SUBODH KUMAR

v.

SHAMIM AHMED

(Civil Appeal Nos. 802-803 of 2021)

MARCH 03, 2021

[ASHOK BHUSHAN AND R. SUBHASH REDDY, JJ.]

Provincial Small Cause Courts Act, 1887 – s.17 – U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 – s. 30(2) – Code of Civil Procedure, 1908 – Or. 9, R.13 – In the year 1994 a suit was filed by the appellant-landlord for possession, rent and mesne profits *– Tenant failed to file written statement – The Court passed an order to proceed* ex-parte *– Thereafter, the tenant filed many applications, which included application u/s. 30(2) of the 1972 Act and deposited rent on various occasions from the year 1997 to 1998 –* Ex-parte *judgment was passed and case of the landlord was allowed – When appellant-landlord filed an application for execution of* ex-parte *judgment, the tenant filed an application u/Or.9, R.13 with s.5 of the Limitation Act – No deposit was made u/s. 17 of the 1887 Act – Tenant pleaded that amount deposited u/s.30(2) of the 1972 Act may be treated as amount deposited u/s. 17 of the 1887 Act – The trial Court by order dated 19.04.2007 rejected application u/Or.9, R.13 and s.5 of the Limitation Act – Revision against the said order was also rejected by the District Court – Respondent-tenant filed writ petition – The High Court allowed the writ petition by order dated 13.12.2018 and remanded the matter back to the trial Court for reconsideration of tenant's application u/Or.9, R.13 and s.5 of the Limitation Act – Aggrieved, the appellant-landlord filed SLP and the same was dismissed and withdrawn – After this order, the review application was filed before the High Court and same was rejected on 24.05.2019 – Before the Supreme Court, the respondent no.1-tenant has filed appeal against the judgment of the High Court dated 13.12.2018 and the order dated 24.05.2019 – Held: The proviso to s.17 of the 1887 Act, gives two options to an applicant against whom an* ex-parte *decree has been passed or who applied for review of the judgment, i.e., (a) deposit in the Court the amount due from*

A *him under the decree or in pursuance of the decree; (b) give such security for the performance of the decree or compliance with the judgment as the Court made on the previous application made by him in this behalf directed – In the instant case, where the tenant has filed an application u/Or.9 R.13 on to recall the ex-parte decree*
B *– There is no reference of any previous application praying the Court to permit the tenant to give security to satisfy the ex-parte decree – The application was not accompanied by the deposit of the amount due from the tenant under the decree – The said application, thus, was not in accordance with proviso to s.17 – When the condition precedent for presenting the application u/Or.9 R.13*
C *was not fulfilled, the application u/Or.9 R.13 was rightly rejected – As far as amount deposited u/s.30(2) of the 1972 Act is concerned, on the date when application u/Or.9, R.13 was filed, total deposit made by the tenant u/s. 30(2) was only Rs.17,550/- whereas the amount due as per execution application was Rs.21,660/- –*
D *Therefore, the tenant had not even deposited u/s.30(2) the total amount due – Further, the deposit of rent u/s. 30(2) the 1972 Act in the present case can not be treated to be deposit for the purposes of proviso u/s. 17 of the Act, 1887 – Thus, judgment dated 13.12.2018 as well as the order dated 24.05.2019 rejecting the review application are set aside – The order of the trial Court dated*
E *19.04.2007 rejecting the application u/Or.9 R. 13 of the respondent is upheld – The Executing Court directed to execute the decree and put the appellant in possession.*

Allowing the appeals, the Court

F **HELD: 1. Proviso to Section 17 of Provincial Small Cause Courts Act, 1887 has been engrafted with the object that unscrupulous tenants who do not appear in the Court in the suit proceedings should not be allowed to file the application to recall ex-parte decree unless they deposit the entire amount or give security to the Court for compliance of the decree. The proviso**
G **is to take care of those tenants who deliberately do not appear in the suit neccesiating the Court to pass ex-parte decree. The object is to protect the landlord and to ensure that the decree passed is satisfied by the tenant, in event, the application under Order 9 Rule 13 is ultimately rejected. Proviso gives two options to an applicant against whom an ex-parte decree has been passed or**
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who applied for review of the judgment, i.e., (a) deposit in the Court the amount due from him under the decree or in pursuance of the decree; (b) give such security for the performance of the decree or compliance with the judgment as the Court made on the previous application made by him in this behalf directed. Thus, requirement of the deposit in the court the entire amount can be waived only when the Court on the previous application directs the tenant to give such security for performance of the decree or compliance with the judgment. The application seeking waiver from deposit has been mentioned as "a previous application" i.e. previous to the application filed under Order 9 Rule 13. [Para 22][1121-G-H; 1122-A-C]

2. The present is a case where the tenant has filed an application under Order 9 Rule 13 on 25.08.1998 to recall the ex-parte decree dated 31.03.1998. There is no reference of any previous application praying the Court to permit the tenant to give security to satisfy the ex-parte decree. The application dated 25.08.1998 was not accompanied by the deposit of the amount due from the tenant under the decree dated 31.03.1998. The application dated 25.08.1998, thus, was not in accordance with proviso to Section 17. When the condition precedent for presenting the application under Order 9 Rule 13 was not fulfilled, the application under Order 9 Rule 13 filed by the tenant respondent did not deserve any consideration and had rightly been rejected. [Para 23][1122-D-E]

