

VIJAY KUMAR MADAN AND ORS.

v.

R.N. GUPTA TECHNICAL EDUCATION SOCIETY AND ORS.

APRIL 18, 2002

[R.C. LAHOTI AND B.N. AGRAWAL, JJ.]

*Code of Civil Procedure, 1908:*

*Order 9, Rule 7—Suit for recovery of arrears of rent and for possession—Defendant not appeared on date fixed—Suit ordered to proceed ex-parte—Application by defendants for setting aside ex-parte order—Trial court setting aside ex-parte order, but putting defendants to terms in that they should deposit monthly lease rent—Defendants filing appeal before High Court as regards putting them to terms—High Court holding the condition imposed by trial court to be too onerous, set it aside—Appeal by plaintiffs—Meanwhile on the basis of interim order by Supreme Court trial court decreed the suit—On execution proceedings, possession recovered by plaintiffs—Held, under order 9, Rule 7, the court does have jurisdiction, while setting aside the ex-parte order, to impose costs and also to put the defendants on terms—But the court cannot exercise its power to put the defendant/applicant on such terms as may have the effect of pre-judging the controversy involved in the suit and virtually decreeing the suit though ex-parte order has been set aside or to put the parties on such terms as may be too onerous—High Court was justified in setting aside the condition imposed by the trial court in its order which was too onerous, also vague, uncertain and suffering from want of clarity—The ex-parte order and the judgment and decree of the trial court based on the said ex-parte order are set aside—The suit shall stand restored on the file of the trial court—As the plaintiffs have secured possession of suit premises and the defendants-respondents have given up their right of restitution so far as the possession of premises is concerned, the suit shall now be treated as a money claim for recovery of arrears as claimed in the plaint as also for recovery of arrears pending suit for the period expiring on 1.11.2000, the date on which the plaintiff-appellants have secured possession over the premises—Defendants shall pay cost of Rs. 50,000 to the plaintiff-appellants.*

*Arjun Singh v. Mohinder Kumar and Ors., AIR (1964) SC 993, relied on.*

**A** CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1890 of 2000.

From the Judgment and Order dated 14.10.99 of the Punjab and Haryana High Court in C.R. No. 2421 of 1999.

**B** Manoj Swarup for the Appellants.

M.N. Krishnamani and Aseem Mehrotra for R.K. Agnihotri for the Respondents.

The following Judgment of the Court was delivered

**C** Certain premises situated in the township of Gurgaon, Haryana were held by the respondents on tenancy from the appellants under the Deed of Lease dated 1.4.1996. The rent of the tenancy premises, payable with effect from 1.4.1996, was Rs. 63,087.50 per month, in addition to maintenance charges of Rs. 40,000 per month. On 27.3.1998, the appellants filed a suit for recovery of rent and ejection of the respondents alleging the respondents to be in arrears with effect from 1.5.1996. On 2.5.1998 the defendants/respondents and their counsel failed to appear in the trial court and, therefore, the trial court directed the suit to proceed *ex-parte* against the defendants. On 29.5.1998 the defendants moved an application under Order 9 Rule 7 of the CPC praying for setting aside of the *ex-parte* order on the ground that their counsel was prevented from appearing in the court on account of having met with an accident. On 9.9.1999 the trial court allowed the defendants application recording the finding that the counsel for the defendant had good and sufficient cause for previous non-appearance in the court and that the non-appearance of defendants and their counsel on 2.5.1998 was not intentional but due to unavoidable circumstances. However, purporting to exercise the power conferred by Order 9 Rule 7 of the CPC to put the defendants, on terms, the trial court directed as under:-

**G** “It is pertinent to mention here that since defendants are enjoying the property, it will be reasonable to direct them to deposit monthly lease amount in the court at the time of filing written statement. If ultimately it is found that case of the plaintiffs is false and that of the defendants is true, defendants will be entitled to claim back that amount from the plaintiffs. On this condition I set aside the *ex-parte* order dated 2.5.98 on the condition that the defendants will deposit monthly lease amount on 16.2.99 for filing the written statement and

**H**

for payment”

The defendants feeling aggrieved by the order of the trial court to the extent to which it placed the defendants on terms in the manner reflected in the order of the trial court extracted and reproduced hereinabove, preferred an appeal in the High Court. In its order dated 14.10.1999, which is impugned herein, the High Court formed an opinion that the condition imposed by the trial court on the defendants while setting aside the ex-parte order was too onerous and in view of such opinion formed by the High Court, the condition imposed by the trial court was directed to be set aside. At the same time taking care of the hardship that was likely to result to the plaintiffs (respondents in the High Court), the High Court directed the trial court to proceed to dispose of the suit as early as possible and latest by 31.3.2000.

