

Court No. - 7

Case :- MATTERS UNDER ARTICLE 227 No. - 5658 of 2024

Petitioner :- Tribhuvan Nath Shukla @ Kalaktar And Another

Respondent :- District Judge, Unnao And 2 Others

Counsel for Petitioner :- Adnan Ahmad

Hon'ble Pankaj Bhatia,J.

1. Heard learned counsel for the petitioner.
2. The present petition has been filed challenging the order dated 14.03.2023 whereby the order was passed striking defense of the petitioner under Order XV Rule 5 Code of Civil Procedure as well as the order dated 31.08.2024 whereby the revision preferred by the petitioner was dismissed.
3. The facts in brief are that a suit was filed for ejectment on account of default against the petitioner on 15.01.2014. In the said case the petitioner moved an application on 26.11.2015 proposing to deposit the said amount alongwith the said application. A tender was also produced with a request to the court to allow the tender so that the payment could be made. Subsequently a written statement was filed by the petitioner on 22.10.2016. It is also evident from record that the petitioner had moved an application on 22.10.2016 itself stating that for the months of January 2015 upto October 2016, i.e. monthly rent of 10 months alongwith interest @ 9% was being deposited and a request was made for condoning the default. Upon the said application the request of the petitioner for condoning the default was rejected, however the amount was still deposited by the petitioner.
4. During the pendency of the suit an application came to be filed on 09.11.2017 stating that as the petitioner has not deposited the amounts, his defense was liable to be struck off in terms of mandate of Order XV Rule 5 CPC. On the said application the impugned order dated 14.03.2023 came to be

passed wherein the trial court recorded that the petitioner had deposited the amount actually on 29.12.2016 which is about 5 months after the first date of hearing and also recorded that the monthly rent as was required to be deposited was not done within time. The court also recorded that the application of the petitioner for condonation of delay in depositing the monthly rent for the period of January 2016 to October 2016 was also rejected on 23.01.2017 and based upon the same the trial court struck out the defense of the petitioner for non compliance of the mandate of Order XV Rule 5 CPC. The petitioner preferred a revision against the said order which too was dismissed.

5. The contention of learned counsel for the petitioner is that in terms of mandate of Order XV Rule 5 CPC, it is incumbent that the amount should be deposited to avoid the rigor of Order XV Rule 5 CPC. In the present case the petitioner had moved an application on 26.11.2015 for tendering the amount however as the orders were not passed on the said application till 29.12.2016 there was no mistake on the part of the petitioner in depositing the amount before the first date of hearing. As regards the delay in payment of monthly rent he argues that Order XV Rule 5 CPC itself prescribes for condonation of delay in terms of the mandate of Order XV Rule 5(2) CPC wherein discretion is conferred upon a court on a representation being made. In the light of the said it is argued that the deposits should be considered in a holistic manner as the provisions of order Order XV Rule 5 CPC have very harsh consequences.

6. The petitioner placed reliance on judgement of Hon'ble Supreme Court in the case of **Bimal Chand Jain vs Gopal Agarwal (1981) 3 SCC 486** and particularly emphasis on paragraphs 4, 5 and 6 which are quoted hereinbelow:

"4. The High Court held in Puran Chand (supra) that if the representation contemplated by sub-rule (2) was not made

within the time prescribed therein the court had no jurisdiction to entertain a representation made beyond time and to condone the delay in making it. It held further that where no representation was made, or if made was filed beyond time, the court was bound to strike off the defence and enjoyed no discretion in the matter.

5. It appears on the facts in this case that no representation under sub-rule (2) was made by the appellant. The only question raised before us is whether, in the absence of such representation, the court was obliged to strike off the defence of the appellant.

6. It seems to us on a comprehensive understanding of Rule 5 of Order XV that the true construction of the Rule should be thus. Sub-rule (1) obliges the defendant to deposit, at or before the first hearing of the suit, the entire amount admitted by him to be due together with interest thereon at the rate of nine per cent per annum and further, whether or not he admits any amount to be due, to deposit regularly throughout the continuation of the suit the monthly amount due within a week from the date of its accrual. In the event of any default in making any deposit, "the court may subject to the provisions of sub-rule (2) strike off his defence". We shall presently come to what this means. Sub-rule (2) obliges the court, before making an order for striking off the defence to consider any representation made by the defendant in that behalf. In other words, the defendant has been vested with a statutory right to make a representation to the court against his defence being struck off. If a representation is made the court must consider it on its merits, and then decide whether the defence should or should not be struck off. This is a right expressly vested in the defendant and enables him to show by bringing material on the record that he has not been guilty of the default alleged or if the default has occurred, there is good reason for it. Now, it is not impossible that the record may contain such material already. In that event, can it be said that sub-rule (1) obliges the court to strike off the defence? We must remember that an order under sub-rule (1) striking off the defence is in the nature of a penalty. A serious responsibility rests on the court in the matter and the power is not to be exercised mechanically. There is a reserve of discretion vested in the court entitling it not to strike off the defence if on the facts and circumstances already existing on the record it finds