3. This Court may also notice submission of the the appellant, that the deposit under Section 30(2) of the Act No.13 of 1972 which was due on the date of filing of the application under Order 9 Rule 13 CPC was not the deposit of the entire amount. In the execution application filed on 27.07.1998 by the landlord to execute the decree dated 31.03.1998, the amount which was claimed was Rs.21,660/- which was due till then. [Para 30][1126-B-C]

4. The application under Order 9 Rule 13 CPC was filed on 25.08.1998, i.e., subsequent to filing of the execution application, thus, at least the amount of Rs.21,660/- was due. The tenant respondent has made a deposit under Section 30(2) in July, 1997

of Rs.16,800/- and again Rs.750/- on 18.10.1997 which was rent from 30.06.1997 to 30.11.1997. Thus, on the date when the application was filed under Order 9 Rule 13, total deposit made by the tenant under Section 30(2) was only Rs.17,550/- whereas the amount due as per execution application was Rs.21,660/-. It was only on 25.11.1998, i.e., much after filing of the application under Order 9 Rule 13, the tenant deposited amount of Rs.1,950/- as a rent from 30.11.1997 to 31.12.1998. Thus, even according to the own case of the respondent tenant on the date when application under Order 9 Rule 13 was filed, i.e., 25.08.1998, the tenant had not deposited under Section 30(2) the total amount due, thus, by no stretch of imagination the tenant could have claimed compliance of proviso to Section 17 of Act, 1887. [Para 31][1126-D-E]

5. When the plaintiff had claimed exemption from the operation of the Act No. 13 of 1972, it was specific pleading as noted above, how deposit can be made under Section 30 of the Act by the tenant respondent. Section 2 begin with the expression that 'Nothing in this Act shall apply'. When there is exemption from the applicability of the Act No.13 of 1972 as pleaded by the plaintiff, Section 30 of the Act shall also not be applicable. When Section 30 itself is not applicable to the building, the deposit claimed to be made under Section 30(2) is wholly irrelevant, for any purposes including for purposes of proviso to Section 17 of Act, 1887. [Para 35][1127-H; 1128-A-B]

6. Therefore, 1) In the application filed by the tenant on 25.08.1998 under Order 9 Rule 13, there was no compliance of Section 17 of 1887 Act and the application was incompetent; 2) The respondent-tenant had not deposited the entire amount due on 25.08.1998 even under Section 30(2) of Act No.13 of 1972; 3) The deposit of rent under Section 30(2) of the Act No.13 of 1972 in the present case cannot be treated to be deposit for the purposes of proviso under Section 17 of the Act, 1887. [Para 42][1131-C-E]

7. The tenant-respondent has not made out any sufficient ground to allow the application under Order 9 Rule 13 and the High Court committed error in interfering with the order of the

trial court rejecting such application which was also confirmed by the District Judge. [Para 50][1133-B-C]

8. The trial court has rejected the application of tenant under Order 9 Rule 13 not adopting any hyper-technical and pedantic approach rather on the finding that there was non-compliance of proviso to Section 17 of the Act, 1887, hence, the application deserves to be rejected. Requirement under proviso to Section 17 can neither be said to be hypertechnical nor pedantic but the same was the requirement of law and condition precedent for maintainability of application under Order 9 Rule 13. The High Court is not right in its view that trial court and Revisional Court has taken hypertechnical and pedantic approach while considering the application under Order 9 Rule 13 of CPC and Section 5 of the Limitation Act. [Paras 54 and 55][1133-G-H; 1134-A-C]

Kedarnath versus Mohan Lal Kesarwari and Others **(2002) 2 SCC 16 : [2002] 1 SCR 144;** *Prem Chandra Mishra versus IInd Additional District Judge, Etah,* Writ **Petition No. 12103 of 1996** *decided on 11.09.2008 reported in* **(2008) 9 ADJ 13;** *Kailash versus Nanku and Others, reported in* **(2005) 4 SCC 480 : [2005] 3 SCR 289 – referred to.**

Case Law Reference

[2002] 1 SCR 144	**referred to**	**para 24**
(2008) 9 ADJ 13	**referred to**	**para 36**
[2005] 3 SCR 289	**referred to**	**para 51**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 802-803 of 2021.

From the Judgment and Order dated 13.12.2018 and 24.05.2019 of the High Court of Uttarakhand at Nainital in Writ Petition (M.S.) No. 418 of 2008 and M.C.C. No. 437 of 2019 in Writ Petition (M.S.) No. 418 of 2008 respectively.

R.B. Singhal, Sr. Adv., Anupam Mishra, Adv. for the Appellant.

Dr. Sumant Bharadwaj, Ms. Mridula Ray Bharadwaj, Advs. for the Respondent.

A The Judgment of the Court was delivered by

ASHOK BHUSHAN, J.

1. Leave granted

2. This appeal has been filed against the judgment of the High B Court of Uttarakhand dated 13.12.2018 allowing the Writ Petition (M.S.) No.418 of 2008 filed by respondent No.1 as well as the order dated 24.05.2019 rejecting the Review Petition filed by the appellant to review the judgment dated 13.12.2018.

3. The facts of the case giving rise to this appeal, which are C relevant for deciding the issues raised, need to be carefully noticed. The High Court in the impugned judgment although has noted few facts but certain relevant facts have been missed by the High Court which have bearing on the issues which had arisen before the High Court.

