

Court No. - 5

Case :- WRIT - A No. - 1000191 of 2002

Petitioner :- Smt. Sangeeta And Others 2

Respondent :- Addl. District Judge Court No-7 Lucknow And Others 2

Counsel for Petitioner :- Ravi Nath Tilhari, Shiv Nath Tilhari, Yogesh Kesarwani

Counsel for Respondent :- C.S.C., Arvind Rajdan

Hon'ble Abdul Moin, J.

1. Supplementary affidavit filed today in Court by the learned counsel for the petitioners is taken on record.

2. Heard Sri Yogesh Kesarwani, learned counsel for the petitioners.

3. Despite the list being revised and the name of Sri Arvind Rajdan, learned counsel, being indicated in the cause list from the side of the respondents, nobody has put in appearance. As the matter is of the year 2002 as such the Court proceeds to decide the same even in the absence of learned counsel for the respondents.

4. Instant writ petition has been filed praying for the following reliefs:

(i). to issue a writ of Certiorari or a writ order or direction in the nature of writ of Certiorari to quash the Impugned Judgement and orders dated 4.4.2001, 13.3.2002, and 23.2.2002 passed by the Judge Small Causes Court, Lucknow in S.C.C. Suit No. 236 of 1999, contained in Annexure Nos. II, III and IV as well as the order dated 29.10.2002 passed by the Opp. Party No.1, in S.C.C. Revision No. 38 of 2002, as contained in Annexure No. I to this writ petition.

(ii). to issue a writ of Mandamus or a writ order or direction in the nature of writ of Mandamus commanding the Opp. Party No. 2 to grant opportunity to the petitioner to file their Written Statement and provide opportunity of hearing i.e. leading of evidence etc. in accordance with law and thereafter to decide the S.C.C. Suit No. 236 of 1999 (Ram Prakash Aneja Vs. B. L. Sharma)

(iii). to issue a writ of Prohibition or a writ order or direction in the nature of writ of Prohibition, restraining the opp. part No. 2 from proceeding any further with the proceedings of S.C.C. Suit No. 236 of 1999 pending before it as exparte against the Petitioners in pursuance of the orders impugned in this writ petition.

(iv). to issue such other and further writ order or direction as this Hon'ble Court may deem fit and proper in the circumstances of the Case.

(v). to allow the writ petition with costs."

5. Incidentally, the date of order dated 20.03.2002, a copy of which is Annexure-4 to the writ petition, has wrongly been typed as 23.02.2002 in the relief clause, as stated by the learned counsel for the petitioners.

6. The aforesaid statement of learned counsel for the petitioners is recorded.

7. Learned counsel for the petitioners states that in the supplementary affidavit filed today it has been indicated that SCC Suit No.236 of 1999 in re:Ram Prakash Aneja Vs. B. L. Sharma, is still pending before the learned trial court.

8. The contention of learned counsel for the petitioners is that a suit had been filed by Sri Ram Prakash Aneja before the learned trial court in the year 1999 for ejectment of the defendants/petitioners herein and for payment of arrears of rent. The matter pertains to a shop. The case was listed on 04.04.2001 for filing of written statement but further time for filing written statement was sought by the defendants. The said application was rejected vide order dated 04.04.2001, a copy of which is Annexure-2 to the writ petition. Learned trial court also fixed the case for 21.04.2001 for ex-parte evidence of the plaintiff. It is stated that no evidence was filed on the said date i.e. 21.04.2001 and the next date was fixed for 30.04.2001. It is also stated that the evidence stage is still continuing.

9. When the matter was listed on 30.04.2001 the defendants filed an application under Order 9 Rule 7 of the CPC praying for recall of the order dated 04.04.2001 but the said application was rejected by the learned trial court vide order dated 13.03.2002, a copy of which is Annexure-3 to the writ petition, primarily on the ground that in terms of provisions of Order 9 Rule 7 of the CPC the said application was to be filed prior to 21.04.2001 which was the date fixed for ex-parte evidence and the same having been filed subsequently is not maintainable.

10. The defendants filed an application for recall of the said order which was

also rejected vide order dated 20.03.2002, a copy of which is Annexure-4 to the writ petition, primarily on the same grounds.

11. Being aggrieved, the defendants filed an SCC Revision No.38 of 2002 in re: B.L. Sharma vs. Ram Prakash Aneja, which has also been rejected vide order dated 29.10.2002, a copy of which is Annexure-1 to the writ petition.

