

**(2012) 10 AHC CK 0241**

**Allahabad High Court**

**Case No:** Civil Miscellaneous Writ Petition No. 35114 of 2005

Roshan Lal and Others

APPELLANT

Vs

Rishi Pal Singh and Others

RESPONDENT

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**Date of Decision:** Oct. 18, 2012

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 9 Rule 13
- Limitation Act, 1963 - Section 5
- Provincial Small Cause Courts Act, 1887 - Section 17, 17(1)

**Citation:** (2013) 1 ADJ 462 : (2013) 1 AWC 643

**Hon'ble Judges:** Sudhir Agarwal, J

**Bench:** Single Bench

**Advocate:** K.M. Garg, for the Appellant; Mahipal Singh, for the Respondent

**Final Decision:** Allowed

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**Judgement**

Sudhir Agarwal, J.

Heard. Since pleadings are complete, the Court proceed to decide the case finally at this stage under the Rules of the Court.

The dispute relates to a shop situated at village Tatarpur Luluwala, Mohalla Adarsh Nagar, Najibabad, District Bijnor.

The shop is owned by petitioners and respondent Nos. 2 and 3. The aforesaid shop was let out to respondent No. 1. Claiming that construction of shop was made in 1989, provisions of Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as "Act, 1972") are not applicable and since there was a default in payment of rent for more than two years i.e. from 1.9.1998, petitioners and respondent Nos. 3 and 4 vide notice dated 8.2.2001 determined tenancy of respondent No. 1 and thereafter filed suit No. 75 of 2002 for ejectment and recovery of arrears of rent. It was decreed ex parte by the Court of

Small Cause, Bijnor vide judgment dated 9.5.2003.

2. The respondent No. 1 filed an application dated 21.5.2003 under Order IX, Rule 13 C.P.C. for setting aside ex parte decree, which was registered as Misc. Case No. 19 of 2003. It was neither accompanied by deposit in the Court the amount due from defendant-applicant i.e. respondent No. 1 under the decree nor any security for performance of the decree nor any application for furnishing such security. In other words there was no compliance of Section 17(1) of Provincial Small Cause Courts Act, 1887 (hereinafter referred to as "Act, 1887").

3. Subsequently on 28.10.2003 respondent No. 1 filed an application u/s 17 of Act, 1887 seeking permission of Trial Court to furnish security of Rs. 9,600/- and deposit of Rs. 8003/- by Tender since according to him total amount under decree would come to Rs. 17,603/-. The Trial Court, vide order dated 5.12.2003 permitted the deposit by tender subject to the rights of the parties. Besides above, respondent No. 1 also filed an application u/s 5 of Indian Limitation Act seeking condonation of delay in filing application for compliance of Section 17 of Act, 1887.

4. The said applications were contested by petitioners. The Trial Court vide order dated 25.8.2004 held that there is no compliance of Section 17 of Act, 1887 and accordingly rejected application under Order IX, Rule 13 C.P.C. for setting aside ex parte decree. The Trial Court besides non compliance of Section 17 also recorded finding of fact that there was no sufficient ground explaining absence on the date fixed when ex parte decree was passed. The respondent No. 1 preferred S.C.C. Revision No. 27 of 2004 which has been allowed by Additional District Judge, Court No. 2, Bijnor by means of impugned judgment dated 18.1.2005 observing that for the purpose of Order IX, Rule 13, the Court must take a liberal view. With respect to compliance of Section 17(1) of Act, 1887 he has held that if decretal amount is deposited on the date of hearing of the application, that is sufficient compliance of proviso to Section 17(1) of Act, 1887 and taking this view the Revisional Court has relied decision of this Court in [Ashok Kumar Dhiman Vs. Smt. Chandrawati Mehta](#) .

5. The short issue up for consideration before this Court whether there was compliance of proviso to Section 17(1) of Act, 1887 in the present case or not and whether the view taken by Revisional Court that deposit need not be on the date of submission of the application for setting aside ex parte order but if it is so on the date of hearing of application, that would be sufficient compliance of proviso to Section 17(1) of Act, 1887, is correct?

6. In my view, Revisional Court has not only misread proviso to Section 17(1) of Act, 1887 but has also ignored catena of decisions of this Court as also that of Apex Court, which have considered proviso to Section 17(1) of Act, 1887 wherein it has been held unambiguously that requirement of deposit or application for security must accompany or precede the application for setting aside ex parte decree and not to be seen on the date of hearing of such application.

7. The Apex Court has considered this aspect in [Kedarnath Vs. Mohan Lal Kesarwari and Others](#). The Court has clearly held that an application moved for compliance of Section 17 at a later stage after filing the application for setting aside ex parte decree cannot be considered as due compliance since it would not fall within the ambit of strict compliance of proviso to Section 17. Paras 9 and 10 of judgment reads as under:

9. A bare reading of the provision shows that the legislature have 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.

10. 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.

8. The Apex Court has referred to the several decisions of this Court which were cited and has approved in the above judgment which are Krishan Kumar v. Hakim Mohd., 1978 ALJ 738; Sharif v. Suresh Chand and others, 1979 AWC 256; Roop Basant v. Durga Prasad and another, 1983 (1) ARC 565; Mohd. Islam v. Faquir Mohammad, 1985 (1) ARC 54; Krishan Chandra Seth v. K.P. Agarwal and another, 1988 (1) ARC 310; Mamta Sharma v. Hari Shankar Srivastava and others, 1988 (1) ARC 341; [Mohd. Yasin Vs. Jai Prakash](#); Purshottam v. Special Additional Sessions Judge, Mathura and others, 1991 (2) ARC 129; [Ram Chandra \(deceased L.Rs.\) and others Vs. IXth Additional District Judge, Varanasi and others](#); [Sagir Khan Vs. District Judge and Others](#); [Mohammad Nasem Vs. Third Additional District Judge and Others](#), and Beena Khare v. VIIIth Additional District Judge, Allahabad and another, 2000 (2) ARC 616.

9. It is not disputed that at the time of filing of application i.e. 21.5.2003 neither decretal amount was deposited nor it preceded or accompanied any application for furnishing security for performance of decree. The decisions of this Court in Ashok Kumar Dhiman (supra) relied by Revisional Court would not lend any help to respondent No. 1 in view of authoritative pronouncement on the question by Apex Court in Kedamath (supra). A belated application for purported compliance of Section 17(1) of Act, 1887 has been deprecated by Apex Court in Kedamath (supra) as is evident from para 11 of the judgment:

11. 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 respondent 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.

10. In view of the above, impugned revisional judgment cannot sustain. The writ petition is allowed. The judgment dated 18.1.2005 (Annexure 14 to the writ petition) passed by Revisional Court is hereby set aside. The decree of ejectment and recovery for arrears of rent passed by Trial Court dated 25.8.2004 passed by Judge Small Cause Court, Bijnor is hereby restored and confirmed. No Costs.