4. The facts of any case are the foundation on which the dispute D between the parties arises. The arguments are built by the counsel for the parties in reference to the foundational facts for applying the legal principles to decide the dispute. A clear grasp of foundational facts are essential. The law is applied on facts and when essential facts are missed, mis-application of law is bound to happen. We may recall prophetic words of Mr. Justice Cardozo when he said: -

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> "...More and more we lawyers are awakening to a perception of the truth what divides and distracts us in the solution of a legal problem is not so much uncertainty about the law as uncertainty about the facts - the facts which generate the law. Let the facts be known as they are, and the law will sprout from the seed and F turn its branches toward the light."

5. The appellant herein shall be referred as 'landlord' whereas the respondent No.1 Shamim Ahmed as 'tenant'. Dispute relates to a shop being shop No.39(29) situated in Compound No.3, Civil Lines, Roorkee, District Haridwar. The respondent was inducted as tenant at G Rs.150/- per month by predecessor-in-title of the landlord. The landlord purchased the shop in question by sale deed on 30.01.1991. The S.S.C case No.4 of 1994 was filed by the landlord on 18.03.1994 claiming possession, rent and mesne profit. The landlord's case was that the notice was given on 24.12.1993 demanding the amount of rent, due rent, profit etc. Thereafter the S.C.C. Case No.4 of 1994 was filed in the Court of H

Additional Civil Judge, Senior Division, Roorkee. On 14.07.1994, the tenant was served summons. He prayed time to file a written Statement till 24.08.1994. The tenant filed an application under Section 10 CPC to stay the suit as well as the application under Order VII Rule 11 CPC. Both applications were rejected and the Court allowed fifteen days time to file a written statement and fixed 16.10.1995 for hearing. On 16.10.1995, the tenant again took time but did not file a written statement. Several other opportunities were given to the tenant to file a written statement in which he failed. On 24.02.1997, Court passed an order to proceed ex-parte. On 18.03.1997, the plaintiff- landlord was permitted to give ex-parte evidence. The application 44Ga was filed by the tenant to recall the orders dated 24.02.1997 and 18.03.1997. On 16.05.1997, the application 44Ga was rejected observing that the defendant wants to delay the case regularly because he is a tenant and getting the benefit of property. The application was found to be mala fide.

6. On 23.05.1997, the tenant filed an application under Section 30(2) of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, to deposit the rent. The application was allowed on 23.05.1997 by the Court observing that the plaintiff may deposit the amount on his own risk. On 07.07.1997, the amount of rent from 01.03.1988 to 30.06.1997 amounting to Rs.16,800/- was deposited by the tenant under Section 30(2).

7. Against the Order dated 16.05.1997, a revision was filed by the tenant before the District Judge, which too was rejected on 22.08.1997. On 18.10.1997, the tenant further deposited Rs.750/- as rent from 30.06.1997 to 30.11.1997.

8. The S.C.C. case No.4 of 1994 filed by the landlord was allowed by ex-parte judgement dated 31.03.1998. On 27.07.1998, the tenant had filed an application for execution of ex-parte decree dated 31.03.1998 claiming a total amount of Rs.21,660/-. The tenant thereafter on 25.08.1998 filed an application under Order 9 Rule 13 CPC along with application under Section 5 of Limitation Act for condoning the delay to recall the ex-parte decree dated 31.03.1998. Along with application dated 25.08.1998 filed under Order 9 Rule 13 CPC, no deposit was made by the tenant as required by Section 17 of the Provincial Small Cause Courts Act, 1887 (hereinafter referred to as "Act,1887").

9. On 25.11.1998, i.e., after filing the application under Order 9 Rule 13, the tenant made further deposit of Rs.1950/- as a rent from

30.11.1997 to 31.12.1998. On 27.07.2002, the application was filed by the tenant praying that amount deposited under Section 30(2) of U.P. Act No.13 of 1972 be presumed to be deposited under Section 17 of the Act, 1887, and the tenant be granted benefit of Section 17.

10. The appellant landlord filed a detailed objection dated 07.08.2002 opposing the application dated 27.07.2002. The trial court vide order dated 19.04.2007 rejected the application filed by the tenant under Order 9 Rule 13 and Section 5 of the Limitation Act. A revision was filed by the tenant against the order dated 19.04.2007 before the District Judge, who rejected the same by order dated 23.02.2008. Aggrieved by the order dated 19.04.2007 of the trial court as well as order dated 23.02.2008 of the District Judge rejecting the revision, a Writ Petition No.418 of 2008 was filed by the tenant in the High Court.

11. The Writ Petition was allowed by the High Court by the impugned judgment dated 13.12.2018. The High Court set aside the order dated 19.04.2007 of the trial court and 23.02.2008 of the Revisional Court and remanded the matter back to the trial court for reconsideration of tenant's application under Order 9 Rule 13 CPC and Section 5 of the Limitation Act in accordance with law. The appellant-landlord aggrieved by the judgment of the High Court dated 13.12.2018 filed a special leave petition in this Court, being SLP(Civil) Diary No.15791 of 2019 which was dismissed and withdrawn by the landlord with liberty to file Review Petition before the High Court. Liberty to come back was also granted by this Court vide Order dated 10.05.2019. After the Order of this Court dated 10.05.2019, a review application was filed by the appellant-landlord before the High Court, which too has been rejected on 24.05.2019. The appellant- landlord aggrieved by the aforesaid judgments dated 13.12.2018 and 24.05.2019 of the High Court has come up in this appeal.

