

**(2014) 07 AHC CK 0114**

**Allahabad High Court**

**Case No:** C.M.W.P. No. 66598 of 2006 and C.M.W.P. No. 27626 of 2012 and C.M.W.P. No. 27094 of 2010

Badruddin

APPELLANT

Vs

Addl. District Judge

RESPONDENT

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**Date of Decision:** July 3, 2014

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 9 Rule 10, Order 9 Rule 13, 151
- Limitation Act, 1963 - Section 5
- Provincial Small Cause Courts Act, 1887 - Section 17
- Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 - Section 16, 16(5), 18

**Citation:** (2014) 106 ALR 63 : (2014) 5 AWC 4430

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

**Bench:** Single Bench

**Advocate:** Akhileshwar Mishra and Ram Kishore Pandey, Advocate for the Appellant; Brijesh Chanda Naik, Advocate for the Respondent

**Final Decision:** Dismissed

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**Judgement**

Sudhir Agarwal, J.

Heard Sri R.K. Pandey, learned Counsel for the petitioners and Sri B.C. Naik Advocate for respondents. All these three writ petitions are connected having arisen from the same Original Suit No. 36 of 1998 and, therefore, as agreed by learned Counsel for the parties have been heard together and are being decided by this common judgment.

2. The facts, in brief, giving rise to these writ petitions may be summarized as under.

3. One Badruddin son of Ajimulla, own house No. C-17/28, Pitarkunda, Varanasi. In aforesaid house one room on the ground floor and two rooms on first floor were under the tenancy of Kabir Alam son of Abdul Karim, Nihaluddin, Jamaluddin, Ijhar and Irshad Ahmad sons of Ajimulla on a monthly rent of Rs. 25. Alleging that rent has not been paid from June, 1991 to February, 1998 and there is arrears of rent of Rs. 2,025/- till then, original suit for ejectment of tenants as also for recovery of arrears of rent and damages for the period of occupation of building after determination of tenancy vide notice dated 10.3.1998 was instituted by Sri Badruddin in the Court of Judge Small Cause, Varanasi. It was registered as SCC Suit No. 36 of 1998.
4. The suit was decreed ex parte. Trial Court held that despite service of summons defendants have not responded. Vide judgment and decree dated 30.3.1999, it was decreed.
5. Kabir Ahmad alias Kabir Alam, i.e., defendant No. 1 in aforesaid suit filed an application (Paper No. 4-C) dated 29.7.1999 under Order IX, Rule 13 read with section 151, C.P.C. for recall of ex parte judgment and decree dated 30.3.1999.
6. An application (Paper No. 9-C) was also filed by defendant No. 1 seeking permission of Trial Court to furnish personal security in lieu of decretal amount in purported compliance of section 17 of Provincial Small Causes Court Act, 1887 (hereinafter referred to as the "Act, 1887").
7. Trial Court took up application (Paper No. 9-C) and observed that defendant No. 1-applicant has not pressed application from 29.7.1999 to 15.9.2000 and even on 20.10.2000 when the matter was posted for disposal of application (Paper No. 4-C) filed under Order IX, Rule 13, C.P.C. The application (Paper No. 9-C) seeking permission for furnishing personal security was rejected as not pressed. The application (Paper No. 4-C) filed under Order IX, Rule 13, however, was deferred for 10.11.2000.,
8. Against order dated 20.10.2000, whereby application (Paper No. 9-C) was rejected, defendant No. 1-applicant preferred SCC Revision No. 76 of 2000, which was rejected by District Judge, Varanasi, vide judgment dated 4.11.2000.
9. Thereafter, Kabir Ahmad alias Kabir Alam, defendant No. 1 filed another application dated 10.11.2000 before Trial Court seeking permission to deposit decretal amount in cash. The said application as well as application (Paper No. 4-C) filed under Order IX, Rule 13, C.P.C., both were rejected vide order dated 10.11.2000.
10. The order dated 20.10.2000 passed by Judge Small Cause Court rejecting application (Paper No. 9-C) as also original order dated 4.11.2000 passed by District Judge in SCC Revision No. 76 of 2000 were challenged in Writ Petition No. 2097 of 2001. While entertaining this writ petition the Court vide order dated 22.1.2001 permitted defendant No. 1, i.e., Kabir Ahmad alias Kabir Alam to deposit entire decretal amount, which tentatively was computed as Rs. 3,000, upto 31.1.2001 by 15.2.2001. It was deposited.

