

(2021) 03 SHI CK 0001

High Court Of Himachal Pradesh

Case No: CMPMO No. 1047 Of 2019

M/s Somnath Sawaran
Lal

APPELLANT

Vs

Dr. Shashi Pal Sood

RESPONDENT

Date of Decision: March 1, 2021

Acts Referred:

Constitution Of India, 1950 " Article 227#Code Of Civil Procedure, 1908 " Section 151, Order 8 Rule 1(A)(3), Order 9, Order 9 Rule 6, Order 9 Rule 7, Order 9 Rule 13, Order 9 Rule 17, Order 17 Rule 2, Order 17 Rule 3, Order 17 Rule 3(a), Order 17 Rule 3(b), Order 39 Rule 7#Limitation Act, 1963 " Section 5

Citation: (2021) 03 SHI CK 0001

Hon'ble Judges: Vivek Singh Thakur, J

Bench: Single Bench

Advocate: Ravi Tanta, B.Nandan Vashishta

Final Decision: Disposed Of

Judgement

Vivek Singh Thakur, J

1. Present petition has been preferred against order dated 19.11.2019 passed by learned Rent Controller, Shimla in Civil Miscellaneous Application

No. 147-6 of 2019 in Rent Petition No. 74-2 of 2017, titled as Dr. Shashi Pal Sood Vs. M/s Som Nath Sawaran Lal and others, whereby application

filed on behalf of petitioner under Order 9 Rule 7 read with Section 151 of the Code of Civil Procedure for setting aside ex parte order has been

dismissed.

2. Petitioner herein is tenant and respondent is landlord and for convenience, hereinafter they shall be referred as such in this order.

3. Landlord has filed a petition on 4.3.2017 under Urban Rent Control Act for eviction of tenant. After service of tenant, reply was filed on 23.9.2017

and issues were framed on 14.12.2017, whereafter case was listed for 9.3.2018 for recording evidence of landlord. On that date, three witnesses,

present in the Court, were examined on behalf of landlord and they were cross-examined on behalf of tenant by Mr.Ravi Tanta, Advocate, who

appeared as vice Mr.Ajay Kochar, Advocate, engaged by tenant. Evidence on behalf of landlord was closed on that very date and case was listed for

recording the evidence of tenant on 27.4.2018 with direction to take steps for the said purpose within seven days.

4. For 27.4.2018 neither steps were taken to examine the witnesses of tenant nor any witness was present in the Court. Accepting the prayer of

tenant to grant time, case was fixed by the Court for recording evidence of tenant on 6.6.2018 with direction to take steps within seven days for that

purpose. However again, neither steps were taken nor evidence was produced on 6.6.2018 by the tenant. This time also, accepting the request of

tenant, case was adjourned for 11.7.2018 for the same purpose with same direction. But this time also neither steps were taken nor evidence was

produced and again, like earlier, case was adjourned for 1.9.2018, on request of tenant for recording his evidence with direction to take steps within

seven days.

5. This time also neither steps were taken for recording evidence, nor any witness was present, however applications under Order 8 Rule 1(A)(3)

read with Section 151 CPC and under Order 39 Rule 7 read with Section 151 C.P.C. were filed.

6. Vide order dated 21.11.2018, application under Order 8 Rule 1(A)(3) CPC was allowed and documents proposed to be placed on record were

permitted to be taken on record and application under Order 39 Rule 7 CPC was also allowed and landlord was directed to permit and allow the

expert of tenant to visit and enter the premises/building in question for the purpose of inspection and for preparing inspection/technical report and case

was listed for 29.12.2018.

7. On 29.12.2018, Presiding Officer was not available being transferred and, therefore, case was fixed for proper orders on 27.2.2019. On 27.2.2019

counsel for landlord had appeared, but there was no representation on behalf of tenant, therefore, notice was issued to counsel for the tenant as well

as tenant for 23.3.2019. On 23.3.2019, it was reported by Dealing Assistant that notice issued to counsel had been received duly signed, but notice

issued to tenant was received unserved. However, none had appeared on behalf of tenant/respondent, therefore, fresh notice was ordered to be issued

to the tenant as well as its counsel for 25.4.2019. On 25.4.2019 notice issued to tenant was received back with the report that tenant was not available

at the address given, whereas notice issued to counsel for the tenant was received back not properly served, therefore, tenant was ordered to be

served by way of affixation for 29.5.2019. This time, it was reported that notice has been served and Mr.Digvijay Singh, Advocate had appeared for

tenant as vice Mr.Ajay Kochar, Advocate and had sought time to file Power of Attorney on behalf of tenant, which, in fact, was already on record.

However, case was adjourned giving last opportunity to tenant to proceed further and case was listed for 19.6.2019.