12. After the judgment of the High Court dated 13.12.2018, the trial court in pursuance of the remand order has allowed the application under Order 9 Rule 13 CPC and Section 5 of the Limitation Act by order dated 24.05.2019.

13. We have heard Shri R.B.Singhal, learned senior counsel appearing for the appellant and Dr. Sumant Bharadwaj, learned counsel appearing for the respondent.

14. Shri R.B. Singhal, learned senior counsel for the appellant submitted that application of tenant under Order 9 Rule 13 was rightly

rejected for non-compliance of mandatory provisions of Section 17 Proviso of the Act, 1887. It is submitted that as per proviso to Section 17, the tenant was obliged to deposit the decretal amount due on the date of filing the application which has not been complied with. The application has been rightly rejected by the trial court. He has further submitted that the application to give the benefit of the amount deposited under Section 30(2) of UP Act No.13 of 1972 was filed by the tenant on 27.07.2002 that is after four years which could not have enured to the benefit of the tenant. The deposit made under Section 30(2) of the U.P. Act No.13 of 1972 was in the name of the appellant as well as the respondent No.5, hence, the deposit also was not relevant for giving benefit to the tenant under Section 17 proviso. The deposit under Section 30(2) being in joint name which could not be withdrawn by landlord-appellant alone, such deposit cannot help the respondent tenant for compliance of Section 17 proviso. Even the deposits made under Section 30(2) was not the deposit of the total amount due on the date of filing the application under Order 9 Rule 13.

15. It is submitted that 25.08.1998 is the date of presenting application under Order 9 Rule 13 and the tenant had deposited only the amount of Rs.17,550/- which was not the entire decretal amount payable by tenant. The execution-application has already been filed by the landlord appellant on 27.07.1998 in which the total decretal amount claimed was Rs.21,660/-. Thus, even assuming without admitting that amount under Section 30(2) can be adjusted, the amount being not total decretal amount, benefit under Section 17 proviso could not be extended to the tenant and the application was rightly rejected. It is further submitted that there was no ground for allowing the application under Order 9 Rule 13 since the order to proceed ex-parte against the tenant was unsuccessfully challenged by the tenant before the Revisional Court. There was no genuine ground for allowing the application under Order 9 Rule 13. The High Court committed error in interfering with the order of the trial court as well as the Revisional Court.

16. Dr. Sumant Bharadwaj, appearing for the respondent submits that the amount deposited under Section 30(2) of U.P.Act No.13 of 1972 was entitled to be given credit for the purposes of proviso to Section 17 of Act, 1887 and the High Court has rightly taken the view that the amount up to 31.12.1998 having already been deposited under Section 30(2), the application under Order 9 Rule 13 could not have been rejected for non-compliance of proviso to Section 17.

17. It is submitted that the High Court has rightly taken the view that the Court below had adopted hypertechnical and pedantic approach while considering the application under Order 9 Rule 13 and Section 5 of the Limitation Act. It is submitted that the tenant had deposited the entire decretal amount under Section 30(2) which was due at the time of filing application under Order 9 Rule 13. The application filed by the tenant was wrongly rejected by the trial court as well as the Revisional Court. The High Court has done substantial justice in allowing the application under Order 9 Rule 13.

18. We have considered the submissions of the learned counsel for the parties and have perused the record.

19. From the submissions of the learned counsel for the parties and materials on record, following issues arise for consideration in this appeal:-

1) Whether in the application filed by the respondent-tenant under Order 9 Rule 13, CPC on 25.08.1998, the requirements as contained in Proviso to Section 17 of the Provincial Small Cause Courts Act, 1887, were complied with?

2) Whether the respondent-tenant had deposited the entire amount due on 25.08.1998 under Section 30(2) of U.P. Act No.13 of 1972?

3) Whether the deposit of rent under Section 30(2) of the U.P. Act No.13 of 1972 in the present case can be treated to be deposited under proviso to Section 17 of Act, 1887?

4) Whether the respondent-tenant has made sufficient ground to allow the application filed under Order 9 Rule 13 CPC dated 25.08.1998?

5) Whether the High Court is right in its view that the trial court and the Revisional Court has taken a hyper-technical and pedantic approach while considering the application under Order 9 Rule 13 CPC and Section 5 of the Limitation Act filed by the respondent?

The first, second and third questions being interrelated are taken together.

20. The S.C.C. suit No.4 of 1994 was filed by the appellant landlord in March, 1994. The plaintiff's case was that he had purchased the

property by the sale deed dated 30.01.1991 after due permission from the District Judge, Haridwar. The plaintiff claimed to be owner of the property w.e.f. 30.01.1991. Defendant Nos.2 to 5 had also joined the plaintiff in the notice given to the respondent terminating the tenancy. There was categorical pleading in the plaint that the U.P. Act No.13 of 1972 is not applicable since the subject property was recent construction. It is useful to refer to the pleadings in paragraph 5 of the plaint which is to the following effect:-

> "5. That U.P. Act 13 of 1972 is not applicable to the disputed property. It is the recent construction and is subject to assessment by Municipal Board, Roorkee and the first such assessment thereon came into effect from 01.04.1984."

