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**AIR 1989 All 176 : (1989) AWC 139**

**Allahabad High Court**

**Case No:** Civil Miscellaneous Writ Petition No. 3430 of 1982

Mohan Lal and Another

APPELLANT

Vs

The Additional District  
Judge, Nainital and  
Others

RESPONDENT

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**Date of Decision:** Oct. 28, 1988

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 9 Rule 13
- Constitution of India, 1950 - Article 226
- Provincial Small Cause Courts Act, 1887 - Section 17

**Citation:** AIR 1989 All 176 : (1989) AWC 139

**Hon'ble Judges:** S.D. Agarwal, J

**Bench:** Single Bench

**Advocate:** R.H. Zaidi, for the Appellant; Rajesh Tandon, for the Respondent

**Final Decision:** Allowed

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**Judgement**

@JUDGMENTTAG-ORDER

S.D. Agarwal, J.

This is a petition under Article 226 of the Constitution of India. A Suit No. 48 of 1979 was filed by Khurshad Ali against Mohan Lal and Anil Kumar in the Court of Judge Small Causes for ejectment and recovery of rent and damages. The property in dispute was a shop situate in Darau Road, Kichha, district Nainital.

2. The suit was decreed ex parte by an order dated 9th May, 1980. The operative portion of the decree is as follows : --

"Plaintiffs suit for ejectment of defendants from shop in suit; for recovery of Rs. 147.50 as arrears of rent and for recovery of pendente lite and future damages at the rate of Rs.

75/-p.m. is decreed with costs ex parte,"

3. On May 15, 1980, only five days after the suit was decreed ex parte, the tenants Mohan Lal and Anil Kumar, who are petitioners in this Court filed an application under Order IX, Rule 13 of the CPC (hereinafter referred to as the C.P.C.) for setting aside the ex parte decree. On that very date an application was made by the petitioners praying that the amount already deposited by them in the Court be treated as security u/s 17 of the Provincial Small Causes Court Act. This application was allowed by the Court and the following order was passed :

"Allowed. The amount which has already been deposited by defendant is more than the decretal amount. In my opinion that amount is a sufficient security."

4. On the application under Order IX, Rule 13. C.P.C. notices were issued. After the issue of the notice, the decree-holder respondent appeared to object to the setting aside of the ex parte decree. By an order dated 6th Sept., 1980, the application under Order IX, Rule 13 of the C.P.C. was dismissed on the ground that there was no compliance of the provisions of Section 17 of the Provincial Small Causes Court Act, as instead of depositing Rs. 1143,50 paise, the judgment-debtor had deposited only Rs. 1100/-. The order dated 6th Sept. 1980 was challenged by the petitioners by way of a revision before the District Judge, Nainital. The revision came up for hearing before the 1st Additional District Judge, Nainital, who dismissed the same and upheld the judgment given by the Judge Small Causes Court rejecting the application of the petitioners under Order IX, Rule 13 of the C.P.C.

4A. Aggrieved, the petitioners have now filed the present petition in this Court challenging the orders dated 6-9-1980 and 16th March, 1982 passed by the revisional Court.

5. I have heard learned counsel for the parties.

5A. Learned counsel for the petitioners has raised three contentions before me. His first contention is that by an order dated 15th May 1980, the Judge Small Causes Court had held that the amount deposited by the petitioners was sufficient security and, consequently, it was not open to the same Court at the time of considering the application under Order IX, Rule 13 of the C.P.C. to recall its earlier order and dismiss the application under Order IX, Rule 13 of the C.P.C. on the ground of non-compliance of Section 17 of the Provincial Small Causes Court Act. His second contention is that in any case even if the Judge Small Causes Court came to the conclusion that there was some deficit in the deposit made by the petitioners, an opportunity should have been granted to the petitioners to deposit the same and the last contention raised by the learned counsel is that in any case the deposit, according to the Court itself, was short of by Rs. 43.50 paisa only, there was no intention on the part of the petitioners not to pay the said amount and there was sufficient compliance of the provision of Section 17 of the Provincial Small Causes Court Act and as such, the Courts below have acted illegally with material

irregularity in exercise of their jurisdiction in dismissing the application under Order IX Rule 13 of the C.P.C. on the ground of non-compliance of the aforesaid Section.

6. In so far as the first contention is concerned, the order dated 15th May. 1980, accepting the security was passed ex parte. The notices were issued on the application under Order IX, Rule 13 of the C.P.C. to the decree-holder respondent. It was open to the decree-holder respondent to bring it to the notice of the Court that sufficient security had not been furnished in compliance of Section 17 of the Provincial Small Causes Court Act and as such, the order passed accepting security, was an order which required reconsideration. An application under Order IX, Rule 13 of the C.P.C. is only maintainable when the provisions of the aforesaid Section have been complied with. Section 17 clearly provides that an application 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. In view of this provision it is incumbent for the applicant to deposit in the Court the amount due from him Under the decree or in pursuance of the judgment. It was, consequently, open to the party against the setting aside of the decree to urge that the order which had been passed accepting security, requires reconsideration and as such, the application under Order IX, Rule 13 of the C.P.C. was liable to be dismissed. In my opinion, it is open to the Court at a subsequent stage to recall an order passed accepting security after the contesting opposite parties appear before the Court and urge that the said order has been passed by mistake of law.

