A KEDARNATH

v.

MOHAN LAL KESAWARI AND ORS.

JANURARY 10, 2002

B [R.C. LAHOTI AND BRIJESH KUMAR, JJ.]

*Code of Civil Procedure, 1908/Provincial Small Cause Courts Act, 1887—Order 9 Rule 13/Section 17(1)/Proviso—**Ex-parte** decree by Court of Small Causes for deposit of arrears of rent and eviction—Application by respondent to set aside the decree—Failure by respondent to deposit decretal amount or make a previous application seeking permission to furnish security—Application to furnish security filed subsequently and after delay—Maintainability of the main application—Held, the law is mandatory and not directory for deposit of decretal amount or filing a previous application—Hence, application for setting aside decree not maintainable on account of failure to comply with proviso.*

Appellant-landlord filed a suit before a Court of Small Causes for recovery of arrears of rent and for eviction against respondent-tenants under Section 20 of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972. The suit was decreed *ex-parte for* recovery of arrears of rent and eviction. The appellant executed the decree and obtained possession of the premises with police help. The respondents filed an application before the trial court seeking setting aside of the *ex-parte* decree under Order 9 Rule 13 of CPC. Along with the application, the respondents neither deposited the decretal amount before the trial court nor filed an application seeking permission to furnish security of the decretal amount. During the course of hearing, the appellant contended that the application filed by the respondents was not maintainable and liable to be dismissed for non-compliance with the proviso to section 17 of the Provincial Small Cause Courts Act, 1887 (PSCC Act). The respondents then filed an application before the trial court seeking permission to furnish security for the decretal amount the trial court dismissed both the applications. The Court of Additional District Judge, in a revision preferred by the respondents, condoned the delay and directed the trial court to accept security and decide the application filed under Order 9 Rule 13 CPC on merits. A Writ Petition filed before High Court by the appellant was dismissed.

In appeal to this Court, the appellant contended that the proviso to section 17 of the PSCC Act is mandatory and hence the non-compliance therewith cannot be condoned; and that, even assuming the court has power to condone the delay, no sufficient cause was made by the respondents. A

Allowing the appeal, the Court

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HELD : 1.1. The object behind establishing the Courts of Small Causes 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. 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 narrowed down by imposing condition as to deposit or giving security for performance or compliance by enacting proviso to section 17(1) of the Provincial Small Cause Courts Act, 1887 (PSCC Act). [149-G; 150-A] C

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1.2. A bare reading of the provision shows that the legislature has chosen to couch the language of the proviso in a mandatory form and there is 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 proviso 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. 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. [151-B-D] E F G

1.3. The application for setting aside *ex-parte* decree was not accompanied by the 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. H

A **The application for setting aside the decree was therefore incompetent.** **[151-F]**

Mohammad Ramzan Khan **v.** *Khubi Khan,* **AIR (1938) Lahore 18 (DB);** *Murari Lal* **v.** *Mohammad Yasin,* **AIR (1939) Allahabad 46;** *Mt. Shikhani* **v.** *Bishambhar Nath,* **AIR (1941) Oudh 103;** *Jagdamba Prasad and Ors.,* **v.** *Ram* B *Das Singh and Anr.,* **AIR (1943) Allahabad 288;** *Roshan Lal* **v.** *Brij Lal Amba Lal Shah,* **AIR (1944) Oudh 104;** *Vembu Amal* **v.** *Esakkia Pillai,* **AIR (1949) Madras 419;** *Khetra Dolai* **v.** *Mohan Bissovi,* **AIR (1961) Orissa 37;** *Dhanna* **v.** *Arjun Lal,* **AIR (1963) Rajasthan 240;** *Krishan Kumar* **v.** *Hakim Mohd.* **(1978) ALJ 738;** *Sharif* **v.** *Suresh Chand and Ors.,* **(1979) AWC 256;** *Roop Basant* **v.** C *Durga Prasad and.Anr.,* **(1983) 1 ARC 565;** *Mohd. Islam* **v.** *Faquir Mohammed,* **(1985) 1 ARC 54;** *Krishan Chandra Seth* **v.** *Dr. K.P. Agarwal and Anr.,* **(1988) 1 ARC 310;** *Mamta Sharma* **v.** *Hari Shankar Srivastava and Ors.,* **(1988) 1 ARC 31;** *Mohd Yasin* **v.** *Jai Prakash,* **(1988) 2 ARC 575;** *Purshottam* **v.** *Special Additional Sessions Judge, Mathura and Ors.* **(1991) 2 ARC 129;** *Ram Chandra (deceased L.Rs.) and Ors.* **v.** *IXth Additional Distric Judge, Varanasi* D *and Ors.,* **AIR (1991) Allahabad 223;** *Sagir Khan* **v.** *The District Judge, Farrukhabad and Ors.,* **(1996) 27 ALR 540;** *Mohammad Nasem* **v.** *Third Additional District Judge, Faizabad and Ors.,* **AIR (1998) Allahabad 125;** *Beena Khare* **v.** *VIIth Additional District Judge, Allahabad and Anr.,* **(2000) 2 ARC 616;** *Surendra Nath Mittal* **v.** *Dayanand Swarup and Anr.,* **AIR (1987)** E **Allahabad 132;** *Chigurupalli Suryanarayana* **v.** *The Amadalayalasa Co-operative Agricultural Industrial Society Ltd.,* **AIR (1975) A.P. 196 and** *Tarachand Hirachand Porwal* **v.** *Durapa Tavanappa Patravali,* **AIR (1943) Bombay 237, referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5109 of 1999.