21. We may notice Section 17 and its proviso, compliance of which was required by the tenant- respondent while filing application under Order 9 Rule 13 CPC. Section 17 is as follows:-

> **"17.Application of the Code of Civil procedure.-** (1) The procedure prescribed in the Code of Civil Procedure,1908(5 of 1908), shall, save in so far 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;
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> 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.
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> (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 (5 of 1908)."

22. Proviso to Section 17 has been engrafted with the object that unscrupulous tenants who do not appear in the Court in the suit proceedings should not be allowed to file the application to recall ex-parte decree unless they deposit the entire amount or give security to the Court for compliance of the decree. The proviso is to take care of those tenants who deliberately do not appear in the suit neccesiating the

A Court to pass ex-parte decree. The object is to protect the landlord and to ensure that the decree passed is satisfied by the tenant, in event, the application under Order 9 Rule 13 is ultimately rejected. Proviso gives two options to an applicant against whom an ex-parte decree has been passed or who applied for review of the judgment, i.e., (a) deposit in the Court the amount due from him under the decree or in pursuance of the B decree; (b) give such security for the performance of the decree or compliance with the judgment as the Court made on the previous application made by him in this behalf directed. Thus, requirement of the deposit in the court the entire amount can be waived only when the Court on the previous application directs the tenant to give such security C for performance of the decree or compliance with the judgment. The application seeking waiver from deposit has been mentioned as "a previous application" i.e. previous to the application filed under Order 9 Rule 13.

23. The present is a case where the tenant has filed an application under Order 9 Rule 13 on 25.08.1998 to recall the ex-parte decree dated D 31.03.1998. There is no reference of any previous application praying the Court to permit the tenant to give security to satisfy the ex-parte decree. The application dated 25.08.1998 was not accompanied by the deposit of the amount due from the tenant under the decree dated 31.03.1998. The application dated 25.08.1998, thus, was not in accordance with proviso to Section 17. When the condition precedent for presenting E the application under Order 9 Rule 13 was not fulfilled, the application under Order 9 Rule 13 filed by the tenant respondent did not deserve any consideration and had rightly been rejected.

24. This Court had occasion to consider Section 17(1) proviso of the Act, 1887, and application filed under Order 9 Rule 13 in ***Kedarnath*** F ***versus Mohan Lal Kesarwari and others, (2002) 2 SCC 16***. In the above case, a suit was filed by the landlord for recovery of arrears of rent and eviction under Section 20(2) of Act No.13 of 1972 which was triable by the Court of Small Causes. The suit was decreed ex-parte. When the decree was put in execution, the tenant moved application G under Order 9 Rule 13 seeking setting aside ex-parte decree. Neither the amount due on the decree was deposited nor an application was filed seeking direction from the Court to give security. The facts have been noted in paragraph 1 of the judgment, which is to the following effect:-

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"1.The appellant-landlord filed a suit for recovery of arrears of rent and for eviction against the respondent-tenants on the ground available under clause (a) of sub-section (2) of Section 20 of the U.P.Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, hereinafter "the 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 09.08.1996, the suit came to be decreed ex parte. The decree directed the respondent-tenants 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 21.02.1998 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 26.02.1998, the respondent-tenants moved an application under Order 9 Rule 13 CPC seeking setting aside of the ex parte decree. Neither was the amount due under the decree deposited nor was an application 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 CPC. The Court appointed 16.10.1998 for orders."

25. The trial court had rejected the application forming an opinion that application under Order 9 Rule 13 has been filed without complying with the proviso to Section 17 which application was not maintainable. In a revision filed before the District Judge, the delay was condoned and the District Judge directed the trial court to accept security as proposed and decide the application under Order 9 Rule 13 on merits. The writ petition before the High Court by the landlord was dismissed, thereafter the matter had come to this Court.

26. This Court, after noticing Section 17, has extracted the statement of objects and reasons for 1935 amendment in Section 17. Following was observed in paragraph 5 of the judgment: -

"5...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 9 of 1935. Earlier these 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" whic 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:

"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 ascertin 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, Part V, p.90)."

27. This Court has held that compliance of the proviso to Section 17 is mandatory for making application under Order 9 Rule 13. In paragraph 8 and 9, following was laid down: -

"8. A bare reading of the provision shows that the legislature has 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.

9. 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."

28. This Court held that the trial court had rightly rejected the application which was not in compliance with Section 17 and both the District Judge and the High Court committed error in interfering with the order of the trial court. In paragraph 10, following was held: -

"10. 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 respondents as incompetent and hence not entertainable. We need not examine the other question whether a sufficient 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."

29. On the date when the application was filed under Order 9 Rule 13, i.e., 25.08.1998, neither any deposit was made by the tenant

A nor there was any previous application seeking permission of the Court to give security. Hence, there being non-compliance of proviso to Section 17, application was liable to be rejected and the trial court vide its order dated 19.04.2007 had rightly rejected the application under Order 9 Rule 13.

B 30. We may also notice one more submission of the learned counsel for the appellant, that the deposit under Section 30(2) of the Act No.13 of 1972 which was due on the date of filing of the application under Order 9 Rule 13 CPC was not the deposit of the entire amount. In the execution application filed on 27.07.1998 by the landlord to execute the decree dated 31.03.1998, the amount which was claimed was
C Rs.21,660/- which was due till then.