8. On 19.6.2019, no one had put in appearance on behalf of tenant and ultimately Court was constrained to proceed further under Order 17 Rules 2

and 3 CPC and observing that tenant was not appearing and had not lead any evidence on record despite availing four opportunities, tenant's

evidence was closed by order of the Court and case was listed for final arguments on 1.7.2019.

9. Arguments were concluded on 1.7.2019 and case was adjourned for pronouncing order on 26.7.2019 and as order was not ready on 26.7.2019,

case was again adjourned for passing order on 30.7.2019.

10. As order could not be pronounced on 30.7.2019 for preoccupation of Presiding Officer to exhaust heavy cause list, case was listed for re-

arguments on 16.8.2019. At this stage, on 13.8.2019, an application was preferred on behalf of tenant under Order 9 Rule 7 read with Section 151

C.P.C. for setting aside ex parte impugned order, but purporting it to be an order passed on 24/26.7.2019.

11. It is stated in the application that due to some inadvertence tenant, through its partners, was not able to contact its erstwhile counsel in the month

of June, 2019, as they had some exigent personal family issues to deal inter-se partners, which required utmost indulgence and occupation of partners

during such period and, therefore, they contacted their counsel on 8.8.2019 to know the status of their case, whereupon it was revealed to them that

case had been listed for final hearing on 16.8.2019 vide order dated 24/26.7.2019. It is further case of the tenant that astounded and baffled by the

revelation, the partners of the tenant had decided to change their counsel and to engage new counsel and till the filing of the application, new counsel

could not ascertain the exact order passed on 24/26.7.2019, however somehow new counsel had managed to know about the fact that on

24/26.7.2019, the Presiding Officer had passed the order under Order 17 Rule 3(a) of the Code of Civil Procedure and the case was firstly listed for

pronouncing the order on 30.7.2019 and thereafter it was listed on 16.8.2019. It is stated in the application that on 24/26.7.2019 erstwhile counsel did

not appear for call of Bar Association to abstain, but proxy lawyer had appeared, but despite that Rent Controller had proceeded under Order 17 Rule

3 CPC, whereas tenant had no intention to not to appear and further that tenant had not lead any evidence by the date of passing of impugned order

by the Rent Controller, therefore, Rent Controller was to proceed further strictly in terms of Order 17 Rule 2 CPC, which directs the Court, in such

circumstances, to proceed further in accordance with order 9 of C.P.C.

12. Vide impugned order dated 19.11.2019, Rent Controller has dismissed the application filed on behalf of tenant on the ground that tenant had failed

to put forth any plausible reason to explain the absence on 19.6.2019 and to show any sufficient reason for setting aside the impugned order dated

19.6.2019 passed against the tenant.

13. Present petition has been filed mainly on the ground that there was no intention of tenant to remain absent or unrepresented during the proceedings

of Rent Petition and as tenant has not lead any evidence in the petition, Rent Controller has wrongly invoked the provisions of Order 17 Rule 3 CPC,

because prior to that he had to act in terms of dictates of Order 17 Rule 2 CPC which provide that in such a situation Court should pass an order

under the modes provided under Order 9 of CPC, whereas Rent Controller has passed impugned order without adhering to explanation appended to

Order 17 Rule 2 CPC and, therefore, Rent Controller has committed illegality and irregularity, which warrants interference of this Court.

14. To substantiate plea of the tenant, learned counsel has put reliance on Prakash Chander Manchanda & Another Vs. Janki Manchanda, (1986) 4

SCC 699 and B. Jankiramaiah Chetty Vs. A.K. Parthasarathi & other, (2003) 5 SCC 641.

15. Per contra, justifying passing of impugned order by Rent Controller for reasons assigned therein, learned counsel for landlord has relied upon Arjun

Singh Vs. Mohindra Kumar and others, AIR 1964 SC 99,3 Jyoti Devi Vs. Ld.Munsiff, Basohli & antoher, 2015 (1) CCC 768, M/s Epsilon Publishing

House Pvt. Ltd. Vs. Mr.Pradeep Kumar Jain, 2017(4) CCC 238 and Rohit Bahadur Singh Vs. Raghunath Mishra & Another, 2017(4) SCC 327.

16. Order 17 Rule 2 CPC provides that when parties or any of them failed to appear, the Court may proceed to dispose of suit in one of the modes

directed in that behalf by order 9 or make such order as it thinks fit, with further explanation attached thereto that once evidence or a substantial

portion of the evidence of any party has already been recorded and such party fails to appear on any date to which the hearing of the suit is adjourned,

Court may, in its discretion proceed with the case as if such party is present.

17. Rule 3(b) of Order 17 CPC provides that where any party to a suit to whom time has been granted, fails to produce his evidence, or to cause

attendance of his witnesses, or to perform any other act necessary to further progress of the suit for which time has been allowed, the Court may,

notwithstanding such default, if the parties are or any of them is, absent, proceed under Rule 2 C.P.C.