12. Being aggrieved, instant writ petition has been filed.

13. The contention of learned counsel for the petitioners is that the learned trial court vide order dated 13.03.2002 had rejected the application filed under Order 9 Rule 7 of CPC primarily on the ground that the said application has been filed subsequent to the date fixed for ex-parte evidence i.e. 21.04.2001, the application itself having been filed on 30.04.2001, which order was not recalled while rejecting the application vide order dated 20.03.2002 and even the revisional court has failed to appreciate relevant facts while rejecting the revision filed by the defendants vide order dated 29.10.2002.

14. Placing reliance on the judgment of this Court in the case of **Jagardeo and others vs. Mohan Lal and another-2005 (23) LCD 1137**, it is argued that this Court has held, after considering the judgment of the Apex Court in the case of **Arjun Singh vs. Mahendra Kumar-AIR 1964 SC 993**, that an application for setting aside the order directing the suit to proceed ex-parte can be filed until judgment is pronounced or reserved and secondly, even without setting aside the order directing the suit to proceed ex-parte, defendants are entitled to participate in the proceedings from the stage when they appear in the suit.

15. The argument is that when this Court has categorically held that an application under Order 9 Rule 7 of CPC would be maintainable until the judgment is pronounced or reserved consequently the learned trial court has patently erred in rejecting the application filed under Order 9 Rule 7 of CPC solely on the ground that the said application should have been filed prior to the date fixed for ex-parte evidence of the plaintiff on 21.04.2001 and thus the orders impugned which have found favour with the dismissal of the recall

application dated 20.03.2002 and the revisional court's order dated 29.10.2002 merit to be set-aside.

16. As nobody has appeared on behalf of the respondents as such the Court has gone through the pleadings on record along with the counter affidavit which has been filed on behalf of the respondents with the assistance of learned counsel for the petitioners.

17. From the arguments as raised by learned counsel for the petitioners as well as from a perusal of the records, it emerges that the plaintiff-Ram Prakash Aneja/respondent herein had filed a suit in the year 1999 for ejectment and arrears of rent of the shop in dispute. The matter was fixed for 04.04.2001 on which date an application for time to file written statement was filed by the defendants. The said application was rejected by the learned trial court vide order dated 04.04.2001 and the matter was fixed for 21.04.2001 for ex-parte evidence. On 21.04.2001, the matter was fixed for 30.04.2001. On 30.04.2001, the defendant filed an application under Order 9 Rule 7 of CPC praying for recall of order dated 04.04.2001. The said application was rejected by the learned trial court vide order dated 13.03.2002 on the ground that the application under Order 9 Rule 7 of CPC should have been filed prior to the date fixed in the matter i.e. 21.04.2001 and the same having been filed subsequent thereto, itself merits the said application to be rejected. Upon an application for recall of the said order being filed, the same has also been rejected by the learned trial court vide order dated 20.03.2002 primarily on the same grounds. Being aggrieved, the defendants filed a revision and even the revisional court vide order dated 29.10.2002 has rejected the said revision being satisfied with the orders of the learned trial court.

18. Whether an application under Order 9 Rule 7 of CPC praying for recall of the said order can be filed even subsequent to the date which has been fixed for ex-parte evidence, is the question with which the Court is seized.

19. The said question is no longer res-integra having been settled by this Court in the case of **Jagardeo (supra)** wherein this Court after placing reliance on the

judgment of the Apex Court in the case of **Arjun Singh (supra)** has held as under:-

"4. It has been held by the Supreme Court in Arjun Singh v. Mahendra Kumar, AIR 1964 SC 993, that firstly, an application for setting aside the order directing the suit to proceed ex-parte can be filed until judgment is pronounced or reserved and secondly, even without setting aside the order directing the suit to proceed ex-parte, defendants are entitled to participate in the proceedings from the stage when they appear in the suit. Order IX, Rule 7, [C.P.C.](#) deals with the power of the Court to set aside order directing the suit to proceed ex-parte. Order IX, Rule 7, [C.P.C.](#) is quoted below :

"Where the Court has adjourned the hearing of the suit ex-parte, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance."