31. The application under Order 9 Rule 13 CPC was filed on 25.08.1998, i.e., subsequent to filing of the execution application, thus, at least the amount of Rs.21,660/- was due. The tenant respondent has made a deposit under Section 30(2) in July, 1997 of Rs.16,800/- and
D again Rs.750/- on 18.10.1997 which was rent from 30.06.1997 to 30.11.1997. Thus, on the date when the application was filed under Order 9 Rule 13, total deposit made by the tenant under Section 30(2) was only Rs.17,550/- whereas the amount due as per execution application was Rs.21,660/-. It was only on 25.11.1998, i.e., much after filing of the
E application under Order 9 Rule 13, the tenant deposited amount of Rs.1,950/- as a rent from 30.11.1997 to 31.12.1998. Thus, even according to the own case of the respondent tenant on the date when application under Order 9 Rule 13 was filed, i.e., 25.08.1998, the tenant had not deposited under Section 30(2) the total amount due, thus, by no stretch of imagination the tenant could have claimed compliance of proviso to
F Section 17 of Act, 1887.

32. Now, we may proceed to consider as to whether deposit under Section 30(2) in the facts of the present case could have enured to the benefit of tenant for the purposes of deposit under Section 17 of Act, 1887. The deposit was made on an applicaion under Section 30(2) filed
G by the respondent tenant. The Court while allowing the application on 23.05.1997 had passed the following order:-

" ORDER

4Kh application u/s 30(2) of Act No.XIII of 1972 is allowed without prejudice to the respective contentions of the parties. The plaintiff
H

may deposit the amount if he so likes at his own risk. The parties shall be free to agitate the question of validity of deposit in the S.C.C. Suit pending. File be consigned." A

33. Thus, the deposit by respondent-tenant under Section 30(2) was under his own risk and the parties were free to agitate the question of validity of deposit in the S.C.C. suit which was pending on that day. B

34. We have noted the pleadings in the suit that the plaintiff-landlord has come up with the case that Act No. 13 of 1972 is not applicable. In the pleadings of the suit, the plaintiff-appellant has claimed the exemption from the operation of the Act 13 of 1972, ten years of construction being not completed. Section 2 of Act No. 13 of 1972 provides:- C

"**2. Exemptions from operation of Act**.

(1)..... ....

(2) Except as provided in sub-section (5) of Section 12, sub-section (1-A) of Section 21, sub-section (2) of Section 24, Sections 24-A, 24-B, 24-C or sub-section (3) of Section 29, nothing in this Act shall apply to a building during a period of ten years from the date on which its construction is completed]: D

Provided that where any building is constructed substantially out of funds obtained by way of loan or advance from the State Government or the Life Insurance Corporation of India or a bank or a co-operative society or the Uttar Pradesh Avas Evam Vikas Parishad, and the period of repayment of such loan or advance exceeds the aforesaid period of ten years then the reference in this sub-section to the period of ten years shall be deemed to be a reference to the period of fifteen years or the period ending with the date of actual repayment of such loan or advance (including interest), whichever is shorter.: E F

Provided further that where construction of a building is completed on or after April 26, 1985 then the reference in this sub-section to the period of ten years shall be deemed to be a reference to a period of forty years from the date on which its construction is completed." G

35. When the plaintiff had claimed exemption from the operation of the Act No. 13 of 1972, it was specific pleading as noted above, how deposit can be made under Section 30 of the Act by the tenant respondent. H

A Section 2 begin with the expression that 'Nothing in this Act shall apply'. When there is exemption from the applicability of the Act No.13 of 1972 as pleaded by the plaintiff, Section 30 of the Act shall also not be applicable. When Section 30 itself is not applicable to the building, the deposit claimed to be made under Section 30(2) is wholly irrelevant, for any purposes including for purposes of proviso to Section 17 of Act, 1887.

B

36. The High Court in the impugned judgment has relied on two earlier judgments of the High Court for coming to the conclusion that the deposit of Section 30(2) of Act No. 13 of 1972 can be adjusted against the amount required to be deposited as per Section 17 proviso of Act, 1887. The High Court has referred to the judgment of the High Court in ***Prem Chandra Mishra versus IInd Additional District Judge, Etah, Writ Petition No.12103 of 1996*** decided on ***11.09.2008*** reported in ***(2008) 9 ADJ 13.***

C

37. In the case of **Prem Chandra Mishra,** certian amount was deposited by the tenant on first date of hearing, some amount was also deposited under Order 15 Rule 5 CPC by the tenant. The amount which was deposited under Section 20(4) of the Act No.13 of 1972 as well as Order 15 Rule 5 CPC which could have been deemed to have been paid on the date of such deposit. Following are the observations of the High Court: -

D

E

"...Question arising in the present case is that Revisional Court has recorded finding of fact which has not at all been assailed before this Court that entire amount which is due from tenant under decree qua the same deposit is already there even before passing of decree and once entire amount in question is there can even in this contingency application under Section 17(1) of Provincial Small Cause Courts Act 1887 can be dismissed for non-compliance of provision of proviso. Amount in question under Section 20(4) of U.P. Act No. 13 of 1972 is permitted to be deposited in any suit for eviction on the ground mentioned in Clause (a) of sub-Section (2) of Section 20 by the tenant on the first hearing of the suit unconditionally and amount which is already deposited under Sub-Section (1) of Section 30 of U.P. Act No. XIII of 1972 is liable to be deducted for enabling tenant to save eviction. Sub-Section (6) of Section 20 clearly provide that any amount deposited by the tenant under Sub-Section (4) or under