This writ petition was allowed by Hon"ble Vikram Nath, J., vide judgment dated 20.12.2000. The relevant operative part of the order reads as under:

However, in view of the reasons stated above, the impugned order cannot be sustained. This writ petition is liable to be allowed. The order dated 20.10.2000 (Annexure-8 to the petition) passed by Judge Small Causes Court Varanasi is set aside and the Court below is directed to pass fresh order on the application (Paper No. 9-C) in accordance with law and proceed with the case.

11. It also appears that plaintiff filed a recall application No. 104(sic)2 of 2005 in this Court but the same was dismissed vide judgment dated 29.9.2005.

12. In the meantime, assailing Trial Court"s order dated 10.11.2000 passed on application under Order IX, Rule 13, C.P.C. which was registered as Misc. Case No. 145 of 1999, Kabir Ahmad alias Kabir Alam preferred another revision alongwith a delay condonation application u/s 5 of Limitation Act, 1963 which was registered as Misc. Case No. 64 of 2001 before District Judge, Varanasi. The same came to be heard by him on 13.2.2001.

13. Learned District Judge vide order dated 13.2.2001 rejected delay condonation application as a result whereof revision also stood dismissed as barred by time. The order dated 10.11.2000 passed by Trial Court as also dated 13.2.2001 passed by District Judge, Varanasi in Misc. Case No. 64 of 2001, though were not challenged before this Court but in view of this Court"s judgment dated 20.12.2004, whereby order dated 20.10.2000 passed on application (Paper No. 9-C) seeking permission to furnish personal secretary and directing Trial Court to pass fresh order thereon, the Trial Court then found no option but to deal with the aforesaid applications, afresh, so as to pass fresh order. The applications (Paper No. 4-C) and (Paper No. 9-C), both were re-registered as Misc. Case No. 6 of 2005 in the Court of Small Cause, Varanasi. The Trial Court observed that pursuant to this Court"s interim order dated 22.1.2001 in Writ Petition No. 2097 of 2001 the defendant No. 1-tenant has deposited decretal amount of Rs. 3,000/-, which was due upto January, 2001, the application (Paper No. 9-C) deserved to be allowed. It consequently accepted the same u/s 17 of Act, 1887 vide order dated 25.3.2006. Against this order plaintiff and defendants No. 2 to 5 preferred SCC Revision No. 18 of 2006, which was dismissed by Additional District Judge (Court No. 4), Varanasi vide judgment dated 4.8.2006.

14. Assailing both the above orders, i.e., dated 25.3.2006 passed in Misc. Case No. 6 of 2005; and, dated 4.8.2006 passed in Revision No. 18 of 2006, the plaintiff and defendants No. 2 to 5 preferred Writ Petition No. 66598 of 2006 (hereinafter referred to as the "first petition"), seeking a writ of certiorari for quashing the aforesaid two orders. The sole ground is, when the orders dated 10.11.2000 and 13.2.2001 dismissing application under Order IX, Rule 13, C.P.C. have not been challenged and had attained finality, question of reconsidering the same applications by re-registration thereof cannot arise

even in view of order passed by this Court since those orders attained finality and in absence of any challenge to those orders, Trial Court could not have treated application under Order IX, Rule 13, C.P.C. to have revived suo motu, therefore, the impugned orders are patently illegal and without jurisdiction.

15. During pendency of this writ petition the Trial Court proceeded to consider defendant's No. 1 application under Order IX, Rule 13 and rejected same vide order dated 18.1.2008 observing that after accepting his application (Paper No. 9-C) on 25.3.2006 it was incumbent upon defendant No. 1 to furnish security which he failed and, therefore, he has not complied with requirement of section 17 of Act, 1887.