18. In present case, one party, i.e. tenant was absent on 19.6.2018. Tenant had failed to produce, much less to examine its witnesses on 24.4.2018,

6.6.2018, 1.7.2018, 11.7.2018 and 1.9.2018 despite granting opportunities by the Court. Even steps for recording evidence or producing witnesses

were not ever taken till 19.6.2019. It is also noticeable that when case was adjourned for proper order for 27.2.2019 on transfer of Presiding Officer,

none had appeared on behalf of tenant on 27.2.2019. Notice was issued to counsel of tenant for 23.3.2019 as well as to the tenant. Despite service of

counsel, none had appeared, however, for non service of tenant case was again listed for its service on 25.4.2019. On that date also, there was no

representation on behalf of tenant and Court was constrained to order service of tenant by way of affixation for 29.5.2019 and only thereafter an

advocate had appeared to represent the tenant on 29.5.2019, on whose request last opportunity was granted to the tenant to proceed further and case

was listed on 19.6.2019. Despite that, after 29.5.2019 also, no steps for recording evidence or producing witness of tenant were taken.

19. Vide order dated 21.11.2018, applications of tenant were allowed and documents proposed to be placed on record were taken on record by the

court and inspection/technical report was also permitted to be prepared by directing the landlord to permit entry of expert of tenant in the premises in

question. It is not a case where tenant was not aware about pendency of case, rather it was very much in its knowledge that it is at the stage of

recording of evidence of the tenant and, therefore, more particularly for order dated 21.11.2018, whereby applications of tenant for placing documents

on record were allowed, it was for the tenant to take overt act to proceed further for recording of its evidence, but tenant had not only failed to take

an overt act, but had also failed to cause its attendance, much less attendance of its witnesses in the proceeding. Therefore, in such situation, as

mandated by Rule 3(b) of Order 17, Rent Controller was constrained to proceed under Rule 2 of Order 17. Rule 2, empowers the Court to dispose of

suit in one of the modes directed in that behalf by Order 9 CPC. It also empowers the Court to make such other order as it thinks fit. So far as

applicability of explanation to Rule 2 is concerned, the same is not applicable in present case, as evidence of landlord has been recorded, but landlord

was not absent, whereas evidence of tenant has not been recorded, but tenant was absent. Explanation, giving discretion to proceed with the case by

considering a party as present, shall be applicable when evidence of a party had already been recorded and such party fails to appear, but not in a

case where no evidence, on behalf of party absent, has been recorded.

20. Plea of tenant that order passed by Rent Controller is not in consonance with Order 17 Rule 3 CPC is also misconceived. Order 9 Rule 6 provides

procedure when only plaintiff appears, but defendant does not appear on a date fixed for hearing. It provides three different actions at three different

situations, i.e. when summons duly served, when summons not duly served and when summons served, but not in due time. In present case not only

summons were duly served, but tenant had been appearing in the proceedings since the year 2017 and was also being represented by an Advocate.

Even if it is considered that Advocate had not informed the tenant any date, though such plea does not appear to be true, then also it was

petitioner's duty to take further steps for progress of proceedings after 21.11.2018. In application it is averred that in the month of June, 2019

partners of tenant could not contact their counsel, but it is evident from the record that on 21.11.2018, next date of hearing was fixed as 29.12.2018,

therefore. But, since November, 2018 till June 2019, tenant did not come for further progress of the case and opted to remain absent from the dates

fixed before the Rent Controller.

21. In aforesaid circumstances procedure under Rule 6 CPC for a situation when defendant does not appear despite duly served, is applicable and it

provides that in such eventuality the Court may make an order that suit be heard ex parte. Rule 2 of Order 17 CPC not only provides that Court may

proceed in accordance with Order 9, but also empowers the Court to pass any other order which is deemed fit by it. In present case Rent Controller

has closed right of leading evidence of tenant and has also decided to proceed further, ex parte, which is in consonance with Rule 2 of Order 17 read

with Order 9 CPC.

22. Interestingly, tenant in its application filed under Order 9 Rule 7 CPC has mentioned the date of passing of the order by Rent Controller as