F

G

H

Rule 5 of Order VX of the First Schedule to the Code of Civil Procedure, 1908 shall be paid to the landlord forthwith on his application without prejudice to the parties pleadings and subject to the ultimate decision in the suits. Similarly Sub-Section (4) of Section 30 provides that on any deposit which are made under Section 30 the amount in question which has been deposited can be withdrawn on an application made in this behalf and further sub-Section (6) of Section 30 provides that any deposit made, same shall be deemed that the person depositing it has paid it on the date of such deposit to the person in whose favour it is deposited in the case referred to in sub-section (1) or to the landlord in the case referred to in sub-section (2). Thus, deposits which are made under Sub-Section (4) of Section 20 and under Section 30 of U.P. Act No. 13 of 1972 and under Order XV Rule 5 C.P.C. are in custody of the Court and said amount in question can at any point of time, be withdrawn by the landlord in question, and are readily available to the landlord..."

38. The High Court in the above case came to the following conclusion: -

"...Facts of the present case are on better footing, inasmuch as here Revisional Court has recorded categorical finding that as per exparte decree. Tenant was required to deposit Rs. 5338.75/- in cash which was inclusive of rent claimed by plaintiff and other expenses and total which has been deposited by him was over and above the amount which was to be paid by him under decree i.e. more than Rs. 5800/-.

In the present case admitted position is that after ex parte decree has been passed application to recall ex-parte decree was made on 24.05.1993 and alongwith the same application under the proviso to Section 17(1) has not at all been moved. Said application was admittedly moved subsequent to the same on 25.02.1994 and in the said application mention was made by him that he has already deposited the rent, cost of suit and interest of JSCC suit much earlier before passing of exparte decree. Said application which has been moved on behalf of tenant was not stating any thing new rather it was sought to be stated by the tenant that in the present case decretal amount is already with the court as he has already paid arrears of rent, cost of suit and interest of JSCC suit

A much before passing of exparte decree and same may be taken into consideration while entertaining application. Distinction will have to be drawn qua the cases wherein entire amount as mentioned in the proviso to Section 17 of Provincial Small Cause Courts Act 1887 already stands deposited even before passing of exparte decree. In the said event of entire amount in question being prior deposited, information has to be furnished before Judge Small Causes Court, then said fact on verification can be treated as sufficient compliance as provided under the proviso to Section 17 (1) of Provincial Small Cause Courts Act 1887, inasmuch as nothing new has been sought to be done after expiry of the period rather only information has been furnished that said condition has already been complied with and interest of landlord is fully protected as per object and the purpose of Section 17. Tenant cannot be asked to make deposit for second time and furnish security for the second time in the backdrop that prior to passing of decree entire amount due under decree or judgment has already been deposited. Judge Small Causes can make inquiry in the matter of this fact on being apprised as to whether decretal amount is there or not but where decree in question has been passed and decretal amount mentioned as above is not at all there then law laid down by Hon'ble Apex Court in Kedarnath's case (supra) has to be followed in its word and spirit.

Facts narrated above clearly makes Kedarnath's case (supra) distinguishable. In the facts of the present case as finding of fact is that entire amount has been deposited which was over and above to the decretal amount and Revisional Court has allowed the same then there being no failure of justice, then there is hardly any scope of interference.

Consequently, in terms of observations made above, present writ petition is dismissed."

39. The perusal of the judgment indicate that the said was a case where applicability of Act No. 13 of 1972 was not questioned and the deposit made under Section 20(4) as well as Order 15 Rule 5 CPC were relied for the purposes of Section 17.

40. In the present case, the plaintiff has come up with the case that Act No.13 of 1972 is not applicable in the building in question. When Act No.13 of 1972 is not applicable, there is no question of deposit under

Section 30 nor deposit under Section 30 can be said to be valid deposit. Thus, judgment of the Allahabad High Court, which has been relied in the impugned judgment, is clearly distinguishable. A

41. We have our own doubts about the correctness of the view taken by Allahabad High Court in the above judgment, but for the purposes of the present case, we need not dwelve any further since in the present case, Act No.13 of 1972 is not applicable. The deposit under Section 30 is of no avail and further, as held above, there was no deposit of the entire amount due on the date of filing the application under Order 9 Rule 13 by the tenant. B

42. In view of the foregoing discussions, our answer to question Nos.1,2 and 3 are as follow:- C

1) In the application filed by the tenant on 25.08.1998 under Order 9 Rule 13, there was no compliance of Section 17 of 1887 Act and the application was incompetent.

2) The respondent-tenant had not deposited the entire amount due on 25.08.1998 even under Section 30(2) of Act No.13 of 1972. D

3) The deposit of rent under Section 30(2) of the Act No.13 of 1972 in the present case can not be treated to be deposit for the purposes of proviso under Section 17 of the Act, 1887. E

Now we come to the question No.4

43. Even if for the arguments sake, we proceed on the assumption that in the present case, there is a compliance of proviso to Section 17, whether application under Order 9 Rule 13 in the facts of the present case was rightly rejected by the trial court is a question to be considered. F

44. We have noticed above that prior to ex-parte decree dated 31.03.1998, trial court had already passed two orders to proceed ex-parte on 24.02.1997 and 18.03.1997. The tenant respondent had filed an application 44Ga to recall the orders dated 24.02.1997 and 18.03.1997 which applications were rejected on 16.05.1997. While rejecting the application 44Ga filed by the tenant to recall the ex-parte order. Following was said by the trial court while rejecting the application: - G

"...The defendant wants to delay the case regularly because he is a tenant and getting benefit from the property. The application is H

based on malafide. The defendant is failed to explain any legal and genuine cause for his absence. It is not reasonable to grant any other opportunity. The application is rejected. The plaintiff present his exparte evidence on 25.05.1997."