7. In regard to the second contention of the learned counsel for the petitioners, this submission, in my opinion, is well founded. Once the security has been accepted by a Court, then if by a subsequent order it is found that the security is not sufficient, then in such a case, the application under Order IX, Rule 13 of the C.P.C. cannot be dismissed by the Court unless an opportunity is afforded to the applicants to furnish the deficit security. It is settled principle of law that no party shall be made to suffer because of a wrong order passed by any Court. It is because of an order passed by the Court accepting the security that a party did not deposit any further amount. Interest of justice, consequently, requires that in such a case where a contrary view is taken at a subsequent stage by the same Court, Court is obliged to give an opportunity to the party to comply with the provisions of Section 17 of the Provincial Small Causes Court Act before rejecting the application for setting aside the ex parte decree for non-compliance of the provisions of the aforesaid section of the Provincial Small Causes Courts Act.

8. In the instant case it is not disputed that on 15th May 1980, an application of the petitioners had been granted by the Judge Small Causes Court accepting the security. By an order dated 6-9-1980, it was held that this security furnished was not sufficient. After having held that the security was not sufficient, it was not open to the Judge Small Causes Court to dismiss the application under Order IX, Rule 13 of the C.P.C. on the

ground of non-compliance of Section 17 of the aforesaid Act, without affording an opportunity to the applicants to deposit the amount found deficient. In the circumstances, the impugned order dated 6-9-1980, suffers from material irregularity inasmuch as the Court could not, on that date, dismiss the application under Order IX, Rule 13 of the C.P.C. without affording an opportunity to the petitioners to deposit the deficit amount.

9. In regard to the third contention raised by the learned counsel for the petitioners, learned counsel relied in support of his submission on a decision of this Court given by Hon"ble R. B. Misra, J. as he then was, in [Dullan Prasad Vs. Smt. Rajeshwari Bibi](#) . In this decision, Hon"ble R. B. Misra, J., has taken the view after analysing various cases and the provisions of Section 17 of the Provincial Small Causes Court Act that once an application for depositing cash security was accepted by the Court, there was sufficient compliance of the requirements of the second part of Proviso and even if the security furnished by an applicant was little less than the decretal amount, but if it satisfied the Court, no exception could be taken to any deficit in the deposit of the cash amount. I respectfully agree with this decision.

10. In the instant case, initially, the Court accepted the deposit made by the petitioners by a specific order dated 15th May 1980. Thereafter, on recalculation, the same Court came to the conclusion that the amount was short by Rs. 43.50 paise. It was short by a very little amount and from the record, it is apparent that there was no intention on the part of the applicants not to deposit the amount if they were so required to do. It is clear that there was sufficient compliance of the provisions of Provincial Small Causes Court Act, and, therefore, the Courts below clearly acted illegally with material irregularity in exercise of their jurisdiction in dismissing the application under Order IX, Rule 13, C.P.C. on a mere shortage of little amount. The word "sufficient" is significant in this contest. The legislature left the matter in the discretion of the Court.

11. In the instant case the suit was decreed ex parte on 9th May 1980. Immediately after five days, an application was made for setting aside the ex parte decree and the decretal amount was deposited practically in full. There appears to be no intention on the part of the petitioners not to comply with the order of the Court.

12. Sri Rajesh Tandon, learned counsel for the respondent has vehemently urged that the view taken by me, is contrary to the decision in the case of Krishna Chandra Seth v. Dr. K. P. Agarwal, (1988) 1 ARC 445. In my opinion, the facts of the case of Krishna Chandra Seth (supra) are clearly distinguishable from the facts of the present petition. The principle laid down in this case does not apply to the present case. In the circumstances, I do not think that the view taken by me is contrary to the decision in the case of Krishna Chandra Seth (supra).

13. In view of the above, interest of justice demands that before passing the decree against the petitioners, they should be heard on merits. In order to avoid further delay in the disposal of the suit on merits, it is necessary, in the interest of justice, in exercise of

the extraordinary power under Article 226 of the Constitution of India to pass final orders on the application under Order IX, Rule 13, C.P.C.

14. In the result, the petition is allowed. The orders dated 6-9-1980 and 16th March, 1982, are hereby quashed. It is held that there was sufficient compliance of the provisions of Section 17 of the Provincial Small Causes Court Act. The application under Order IX, Rule 13 of the C.P.C. is allowed and the matter is remanded to the trial Court for decision of the suit on merits. It is further directed that since the suit is pending since the year 1979, the trial Court shall dispose of the suit, as far as possible, within three months from the date a certified copy of this judgment is produced before it. The interim order dated 26-3-1982, is, hereby, vacated. Parties are directed to bear their own costs.