F

From the Judgment and Order dated 18.5.99 of the Allahabad High Court in C.M.W.P. No. 20579 of 1999.

Gourab K. Banerji, S. Bhatnagar and M. Trivedi for Ms. Nandini Gore for the Appellant.

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B.L. Yadav, Ms. Gargi Khanna and Rajesh for the Respondents.

The Judgment of the Court was delivered by

R.C. LAHOTI, J. The landlord-appellant filed a suit for recovery of H 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 it 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

A 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 B 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 Articles 226 and 227 of the Constitution before the High Court, which has been rejected. The landlord has filed this appeal by special leave.

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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 D 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- E 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:

> "17. Application of the Code of Civil Procedure.- (1) The procedure prescribed in the Code of Civil Procedure, 1908, shall save in so far F 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 G 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.
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> H (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." A

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: B C

> "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 set 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)." D E F

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 G H

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 B 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, C to wit : *Mohammad Ramzan Khan* v. *Khubi Khan,* AIR (1938) Lahore 18 (DB), *Murari Lal* v. *Mohammad Yasin,* AIR (1939) Allahabad 46, *Mt. Shikhani* v. *Bishambhar Nath,* AIR (1941) Oudh 103, *Jagdamba Prasad & Ors.* v. *Ram Das Singh & Anr.*, AIR (1943) Allahabad 288, *Roshan Lal* v. *Brij Lal Amba Lal Shah,* AIR (1944) Oudh 104, *Vembu Amal* v. *Esakkia Pillai,* AIR (1949) Madras 419, *Khetra Dolai* v. *Mohan Bissovi,* AIR (1961) Orissa 37, and D *Dhanna* v. *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* v. *Hakim Mohd.,* (1978) ALJ 738, *Sharif* v. *Suresh Chand & Ors.*, (1979) AWC E 256, *Roop Basant* v. *Durga Prasad & Anr.*, (1983) 1 ARC 565, *Mohd. Islam* v. *Faquir Mohammad,* (1985) 1 ARC 54, *Krishan Chandra Seth* v. *Dr. K.P. Agarwal & Anr.,* (1988) 1 ARC 310, *Mamta Sharma* v. *Hari Shankar Srivastava & Ors.*, (1988) 1 ARC 341, *Mohd. Yasin* v. *Jai Prakash,* (1988) 2 ARC 575, *Purshottam* v. *Special Additional Sessions Judge, Mathura & Ors.,* (1991) 2 ARC 129, *Ram Chandra (deceased L.Rs.) & Ors.* v. *IXth Additional District* F *Judge, Varanasi & Ors.*, AIR (1991) Allahabad 223, *Sagir Khan* v. *The District Judge, Farrukhabad & Ors.*, (1996) 27 ALR 540, *Mohammad Nasem* v. *Third Additional District Judge, Faizabad & Ors.*, AIR (1998) Allahabad 125 and *Beena Khare* v. *VIIIth Additional District Judge, Allahabad & Anr.*, (2000) 2 ARC 616.

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The learned counsel for the respondent brought to our notice *Surendra Nath Mittal* v. *Dayanand Swarup and Anr.*, AIR (1987) Allahabad 132, *Chigurupalli Suryanarayana* v. *The Amadalayalasa Co-operative Agricultural Industrial Society Ltd.,* AIR (1975) A.P. 196 and *Tarachand Hirachand Porwal* v. *Durappa Tavanappa Patravali,* AIR (1943) Bombay H 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

A 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
B 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.

B.S. Appeal allowed.