16. The defendant-tenant assailed order dated 18.1.2008 in SCC Revision No. 6 of 2009 which has been allowed by Special Judge (E.C. Act), Varanasi vide judgment and order dated 17.4.2010 observing that applicant-tenant having already deposited Rs. 3,000/- towards decretal amount it could not have been said that he has not complied with section 17 of Act, 1887. Therefore, recall application filed under Order IX, Rule 13 was illegally rejected. The Revisional Court directed Trial Court to reconsider tenant's application (Paper No. 4-C) treating as if the requirement of section 17 was already complied with. Aggrieved by this judgment and order dated 17.4.2010 passed by Special Judge (E.C. Act), Varanasi, the landlord, Badruddin has preferred Writ Petition No. 27626 of 2012 (hereinafter referred to as the "second petition").

17. Writ Petition No. 27094 of 2010 (hereinafter referred to as the "third petition") has been filed by Jamaluddin, who is defendant No. 3 in Original Suit No. 36 of 1998, challenging Revisional Court's order dated 17.4.2010 passed in SCC Revision No. 6 of 2009, impleading other defendants as also plaintiff Badruddin as respondents.

18. When this Court required from learned Counsel for the petitioners in third petition as to how defendant No. 3 got a cause of action to institute third petition challenging order dated 17.4.2010 though there is nothing on record to show that there was any inter se contest between defendants and in any case an order which has passed against plaintiff, how could it be challenged by a co-defendant, it is submitted that petitioner, Jamaluddin in third petition, is brother of Badruddin, and co-owner and landlord in property in dispute.

19. However, from perusal of plaint, copy whereof has been filed as Annexure-1 to Writ Petition No. 2097 of 2001, which has already been decided, this Court finds that nothing has been said about alleged co-ownership or co-landlord status in respect of disputed property between plaintiff and defendants No. 2 to 5. On the contrary, para 1 says that plaintiff is the owner and in possession of disputed property and defendants are tenants therein. However, in para 8 a vague averment has been made that defendants No. 2 to 5 are not residing in Varanasi and, therefore, they are impleaded as defendants.

20. Be that as it may, so far as this Court is concerned, since no dispute on the question of status of landlord vis-à-vis plaintiff and defendants No. 2 to 5 has been raised by any

of the parties, therefore, I am not delving upon this aspect of the matter further but finds it appropriate to place on record poor quality of drafting of plaint and also the strange manner in which case has been contested.

21. Now coming to the merits, in the earlier writ petition, i.e., Writ Petition No. 2097 of 2001 it has been said that against order dated 20.10.2000 plaintiff preferred revision, which has been rejected. The revisional order was also challenged but admittedly that order was not set aside by this Court. It has been held that a revision, if preferred and is dismissed on merits, the order which is subjected to revision merges with revisional order and if revisional order is not set aside it would mean that earlier order by itself would have no existence since it has already merged with revisional order.

22. This Court in *Vikram Singh v. Distt. judge, Aligarh and others*, 1978 ARC 416 in para 4, held as under:

The next controversy that arises now for decision in the effect of the confirmation of the order of the Trial Court as a result of the dismissal of the revision by the District Judge. The learned Counsel for the petitioner urged that despite the confirmation of the decision of the Trial Court, under sub-section (5) of section 16 of U.P. Act No. XIII of 1972, the Rent Control and Eviction Officer had ample power to review the allotment order. The submission does not appear to be correct. By the aforesaid sub-section (5) of section 16, there is no dispute that the power of review has been conferred on a rent control and Eviction Officer, and that he can set aside or recall the previous order of allotment if he is satisfied that the allotment was not made in accordance with Clause (a) or Clause (b) of sub-section (1) of section 16. Although there is nothing in the said provision showing the stage upto which the power of review can be exercised, but from the nature of the power it has to be found that a review can be granted by the Rent Control and Eviction Officer only so long as the order of allotment passed by him has not been confirmed in revision. The consequence of the confirmation of the order is that the same would be deemed to have been merged in that of the revision authority. If the order is merged in that of the higher authority, the lower authority can have no jurisdiction or power to recall the order for the review of which an application is filed."