5. Learned Counsel for contesting respondent No. 1 has cited an authority of this Court in Prahlad Singh v. Niyaz Ahmad and Ors., 2000 AWC 1721, to contend that application under Order IX, Rule 7, [C.P.C.](#) can be filed only on the next date, which is fixed on the date when order directing the suit to proceed ex parte is passed. This authority has been referred to by the revisional court also. In the said authority of Prahlad Singh application under Order IX, Rule 7, [C.P.C.](#) was filed after conclusion of the evidence. It was filed on the date fixed for arguments. In the authority of Prahlad Singh it was also observed that similar application under Order IX, Rule 7, [C.P.C.](#) had earlier been rejected on merit hence subsequent application under the same provision was barred by Section 11, C.P.C. (res judicata):

6. The view that application under Order IX, Rule 7, [C.P.C.](#) can be filed only on the date fixed while directing the suit to proceed ex parte and not afterwards taken in the aforesaid authority of Prahlad Singh is neither in consonance with Order IX, Rule 7, [C.P.C.](#) which nowhere places such restriction nor with the judgments of the Supreme Court in Sangram Singh v. Election Tribunal, AIR 1955 SC 425 and Arjun Singh's case (supra). The only restriction is that the application shall be filed before the conclusion of the hearing, The said view is directly in conflict with Division Bench authority of this Court in Bhagwat Prasad v. Muhammad Shibli, AIR 1922 All 110, the relevant portion of which is quoted below :

"Bhagwat Prasad did not appear and the Court recorded an order directing that the case should be heard against him ex parte. The case however was not heard on that date, and the hearing was postponed to a subsequent date. On that date, Bhagwat Prasad appeared and asked for an adjournment to enable him to file his written statement and to put forward his defence, and to adduce his evidence. This application was refused, but the case was for some reason adjourned to another date. On that date Bhagwat Prasad again appeared and

asked the Court to permit him to file his written statement; and he stated that his witnesses were present in Court and he was ready to adduce his evidence. The Court refused to listen to him and to receive his written statement, on the ground that on the first date fixed for hearing he was not present and the Court had ordered proceedings to be held ex parte against him. This view of the Court of first instance was clearly erroneous and, strangely enough it was accepted by the lower appellate court."

7. I am therefore of the view that as evidence has not yet commenced hence it will be in the interest of justice to permit the petitioners to file the written statement and participate in the proceedings on payment of heavy cost.

8. Accordingly, writ petition is allowed. Both the impugned orders dated 1.4.2004 and 21.4.2005 as well as order dated 4.1.1999 are set aside on the following condition.

9. Within one month from today petitioners shall file written statement along with Rs. 10,000 as cost through Draft drawn in the name of plaintiff/respondent No. 1.

10. If the above condition is fulfilled then petitioners shall be permitted to participate in the proceedings of the suit and the suit shall be decided positively within four months from the date of filing of written statement and payment of cost.

11. If the above condition is not fulfilled then this writ petition shall stand dismissed and impugned orders shall revive after one month."

20. From perusal of the aforesaid judgment in the case of **Jagardeo (supra)**, it emerges that the orders of the learned trial court as well as the learned revisional court holding that under Order 9 Rule 7 of CPC an application can only be filed on or before the date fixed for hearing and not afterwards, cannot be said to be in consonance with the provisions of Order 9 Rule 7 of CPC which nowhere places such restriction nor would be in accordance with the judgment of Hon'ble Apex Court in this regard.

21. Accordingly, when the orders impugned are seen in the light of the judgment of this Court in the case of **Jagardeo (supra)** it clearly emerges that the learned trial court patently erred in rejecting the application under Order 9 Rule 7 of CPC filed by the defendants vide order dated 13.03.2002 which fact has also not been appreciated while rejecting the application for recall vide order dated 20.03.2002. This aspect of the matter has also not been considered by the revisional court while rejecting the revision filed by the petitioners/defendants

vide judgment and order dated 29.10.2002.

22. Keeping in view the aforesaid discussion, the writ petition is **allowed**. The orders impugned dated 04.04.2001, 13.03.2002, 20.03.2002 and 29.10.2002, copies of which are Annexures 2, 3, 4 and 1 respectively to the writ petition, are set-aside.

23. As the evidence stage is still continuing as stated by learned counsel for the petitioners, hence it would be in the interest of justice to permit the petitioners/defendants to file the written statement and participate in the proceedings on payment of cost.

24. Accordingly, within one month from today the petitioners shall file written statement on payment of Rs.15,000/- as cost through draft drawn in the name of legal heirs of the plaintiff.

25. If the above condition is fulfilled then petitioners shall be permitted to participate in the proceedings of the suit and the suit shall be decided expeditiously.

26. It is also provided that as the instant petition has only arisen on account of repeated adjournments which have been sought by the defendants before the court below which has also been observed by the learned trial court in its orders as such it is provided that the learned trial court shall not grant any adjournment to the defendants on any pretext whatsoever. However, in case an adjournment is granted on account of unavoidable reasons, which entail granting of an adjournment, the said adjournment would only be granted on heavy cost.

Order Date :- 14.3.2024

A. Katiyar