

(2013) 07 AHC CK 0267

Allahabad High Court

Case No: Civil Miscellaneous Writ Petition No. 21267 of 2003

Vinayman Singh

APPELLANT

Vs

Additional District Judge and
Others

RESPONDENT

Date of Decision: July 22, 2013

Citation: (2013) 7 ADJ 751 : (2013) 100 ALR 439 : (2014) 1 AWC 79 : (2013) 121 RD 132

Hon'ble Judges: Rajes Kumar, J

Bench: Single Bench

Advocate: A.K. Trivedi, for the Appellant; S.K. Mishra, for the Respondent

Final Decision: Dismissed

Judgement

Rajes Kumar, J.

Heard Sri A.K. Trivedi, learned counsel for the petitioner and Sri S.K. Mishra, learned counsel appearing on behalf of the respondents. By means of the present writ petition, the petitioner is challenging the order dated 28.1.2002 passed by the Additional District Judge, Court No. 3, Fatehpur whereby the revision filed by the respondents against of Civil Judge (Senior Division), Fatehpur dated 31.1.2001 in Misc. Case No. 142/74/97 has been allowed.

2. Brief facts of the case are that the petitioner filed the SCC suit No. 5 of 1979 before Civil Judge (Senior Division), Fatehpur for eviction, being the landlord of the property in dispute. During the pendency of the suit, an amendment application has been filed, which has been allowed at the cost of Rs. 150/-. It appears that time was given till 20.10.1997 for deposit of cost and 21.10.1997 was the date fixed for evidence. On 21.10.1997 the suit has been dismissed on account of non-deposit of cost. Civil Judge (Senior Division) passed as order "Cost not paid in compliance of order dated 13.10.1997 suit stand dismissed with cost vide order dated 13.10.1997". The petitioner moved a composite application under Order 9 Rule 9 and Section 148 of C.P.C. on the ground that the petitioner was ill and therefore, could not attend the Court on the date fixed and prayed for setting aside the order dated 21.10.1997

The said application has been allowed by Civil Judge (Senior Division) and the order dated 21.10.1997 has been recalled on the cost of Rs. 150/- and the case has been restored back to its original number. Being aggrieved by the order, the respondent filed revision, which has been allowed by the impugned order. The revisional authority has held that the suit has been dismissed on the ground that the cost has not been deposited and not on account of non-appearance of the plaintiff. The application under Order 9 Rule 9 C.P.C. and u/s 148 was not maintainable. The plaintiff ought to have filed the appeal against the order dated 13.1.2001.

3. Learned counsel for the petitioner submitted that application for extension of time has been sought u/s 148 of the Act for deposit of cost and under Order 9 Rule 9 C.P.C., the petitioner prayed for setting aside the order dated 21.10.1997, which has rightly been allowed by the trial Court and the revisional authority has erred in setting aside the order trial Court.

4. I do not find substance in the argument of learned counsel for the petitioner. On 21.10.1997 the Court has dismissed the suit for non-deposit of the cost and not for non-appearance of the petitioner. The question is whether such order can be recalled under Order 9 Rule 9 C.P.C. Order 9 Rule 9 C.P.C. provides that where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set aside the dismissal, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit. Rule 8 provides that where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed. Such situation is not available in the present case.

5. In the present case, the suit has been dismissed for non-deposit of cost and not on account of non-appearance of the plaintiff. Further unless the order dated 21.10.1997 dismissing the suit for non-deposit of cost is recalled, the time for extending the period of deposit u/s 148 of the Act cannot be allowed. In fact it has not been allowed by the trial court also.

6. In view of the above, the application under Order 9 Rule 9 C.P.C. and Section 148 of the Act was not maintainable and the trial Court has illegally allowed the same and revisional Court has rightly set aside the order. In the result, the writ petition has no merit and is, accordingly dismissed. However, it will be open to the petitioner to file appeal against the order dated 21.10.1997 and can also file fresh suit. The proceedings of the present suit will not prejudice the right of the petitioner.