The plaintiffs filed the present petition seeking special leave to appeal. On 28.2.2000, while allowing the leave to the appellants, it was directed that the impugned order of the High Court dated 14th October, 1999 should remain stayed. However, the Court added that the stay will not in any way affect the direction of the High Court regarding the disposal of the suit by 31st March, 2000. The result of the interim order was that the order of the trial court dated 9.1.99 putting the defendants on terms came into operation and as the defendants failed to comply with the condition imposed by the trial court, the trial court in terms of the interim order passed by this Court decided the suit on 31.3.2000 passing a decree for recovery of rent in arrears as also for recovery of possession as prayed for by the plaintiffs. However, it appears that prior to 28.2.2000 the date of the passing of the interim order by this Court, and armed with the order of the High Court, the defendants had filed their written statement. The trial had proceeded and on behalf of the plaintiffs four witnesses (P.W. 5 to P.W. 8) were examined and were also cross examined on behalf of the defendants, by the time this court passed the order dated 28.2.2000. Earlier, while the proceedings had remained ex-parte, four witnesses, namely, PW 1 to PW 4 were examined on behalf of the plaintiffs and they were not cross examined by the defendants. There is yet another important event which has taken place during the pendency of this appeal. Subsequent to the passing of the decree by the trial court the same was put to execution. On 1st November, 2000, the plaintiff-appellants have taken possession over the property with police aid, as directed by the executing court.

Here we may give an indication of the controversy between the parties

A to the suit though we are not concerned with the merits thereof. On the question of recovery of arrears of rent the parties are laying blame on each other. According to the defendants the plaintiffs have failed in fulfilling their obligation as to certain material terms and conditions of the lease and therefore, the obligation of the defendants to pay rent remains suspended and they are not liable to pay the rent; while according to the plaintiffs they have placed the defendants in peaceful and full possession of the tenancy premises and nothing had remained to be done by them, and therefore, they are entitled to the recovery of rent and maintenance charges as agreed.

C During the courses of hearing, the learned counsel for the defendant-respondents submitted that if this Court is inclined to sustain the order of the High Court, in that event in order to do complete justice in the case this Court ought to set aside the judgment and decrees dated 31.3.2000 passed by the trial court which is in consequence of the interim order made by this Court and the parties should be put back to the position to which they would stand relegated in terms of the order of the High Court. However the learned counsel very fairly stated under instructions that if the order of the High Court be sustained the defendants shall not pray for restitution of possession over the tenancy premises in spite of the decree of evictions being set aside and shall also not insist on such of the witnesses being recalled and made available for further cross-examination, as have already been cross examined by the defendants. In view of the above said stand taken by the learned counsel for the defendants, the limited issue which survives for decision is whether the condition imposed by the trial court putting the defendants on terms can be said to be too onerous as could not have been imposed under Order 9 Rule 7 of the CPC and whether the High Court was justified in setting aside that condition while sustaining the order of the Trial Court setting aside the ex-parte proceedings.

G Having heard the learned counsel for the parties, we are of the opinion that the impugned order of the High Court deserves to be maintained but subject to certain modifications. Under Order 9 Rule 7 of the CPC the Court does have jurisdiction, while setting aside the ex-parte order to impose costs and also to put the defendants-applicants on terms. Rule 7 of Order 9 of the CPC reads as under:-

“R.7. Procedure where defendant appear on day of adjourned hearing and assigns good cause for previous non-appearance.

H Where the Court has adjourned the hearing of the suit ex-parte

and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance." A

Power in the Court to impose costs and to put the defendant-applicant on terms is spelled out from the expression "Upon such terms as the Court directs as to costs or otherwise". It is settled with the decision of this Court in *Arjun Singh v. Mohinder Kumar and Ors.*, AIR (1964) SC 993, that on an adjourned hearing, in spite of the Court having proceeded ex-parte earlier the defendant is entitled to appear and participate in the subsequent proceedings as of right. An application under Rule 7 is required to be made only if the defendant wishes the proceedings to be relegated back and re-open the proceedings from the date wherefrom they became ex-parte so as to convert the ex-parte hearings into bi-parte. While exercising power of putting the defendant on terms under Rule 7 the Court cannot pass an order which would have the effect of placing the defendant in a situation more worse off than what he would have been if he had not applied under Rule 7. So also the conditions for taking benefit of the order should not be such as would have the effect of decreeing the suit itself. Similarly, the Court may not in the garb of exercising power of placing upon terms make an order which probably the Court may not have made in the suit itself. As pointed out in the case of *Arjun Singh* (supra), the purpose of Rule 7 in its essence is to ensure the orderly conduct of the proceedings by penalizing improper dilatoriness calculated merely to prolong the litigation. B C D E

