisionist then relied upon the case reported in 1979 (UP) RCC 218 : (1979 All LJ 484). That case, however, has no relevance to the present case at all since it was based on the wordings of the section which existed prior to the amendment of 1976.

8. The last case on which reliance was placed is Chintapalli Agency Taluk Arrack Sales Co-op. Society v. Secretary (Food and Agriculture) Govt, of Andhra Pradesh (AIR 1977 Supreme Court 2313). There also the opposite parties had filed certain representations before the government and the petitioner also filed representation before the government on the same date. A few days later, the petitioner requested the government that he should be given an opportunity to file a counter to the representation filed by the respondents. This opportunity was not granted to the petitioner and the applications of the opposite parties were allowed. It was contended that whatever the appellant could say in the reply to the representations of the opposite parties was already contained in his representation, and, therefore, he was not at all prejudiced in any manner and the mere fact that no opportunity was given to the petitioner to file reply would not vitiate the order. This plea of the respondent was repelled. That case is clearly distinguishable from the case in hand. Here the defendant did not make any request to get the copy of the plaint filed by the plaintiff, and even sought for extension of time for filing the written statement. The petitioner in the Supreme Court case may have covered all the points which were mentioned in the petition by the opposite parties before the government but he had a right to file objections to the same and this right was denied to them. In the instant case, the defendant had a right to file written statement in reply to the plaintiff's plaint which he had done and he never objected about that fact. In these circumstances, it cannot be said that the defendant did not have an opportunity of replying to the plaint case set up by the plaintiff. The Supreme Court decision referred to is clearly distinguishable from the facts of the present case.

9. On these considerations and in order to place harmonious construction on the wordings of the Explanation I am of the view that the word 'summons' used in the Explanation must be construed as including the order of the court by which the defendant who is represented in a case and who is made aware about the date fixed for the hearing as well for filing the written statement. The word

'summons' used here could not mean only summons as issued under Order 5 of the Civil Procedure Code In any view of the matter, when the order was passed on 11-9- 1978 in the presence of the counsel for the defendant fixing the date for filing the written statement also for fixing the date for final hearing would mean summons issued and served on the defendant within the meaning of the Explanation of Section 20 (a) of the Act. Since 11-9-78 is the date when the summons was served and one month's time is allowed for filing the written statement though it may be the date for taking any steps by the defendant, and, therefore, by that date the defendant should have complied with the provisions of sub-clause (4) of Section 20. Admittedly, this has not been done in the instant case. The rent was deposited only on 24-10-78 while the period of one month for filing written statement expired on 11-10-78. In these circumstances, therefore, the defendant could not avail of the advantage under Sub-section (4) of Section 20 of U. P. Act No. XIII of 1972 and is liable to ejectment. The decision of the court below, therefore, is perfectly justified and it cannot be interfered with in revision.

10. No other point is pressed.

11. The revision is, accordingly dismissed. However, in the circumstances of the case, I direct the parties to bear their own costs.

Revision dismissed.