

(2004) 11 AHC CK 0265

Allahabad High Court

Case No: C.M.W.P. No. 41488 of 2002

Vijay Kumar

APPELLANT

Vs

Additional District Judge and
Others

RESPONDENT

Date of Decision: Nov. 9, 2004

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 9 Rule 13
- Limitation Act, 1963 - Section 5
- Provincial Small Cause Courts Act, 1887 - Section 17

Citation: (2005) 1 ARC 672

Hon'ble Judges: Vikram Nath, J

Bench: Single Bench

Advocate: Nalin Kumar Sharma, for the Appellant; Rajiv Gupta, for the Respondent

Final Decision: Allowed

Judgement

Vikram Nath, J.

This petition has been filed by the tenant for quashing the order dated 29.1.2000 passed by respondent No. 2, Civil Judge, Junior Division, Muzaffar Nagar and the order dated 6.9.2002 passed by respondent No. 1 Additional District Judge, Muzaffar Nagar whereby the application of the petitioner for setting aside ex parte decree has been rejected and the revision against the same has also been dismissed.

2. The dispute relates to a portion of House No. 618 Civil Lines South, Bagh Pyarelal near D.A.V. College, Muzaffar Nagar. The respondent No. 3 is the owner landlord of the said house and the petitioner is a tenant of one of the rooms of the said house at monthly rent of Rs. 125/-. The landlord respondent No. 3 filed suit for ejectment of the petitioner on the ground of default, which was registered as S.C.C. Suit No. 16 of 1996. In the said suit the defendant after initial contest failed to appear and, therefore, the trial Court directed that the case may be proceed ex-parte vide order

dated 6.1.1998. After the suit proceeded ex parte it was dismissed in default on 28.4.1998. Thereafter, the plaintiff respondent No. 3 filed an application for recalling the order dated 28.4.1998, which was allowed on 25.8.1998. Subsequently, the suit was decreed ex-parte on 16.2.1999. The petitioner claimed to have acquired knowledge of the ex-parte decree on 5.7.1999. He applied for setting aside the ex-parte decree on 15.7.1999 by filing an application under Order IX, Rule 13, C.P.C. and also making necessary compliance as provided in the proviso to Section 17 of the Provincial Small Causes Courts Act, 1887. The petitioner also filed an application u/s 5 of the Limitation Act, 1963 for condoning the delay in filing the application under Order IX, Rule 13, C.P.C. Both the applications of the petitioner were dismissed by the trial Court on 29.1.2000. The revision filed by the petitioner being S.C.C. Revision No. 221 of 2001 was also dismissed vide judgment dated 6.9.2002 by respondent No. 1. Aggrieved by the said orders, the present writ petition has been filed.

3. I have heard Shri Nalin Kumar Sharma, learned Counsel for the petitioner and Shri Rajiv Gupta, learned Counsel for the respondent No. 3, Shri Rajiv Gupta stated that he does not propose to file counter affidavit. The matter is being heard finally on the joint request of the Counsel for the parties.

4. The contention of the learned Counsel for the petitioner is that after the suit was dismissed in default on 28.4.1998 and the restoration application having been filed by the plaintiff no notice was issued to the defendant petitioner either on the restoration application or even after the suit having been restored by order dated 25.8.1998. Further contention of the petitioner is that even assuming that no notice was required in the restoration application still once the suit was restored notice was necessary. In view of the same it is contended that the impugned orders be set aside as no opportunity has been afforded to the petitioner. It is further contended that as the petitioner did not have knowledge there was no delay in filing the application for setting aside the ex-parte decree from the date of the knowledge.

5. Shri Rajiv Gupta, appearing for respondent No. 3 has pointed out from the judgment of the trial Court dated 29.1.2000 that the trial Court directed vide order dated 15.12.1998 for issue of notices and that there is an endorsement that notices were issued. However, he has not been able to point out from material on record, that on which date the notices were issued and what was the status of the service on the defendant. There is no material available on record to show that summons or notices were returned after endorsement of service/refusal/unserved. Even the impugned orders do not indicate that the summons/notices had been validly served upon the defendant, which are alleged to have been issued pursuant to the order dated 15.12.1998.

6. It cannot be presumed that service has been validly affected merely because there is an order to issue notice and office and has made a note that notices have been issued. For valid service there has to be material on record. In the

circumstances the only conclusion that can be drawn is that there has been no service upon the defendant.

7. It is settled law that opportunity of hearing should be afforded and the discretion of the Court should not have been exercised to shut out hearing.

8. In the present case the defendants were not served with any notice after the suit was dismissed in default on 28.4.1998. The Courts below have proceeded on the assumption that since the suit was preceding ex-parte pursuant to the order dated 6.1.1998 there was no necessity to issue any notice to the defendant petitioner. Such a view taken by the Court below is not correct and cannot be sustained under law. Once the suit was dismissed in default, notice to the defendant was essential. Without there being valid service of notice the impugned orders cannot be sustained and are liable to be set aside. In the circumstances the petition succeed and is allowed. The impugned orders dated 6.9.2002 and 29.1.2002 are set aside. Since it has been held that there was no notice to the defendant after 28.4.1998, no fruitful purpose would be served by directing the Courts below to reconsider the application for setting aside the exparte decree. Counsel for the parties have agreed that the suit itself may be decided on remits expeditiously. Accordingly, the applications of the petitioner for condonation of delay and for setting aside the ex-parte decree are allowed and the exparte decree dated 16.2.1999 is also set aside subject to payment of costs of Rs. 1000/-. Such costs shall be paid within a period of one month before the trial Court before the suit proceeds further. In case costs are not paid this order shall not be given effect to and the suit shall remain decreed ex-parte and the Respondent 3 may press the execution proceedings.

9. Further since the matter is of the year, 1996 the trial Court is directed to decide the same expeditiously if possible within a period of 6 months from the date of production of certified copy of the order. Further Sri Rajiv Gupta, learned Counsel for the respondent No. 3 states that the defendant petitioner has not deposited any rent subsequent to the filing of the application for setting aside the ex-parte decree. Counsel for the petitioner states that he has no knowledge in this regard. Whatever be the case it is directed that any arrears of rent shall also be deposited within a period of 2 months from today and future rent will also be regularly paid from month to month by the 10th of every month till the disposal of the suit.

10. Both the parties have agreed that they will appear before the trial Court on 1.12.2004. The trial Court will proceed in accordance with law and in accordance with the observations made above.

11. The writ petition succeeds and is allowed.