Costs should be so assessed as would reasonably compensate the plaintiff for the loss of time and inconvenience caused by relegating back the proceedings to an earlier stage. The terms which the Court may direct may take care of the time or mode of proceedings required to be taken pursuant to the order under Rule 7. For example, keeping in view the conduct of the defendant-applicant, the Court may direct that though the ex-parte proceedings are being set aside, the defendant must file the written statement within an appointed time or recall for cross examination at his own cost and expenses the witnesses examined in his absence or that the defendant shall be allowed not more than one opportunity of adducing his evidence and so on. How the terms are to be devised and made a part of the order would depend on the facts and circumstances of a given case. In short, the court cannot exercise its power to put the defendant/applicant on such terms as may have the effect of pre-judging the controversy involved in the suit and virtually decreeing F G H

A the suit though ex-parte order has been set aside or to put the parties on such terms as may be too onerous. That apart, the order of the trial court dated 9.1.1980 suffers from another infirmity of vagueness and want of clarity. In fact, during the course of hearing, the learned counsel for the parties tried to place their own respective interpretation certainly divergent to each other, on the order of the High Court as to what it means, that is, whether the trial court directed to pay all the arrears of monthly lease and the amount being deposited along with filing of the written statement or for that month only and whether for future too, but we do not propose to deal further with this aspect as it is unnecessary. That condition in the order of trial court having been set aside by the High Court, we are inclined to sustain the order of the High Court but subject to certain modification. In our opinion the High Court was justified in setting aside the condition imposed by the trial court in its order which was too onerous, also vague, uncertain and suffering from want of clarity. The order of the High Court to the extent of setting aside the ex-parte proceedings and directing the expeditious trial of the suit has to be sustained as it serves the ends of justice. But in view of the subsequent events brought to our notice and the statement made by the learned counsel for the defendant-respondents during the course of hearing, the following directions are made:-

E 1. The ex-parte order dated 2.5.98, and the judgment and decree of the trial court based on the ex-parte order dated 2.5.98 are set aside. The interim order of this Court dated 28.2.2000 shall also stand vacated. The suit shall stand restored on the file of the trial court.

F 2. As the plaintiffs have secured the possession of suit premises and the defendant-respondents have given up their right of restitution so far as the possession of the premises are concerned, the suit filed by the plaintiff-appellants shall now be treated as a money claim for recovery of arrears as claimed in the plaint as also recovery of arrears pending suit for the period expiring on 1.11.2000, the date on which the plaintiff-appellants have secured possession over the tenancy premises.

G 3. Such of the witnesses as have already been cross examined by the defendant-respondents shall not be recalled for further cross examination, in view of that right having been given by the learned counsel for the defendant-respondents before this Court. Such of the plaintiffs' witnesses as were not cross examined, shall be recalled for cross examination at the cost and expenses of the defendant-respondents.

H 4. The parties shall have the liberty to lead such other evidence as they

propose to do.

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5. The trial court may refuse to grant any avoidable adjournment at the trial which may have the effect of delaying the hearing of the suit. The suit shall be expeditiously heard and decided. The learned counsel for the defendant-respondents has assured that the defendants shall co-operate therein.

B

6. To avail the benefit of the orders passed by the High Court and this order the defendants shall pay cost of Rs. 50,000 to the plaintiff-appellants within four weeks as a condition precedent.

During the execution of decree an amount of Rs. 20,00,000 (Rupees twenty lakhs only) is said to have been attached by the executing court. As the ex-parte decree has been set aside and the suit stand re-opened, the plaintiff-appellants shall be at liberty to move an application for attachment before judgment of such amount and/or such other interim relief as may be available to them before the trial court. However, we express no opinion on this.

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The appeal stands disposed of in the terms abovesaid.

R.P.

Appeal disposed of.