(Emphasis added)

23. The Hon"ble Single Judge followed and refer to an earlier Full Bench decision in [Behari Lal and Another Vs. M.M. Gobardhan Lal and Others](#),

24. The Apex Court also recently in *Ram Kishor Gupta v. Ramesh Chandra Bhatnagar* (2008) 17 SCC 635 has said that once remedy of revision u/s 18 is availed, remedy u/s 16(5) would not be available and once revision is decided, remedy of review would disappear. The Apex Court in para 7 of judgment, said:

The revision having been dismissed on merits, the review is clearly not maintainable.

25. In earlier part i.e., in para 6 of the judgment in Ram Kishor Gupta (supra), the Court said:

....Once a party decides to challenge an order before a higher forum and his appeal or revision is dismissed by the higher forum on merits,, then no question arises for filing a review of the order which has been affirmed by the higher forum. Once the respondent's revision against the order dated 19.1.2001 was dismissed on merits, no question arose of filing a review of the order dated 19.1.2001. Such a review is clearly not maintainable and must be dismissed as such.

26. This is really strange that this aspect was not at all placed, argued and brought to notice of this Court either when Writ Petition No. 2097 of 2001 was decided on 20.12.2004 or when recall application was rejected on 29.9.2005. This has created a piquant situation. An earlier order was set aside by this Court though the revisional order was also challenged for which a specific prayer was also made but that has not been touched. Ordinarily, A prayer made but not granted amounts rejection of prayer, but the manner in which order has been passed by this Court giving a positive direction to Trial Court to consider application (Paper No. 9-C), clearly shows that this Court treated the application to have revived and that being so, the above proposition of law, I find difficult to apply in this case. Since the judgment of this Court in Writ Petition No. 2097 of 2001 has already attained finality, I find no occasion to visualize a situation whereby the aforesaid judgment of this Court may render futile or inoperative. That cannot be done particularly when parties have already contested and represented the matter and even a recall application of plaintiff-landlord has been considered rejected.

27. That being so, it is evident that the Court held that application (Paper No. 9-C) seeking permission to furnish security in purported compliance of section 17 of Act, 1887 is pending. If that application was pending, question of dismissing application (Paper No. 4-C) under Order IX, Rule 13, C.P.C. for noncompliance of section 17 of Act, 1887 could not have arisen. It is true that subsequent order rejecting application under Order IX, Rule 10, C.P.C. was not challenged by tenant before this Court in earlier proceedings and even at any earlier or subsequent stage, but in order to keep the things straight and to avoid any complication I declare both these orders dated 10.11.2000 and 13.2.2001 illegal since the very basis and foundation whereupon application under Order IX, Rule 13 was rejected, had disappeared, order rejecting application cannot continue to exist and would disappear suo motu. Therefore, the basic argument raised by plaintiff-landlord in second and third petition, fails and rejected.

28. I now proceed to consider correctness of revisional order dated 17.4.2010, whether there was already compliance of section 17 of Act, 1887. It is not the case of petitioners of second and third petition that the sum of Rs. 3,000/- which was deposited by tenant before Trial Court pursuant to interim order dated 22.1.2001 passed in Writ Petition No. 2097 of 2001 did not satisfy the total decretal amount which the tenant would have required to pay for compliance of section 17. Once that is the fact situation, it cannot be

doubted that decretal amount having already been paid with the Court, and application seeking permission became pending on that date, the applicant cannot held guilty of non-compliance of requirement of section 17 of Act, 1887.

29. It is true that requirement of section 17 is mandatory but in the chequered factual history of this case, and the way in which matter has been contested by parties at different stages, a whole sale confusion has arisen. In these facts and circumstances, I do not find any reason to non-suit tenant on a hyper technical ground.

30. In the result, I find no justification to interfere with any of the orders passed which are impugned in these writ petitions. Since the Trial Court is now ceased with application under Order IX, Rule 13, C.P.C. is pending since long, in the facts and circumstances of this Court, I find it prudent to direct Trial Court to decide tenant's application, filed under Order IX, Rule 13, C.P.C., on merits, expeditiously and in any case within a period of three months from the date of production of a certified copy of this order. With the aforesaid directions/observations, all these writ petitions are dismissed. No costs.