

# ALLAHABAD HIGH COURT

Mohammad Nasem

Vs

Third Addl. District Judge

Writ Petn. No. 2801 (R/C) of 1983 and 5077 (R/C) of 1981

(Amarbir Singh Gill, J.)

29.05.1997

## ORDER

### **Amarbir Singh Gill, J.**

1. This judgment shall dispose of both the writ petitions, as common question of law is involved. The short question which requires decision in these two writ petitions is the application of proviso to Section 17(1) of Provincial Small Cause Courts Act, 1887.

2. In writ petition No. 2801 (R/C) of 1983 an *ex parte* decree dated 17-3-81 passed by the Judge small cause courts, Faizabad for ejectment of the petitioner as also for arrears of rent with costs and pendentelite and future damages on payment of requisite court fees is in dispute. The petitioner filed an application for setting aside the *ex parte* decree on 2-7-81 and also deposited the decretal amount. He, however, deposited costs etc. subsequently on 3-9-81. Objections to the tender were filed by the decree holder. The Judge Small Cause Courts vide judgment dated 22-9-82, copy of which is Annexure-5, relying upon proviso to Section 17 of the Act dismissed the application for setting aside the *ex parte* decree petitioner filed revision, which also met with the same fate and was dismissed on 16-5-83, copy of judgment is Annexure-4.

3. In writ petition No. 5077 (R/C) of 1981 the facts are somewhat similar. An *ex parte* decree dated 20-8-74 was passed for ejectment of the petitioner besides pendente lite and future damages at the rate of Rs. 30/- per month till the delivery of possession. The defendant filed an application for setting aside the same under Order 9, Rule 13 Civil Procedure Code. on 9-4-80 and also deposited the sum of Rs. 408.95 towards the decretal amount. Admittedly without depositing any amount towards rent and damages pendente lite along with the interest such an application could not be made. This application for setting aside the decree was also dismissed by judgment dated 14-1-81 vide Annexure-3, by Judge Small Cause Courts. Lucknow holding that the applicant did not comply with the provisions of Section 17 proviso one of the Act by not depositing the pendente lite and future damages, for use and occupation and dismissed the application accordingly. In revision as well as similar view was taken by order dated 16-9-81 passed by III Additional District Judge, Lucknow, copy of which is Annexure-5.

4. The learned counsel for the parties have been heard.

5. The proviso to Section 17 (1) of the Act reads as under :-

"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 his 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."

6. A bare perusal of the aforesaid provision leaves no doubt in any manner of its mandatory nature and its non-compliance amounts to an illegality. It is so because an application for setting aside an *ex parte* decree is to accompany with the deposit in the court of the amount due from the applicant under decree or in pursuance of a judgment. The applicant by itself becomes incompetent without the deposits aforesaid on account of mandate contained in the expression "shall" in the proviso. Expression "amount" under the decree also includes the amount in pursuance of the judgment that apart from the decretal amount any other direction for payment of damages pendente lite or future for use and occupation if ordered have to be part of decretal amount i.e. the amount claimed by the plaintiff in the suit. The Small Cause Court while decreeing the suit *ex parte* for ejection decreed not only for arrears of rent but also for future mesne profits, the payment of future mesne profits thus becomes part of decretal amount and the judgment-debtor in order to seek setting aside of such a decree, if fails to make the full deposit, the Court is justified in rejecting his application and refusing the setting aside of *ex parte* decree. This Court has already taken a similar view in the case of *Salik Ram v. Sita Devi*<sup>1</sup> In another case *Mohd. Yaseen v. Jai Prakash*<sup>2</sup>, it was held that if the requirements of the proviso are not satisfied the Court has no further jurisdiction left to pass any order with regard to furnishing of security or to allow the defendant to pay the decretal amount later on. In the case of *Ram Chandra v. IX Addl. District Judge*<sup>3</sup>, also it was observed that the deposit of the amount due from the applicant under the decree was to be made at the time of presentation of application under Order 9 Rule 13 Civil Procedure Code. and if any application for deposit is made subsequently, it is not permissible being not in compliance with the proviso to Section 17 of the Act.

7. The learned counsel for the petitioner Mr. Abdul Mateen has referred to the decision of *Kallu Mal v. Ch. Bikramajit Singh*<sup>4</sup>, and has contended that it is sufficient compliance of the proviso to Section 17, if applicant deposits the amount due under decree, which according to the cited decision being the amount under decree at the date it is given and not the amount due under the decree at the time when the application for restoration is presented. However, in this decision an earlier decision in *Bisesar Ram Dassi Ram v. Har Kishan Pahlad Rai*<sup>5</sup>, was relied upon with the observation that since there was no decision with a contrary view available the same view was to be followed. However, as already referred to above, there has been later on decisions of this Court holding that in order to avail the benefit of Order 9, Rule 13 Civil Procedure Code against an *ex parte* decree passed by the Judge Small Cause Courts, the defendant/judgment debtor has to simultaneously deposit the amount due under a decree which includes the mesne profit or damages pendente lite and future besides the decretal amount.

8. We may also refer to a decision in *Mijan v. II Addl. District Judge, Lucknow*<sup>6</sup> which supports the view that it is mandatory for an applicant for setting aside the *ex parte* decree of Small Cause Courts with the decretal amount any other amounts like damages pendente lite or future have to be deposited with the decretal amount. Now it would be seen that the petitioner in Writ Petition

No. 2801 (R/C) of 1983 only deposited the decretal amount of Rs. 2151/- on the date of presentation of application under Order 9, Rule 13. The amount of cost was Rs. 393.80 paise and the amount of pendente lite and future damages was Rs. 165/-. These amounts of costs of pendente lite and future damages were tendered by the applicant on 3-7-81 whereas the application under Section 5 Limitation Act for a qualified tender claiming that though the amount of pendente lite and future mesne profits were not required to be deposited, yet the Court if is of the opinion that the said damages were necessary, the deposit may be ordered and the delay may be condoned. However, no specific plea was taken for explaining the delay so as to enable the court even to consider the application under Section 5 of Limitation Act. Admittedly, the tender was not in accordance with the proviso to Section 17 of the Act, as such the Courts rightly refused to allow the application under Order 9, Rule 13 C.P.C.

9. Similarly in Writ Petition No. 5077 (R/C) of 1981 admitted case is that the decretal amount of sum of Rs. 408.95 paise was deposited by the petitioner and he did not deposit the amount towards pendente lite and future mesne profits as ordered in the decree. The decree provided for realisation of damages pendente lite and future at the rate of Rs. 30/- per month. The decree was passed on 20-8-74 and the application for setting aside was moved on 9-4-80. The petitioner had deposited Rs. 300/- i.e. towards arrears of rent and Rs. 108.95 paise, total amount of Rs. 408.95 paise along with the application. Admittedly the petitioner did not deposit the total amount towards the damages pendente lite and future till the date of application and thereby did not comply with the mandatory provision of proviso to Section 17 of the Act.

10. There is, thus no legal flaw in the judgments of both the courts below in both these writ petitions. There is no merit in these writ petitions and the same are dismissed.

Petitions dismissed.

Cases Referred.

11979 All WC 96

21988 AllC. J. 702

31991 All WC 670

4AIR 1933 All 13

5AIR 1925 All 412

6(1986) 2 All Rent Cas 316