24/26.7.2019 instead of 19.6.2019, by taking the plea that erstwhile counsel was not able to inform them properly and, therefore, new counsel was

engaged by them and he could not trace the exact date of passing of order by Rent Controller. As per record, earlier, on 2.5.2017 tenant was

represented through Mr.Dhreeeraj Kanwar, Advocate and thereafter Ms.Priyanka Advocate had filed memo of appearance on 12.6.2017 on behalf of

tenant and lastly Power of Attorney by Mr.Ajay Kochar and Mr.Amit Sharma, Advocates was filed on 11.7.2017 on behalf tenant. It is also

noticeable that on 9.3.2018 Mr.Ravi Tanta, Advocate had appeared vice Mr.Ajay Kochar, Advocate and on that date three witnesses of landlord

were examined and they were cross-examined by Mr.Ravi Tanta, Advocate on behalf of tenant. Now it has been purported by tenant that they have

engaged a new counsel and application under Order 9 Rule 7 C.P.C. as well as present petition has been preferred through newly engaged Advocate,

namely, Mr.Ravi Tanta, Advocate. But record reveals that Mr.Ravi Tanta, Advocate had already been appearing for tenant, not only as a vice

counsel, but as a counsel representing them effectively, as he had cross-examined three witnesses of landlord. It appears that to make a ground for

setting aside order dated 19.6.2019 a story of changing the counsel has been concocted by the tenant. From the material available on record, it also

appears that wrong date as 24/26.7.2019 has also been mentioned deliberately, so as to bring the filing of application under Order 9 Rule 7 CPC within

a period of limitation of 30 days, as the said application was filed on 13.8.2019 and in case of mention of correct date i.e. 19.6.2019, tenant had to file

an application under Section 5 of the Limitation Act for condonation of delay in preferring an application under Order 9 Rule 17 C.P.C. Thus, now

story stated in the application under Order 9 Rule 7 C.P.C. appears to be a concocted story and thus intention of tenant appears to be only to delay the

proceedings pending before the Rent Controller.

22. Judgments referred on behalf of tenant are not applicable in present case. In Rakesh Chander Manchanda & Ors case, for absence of defendant,

his evidence was closed and on subsequent dates arguments of plaintiff were heard ex parte and judgment and decree was passed against the

defendant. Later on defendant had filed an application under Order 9 Rule 13 CPC for setting aside ex parte decree which was dismissed by the trial

Court, holding that case was disposed of not in accordance with Order 17 Rule 2 C.P.C., but in accordance with Order 17 Rule 3 C.P.C. and,

therefore, the application under Order 9 Rule 13 C.P.C. was not maintainable. The Supreme Court after discussing the provisions of Order 17 Rule 2

and Rule 3 C.P.C. has concluded that where a party is absent the only course, as mentioned in Order 17 Rule 3(b) C.P.C., is provided under Rule 2

and language of Rule 2 empowers the Court to proceed to dispose of suit in one of the modes dictated under Order 9 and, therefore, it is held that in

such a situation application under Order 9 Rule 13 C.P.C. is maintainable. In present case trial Court has not rejected the application filed by tenant

under Rule 7 C.P.C. on the ground of maintainability, but same has been rejected for want of sufficient cause for absence of tenant on 19.6.2019.

23. In B. Jankiramaiah Chetty & Ors case also it was held that when the Court proceeded ex parte in absence of defendant, Order 9 Rule 13 C.P.C.

shall be applicable, therefore, ratio of this judgment is also of no help to the tenant, who has failed to establish sufficient cause on record for his

absence.

24. In judgments referred on behalf of landlord, ratio of law is that when entire hearing is complete, arguments were heard and suit/matter has been

adjourned for pronouncing judgment, then provision of Order 9 Rule 7 C.P.C does not apply. These judgments are not applicable in present case, as

also observed by the trial Court that though arguments were concluded on 1.7.2019, but thereafter vide order dated 30.7.2019, case was fixed for re-

arguments on 16.8.2019 and application under Order 9 Rule 7 C.P.C. was filed by tenant on 13.8.2019, therefore, it cannot be said that application has

been filed after completion of proceedings of eviction petition, as the said petition was listed for arguments on 16.8.2019. Therefore judgments

referred by landlord are not applicable in facts and circumstances of the present case.

25. In view of above discussion, I find no infirmity, irregularity, or illegality in the impugned order passed by learned Rent Controller, warranting

interference of this Court in petition filed under Article 227 of the Constitution of India. However, taking a lenient view, as finally prayed, tenant is

permitted to join the proceedings henceforth with one more, but last opportunity, to lead evidence on its own responsibility on 8th March, 2021 before

the Rent Controller, Shimla, H.P., subject to payment of cost of Rs.10,000/- to the landlord on or before the said date, failing which tenant shall not be

entitled to lead evidence. No further opportunity shall be granted to lead evidence for any cause attributed to tenant.

26. Parties are directed to appear before Rent Controller on 8th March, 2021 to complete the recording of evidence of the tenant. No fresh notice

shall be issued to them for putting their appearance before the Rent Controller. On failure in ensuring representation on 8th March, 2021 or any

subsequent date(s), adverse order shall follow. Rent Controller shall make endeavor to complete the proceedings in main petition on or before 10th

May, 2021.

Registry to ensure transmission of record to Rent Controller forthwith along with copy of this order, so that it is available with Rent Controller on 4th

March, 2021.

The petition stands disposed of in aforesaid terms.