45. The tenant's application to recall the exparte order was rejected by recording the findings as noted above. The trial court while rejecting the application under Order 9 Rule 13 has considered the entire sequence of events and facts. The trial court while rejecting the application under Order 9 Rule 13 vide its order dated 19.04.2007 has recorded categorical finding that there is no compliance of proviso to Section 17, the decretal amount having not been deposited at the time of filing application under Order 9 Rule 13.

46. We may also notice the order of the District Judge by which he rejected the revision petition filed by the tenant against the order dated 19.04.2007. District Judge in judgment noted that the tenant was provided with several opportunities to file written statement.

47. We are, thus, of the considered opinion that there was no valid ground on which the High Court could have interfered with the order of the trial court rejecting the application under Order 9 Rule 13 filed by the tenant to recall the ex-parte decree. We may further hold that even in the case where there is a compliance of proviso to Section 17, the application filed under Order 9 Rule 13 to set aside the decree passed ex-parte or for review of the judgment cannot be automatically granted. The compliance of proviso to Section 17 is a Pre- condition for maintainability of application under Order 9 Rule 13. Application under Order 9 Rule 13 can be allowed only when sufficient cause is made out to set aside the ex-parte decree. The present is a case where no sufficient cause was made out to set aside the ex-parte decree.

48. As noted above, the tenant had unsuccessfully challenged the orders passed by the trial court on 24.02.1997 and 18.03.1997 to proceed ex-parte. The application of the tenant to recall the orders dated 24.02.1997 and 18.03.1997 was rejected by the trial court with a clear finding that the tenant wants to delay the case regularly because he is the tenant and getting benefit of the property. The application of the tenant was held to be mala fide.

49. The High Court without even adverting to the earlier order of the trial court dated 16.05.1997, where categorical findings had been

recorded against the tenant, choose to allow the application under Order 9 Rule 13 filed by the tenant to recall ex-parte decree, which cannot be said to be correct exercise of jurisdiction under Article 226 of the Constitution.

50. We, thus, answer question No.4 in the following words:

> The tenant-respondent has not made out any sufficient ground to allow the application under Order 9 Rule 13 and the High Court committed error in interfering with the order of the trial court rejecting such application which was also confirmed by the District Judge.

QUESTION NO.5

51. The High Court in its impugned judgment has referred to judgment of this Court in ***Kailash versus Nanku and others, reported in (2005) 4 SCC 480,*** where this Court has laid down that all rules of procedure are the hand made of justice. In the above case, this Court was considering the power of the Court to permit extension of time for filing of written statement beyond a time as fixed under Order 8 Rule 1 CPC. The observations in paragraphs 28 and 29, which have been relied by the High Court, where in reference to Order 8 Rule 1 CPC, this Court held that provisions under Order 8 Rule 1 CPC are directory.

52. The above judgment was not applicable in the facts of the present case. Present was not a case where there was any procedural breach at the part of tenant-respondent. The tenant-respondent has not complied with condition precedent for maintainability of the application under Order 9 Rule 13 as laid down in Section 17 proviso.

53. The High Court in paragraph 20 of the judgment has made following observations:-

> "20. Since the learned Courts below have adopted a hyper-technical and pedantic approach while considering the applications under Order 9 Rule 13 C.P.C. and Section 5 of Limitation Act, filed by the petitioner, therefore the impugned orders are liable to be quashed."

54. The above observations of the High Court cannot be approved. The trial court has rejected the application of tenant under Order 9 Rule 13 not adopting any hyper-technical and pedantic approach rather on the finding that there was non-compliance of proviso to Section 17 of

A the Act, 1887, hence, the application deserves to be rejected. Requirement under proviso to Section 17 can neither be said to be hypertechnical nor pedantic but the same was the requirement of law and condition precedent for maintainability of application under Order 9 Rule 13.

55. The question no.5 is answered as follows:

B The High Court is not right in its view that trial court and Revisional Court has taken hypertechnical and pedantic approach while considering the application under Order 9 Rule 13 of CPC and Section 5 of the Limitation Act.

56. In view of the foregoing discussions, we are unable to sustain C the judgment of the High Court dated 13.12.2018. The judgment dated 13.12.2018 as well as the order dated 24.05.2019 rejecting the review application as well as consequential order passed by the trial court dated 24.05.2019 are set aside. The order of the trial court dated 19.04.2007 rejecting the application under Order 9 Rule 13 of the respondent is D upheld.

57. In view of the facts of the present case especially the fact that the appellant has not been able to reap the benefit of the decree which was passed in his favour on 31.03.1998, we direct the Executing Court to execute the decree and put the appellant in possession along E with the payment of entire decretal amount up to date within a period of three months from the date the copy of judgment is produced before the Executing Court.

58. The appeals are allowed with costs of Rs.25,000/- to be paid by the respondent to the appellant before the Executing Court.

Ankit Gyan Appeals allowed.