good reason for not doing so. It will always be a matter for the judgment of the court to decide whether on the material before it, notwithstanding the absence of a representation under sub-rule (2), the defence should or should not be struck off. The word "may" in sub-rule (1) merely vests power in the court to strike off the defence. It does not oblige it to do so in every case of default. To that extent, we are unable to agree with the view taken by the High Court in *Puran Chand (supra)*. We are of opinion that the High Court has placed an unduly narrow construction on the provisions of clause (1) of Rule 5 of Order XV."

7. He further placed reliance on the judgment of this Court in the case of **Leela Devi and ors vs Shanti Devi Jaiswal, AIR 1986 All 90** wherein this Court had noticed the judgement of Hon'ble Supreme Court in the case of **Bimal Chand Jain (supra)** and has recorded as under:

"10. The fact that the provisions of Order XV, Rule 5, C.P.C. are discretionary presupposes that even if there is a default the Court has to consider as to whether in a particular case it was in the interest of justice to strike off the defence. For deciding whether in a particular case defence should or should not be struck off one has to consider the circumstances of that particular case which has not been done in this case. One of the main circumstances which requires consideration is the nature of the default. If the amount of default is small or negligible considering the amount already deposited lenient view may be taken. The Court below has not even mentioned the total amount due, the amount deposited and the amount remaining unpaid and, therefore, it cannot be ascertained as to what was the actual extent of the default. Similarly, another important circumstance is the nature of explanation offered for not complying with the provisions regarding deposit of the amount. Here again, the Court below has not considered the case in correct perspective. The case of the applicants was that they failed to deposit the rent on the first date of hearing due to wrong legal advice. The Court below instead of deciding the correctness or otherwise of this allegation on the basis of evidence on record has rejected it with the observations that it will be unbelievable that an Advocate would have given the advice to the tenant that only the deposit of arrears of rent was

enough. If the allegation of the applicants that they failed to deposit necessary amount in the Court within time due to wrong legal advice is found correct the defence of the applicants may not be struck off on this ground alone in view of the decision of this Court in *City Board, Mathura v. Ashok Kumar*, 1979 All LJ 333 that plea for condonation of delay in making deposit of rent on ground of counsel's wrong advice was sufficient for condoning the delay. This Court held-

"It has come in the judgment itself that the counsel appearing for the defendant-applicant had stated that the deposit had not been made because of the wrong advice given by him. If that was so, the Court below should not have insisted upon the affidavit and it should have accepted the statement of the counsel. It is settled that no client should suffer on account of the mistake of a lawyer. Hence the Court below should have accepted the representation and also the deposit which had been made on that date."

11. In my opinion, the view of the Court below that as the applicants did not make any representation at the time of making the deposit for condonation of delay their defence was liable to be struck off is incorrect. The Court below has placed reliance on a decision of this Court in *Bimal Chand Jain v. Sri Gopal Agarwal*, (1982) 1 ARC 638 : (1982 ALJ 1315) for this purpose which was practically set aside by the Supreme Court in Civil Appeal No. 2718 of 1982, *Bimal Chand Jain v. Shri Gopal Agarwal*. 1983 1 ARC 203."

8. He further placed reliance on judgement of this Court in the case of **Shiv Prasad vs Special Judge and Ors, 1996(1) ARC 110** wherein the judgement passed by Hon'ble Supreme court has also been noted as under:

"6. In *Bimal Chand Jain v. Sri Gopal Agarwal* 1981 ARC 463, the Hon'ble Supreme Court held that the provisions of Order XV, Rule 5, Code of Civil Procedure are discretionary and the Court has power not to strike off defence even in the absence of a representation by tenant, if on facts and circumstances already existing on record, it finds good reason for not striking off defence. The Hon'ble Supreme Court further held that it must be remembered that an order under Sub-rule (1) striking off the defence is in the nature of a penalty and serious responsibility rests on the court in the matter and the power is

not to be exercised mechanically. The Hon'ble. Supreme Court further observed that there is a reserve of discretion vested in the Court entitling it not to strike off the defence if on the facts and circumstances already existing on the record, it finds good reason for not doing so and that the provisions of Order XV, Rule 5 did not oblige the Court to strike off the defence in every case of default. The Hon'ble Supreme Court remanded the matter back to this Court for fresh consideration and the matter was decided by this Court in *Bimal Chand Jain v. Sri Gopal Agarwal* 1982 ALJ 1315. The chart of deposits as given in the judgment of this Court is as under:

Period of Month	Deposit was to be made by	Deposit was made on
18.12.77 to 14.01.78	22.1.78	4.2.78
15.1.78 to 14.2.78	22.2.78	25.2.78
15.10.78 to 14.11.78	22.11.78	8.12.78
15.8.79 to 14.9.79	22.9.79	11.10.79
15.10.79 to 14.11.79	22.11.79	3.1.80
15.11.79 to 14.12.79	22.12.79	3.1.80
15.12.79 to 14.1.80	22.1.80	10.4.80
15.1.80 to 14.2.80	22.2.80	10.4.80
15.2.80 to 14.3.80	22.3.80	10.4.80

7. This Court upheld the lower Court's decision to strike off the defence and dismissed the tenant's revision petition. The matter again went back to the Hon'ble Supreme Court in *Bimal Chand Jain v. Sri Gopal Agarwal* 1983 ARC 203 and the Hon'ble Supreme Court reversed the decision of this Court holding that this was not the kind of a case in which the defense of the Appellant-tenant could be struck off.

8. In *Bharat Bhushan Misra v. District Judge* 1990 ALJ 292, a learned Single Judge of this Court held that delayed deposit of rents for certain months after institution of the suit does not

render the defence liable to be struck off particularly when such request was made by the landlord after evidence had been closed and the suit was listed for argument. In *Laxmi Narain v. Rama Nand* 1994 AWC 1169, another learned single Judge of this Court held that where the delay in depositing of rent had occurred on account of lack of suitable advice from the Counsel the defence cannot be struck off.

9. The purpose of enacting the provisions of Rule 5 in Order XV was not to give lever to the landlord to get a tenant punished, for insignificant lapses. The purpose was merely to ensure that the dues of the landlord are properly secured and he can get his rent regularly even though the litigation may continue. The details of the deposits made by the Petitioner, in this case indicate that he has substantially complied with the provisions of the aforesaid rule and when it struck to him that there was a little deficiency and delay, he even deposited the amount of interest though there is no provision in the aforesaid rule for payment of interest on delayed deposits in respect of the rent falling due after the institution of the suit. It is also clear that though the tenant had been depositing the amounts over a number of years, no one, not even the court pointed it out to him that the deposits are not in order. Even the landlord in his application under consideration did not pinpoint the default and wrongly alleged that no deposit has been made. The said application was not taken up for hearing immediately and was allowed to remain pending for about 10 months. Therefore, this was not a case in which the courts 'reserve of discretion' could have been exercised to strike off the defence and it was undoubtedly a case in which the Court should have exercised that 'reserve of discretion' by declining to strike off the defence. As held by the Hon'ble Supreme Court, the striking off of defence is of a penal nature. In *Hindustan Steel Limited v. State of Orissa* (1972) 83 ITR 26, the Hon'ble Supreme Court held that an order imposing penalty for failure to carry out a statutory obligation is the result of quasi-criminal proceedings and penalty will not ordinarily be imposed unless the parties obliged either acted deliberately in defiance of law or was guilty of conduct, contumacious or dishonest or acted in conscious disregard of its obligation. Penalty will also not be imposed merely because it is lawful to do so. Whether a penalty should be imposed for failure to perform statutory obligation is a matter of discretion of the authority to be exercised judicially

and on a consideration of all relevant circumstance. The circumstances of the present case, as discussed above, show that the tenant Petitioner is not guilty of any dishonest or contumacious conduct. Nor it is shown that he acted deliberately in defiance of law. He has almost fully complied with the requirements of law and the default was so insignificant and trifling that Judicial discretion required the same to be ignored."

9. Learned counsel for the petitioner further placed reliance on the judgement of Hon'ble Supreme Court in the case of **K Saraswathy Alias K. Kalpana versus P.S.S. Somasundaram Chettiar, 1989 (4) SCC 527** wherein Hon'ble Supreme Court had noticed that the amount deposited by means of cheque however the same was encashed subsequently and Hon'ble Supreme Court was of the view that the date of tender would be the date of furnishing of cheque and the benefit should be granted to the tenants.

10. A similar view was taken by Hon'ble Supreme Court in the case of **Damadi Lal vs Parash Ram, 1976 (4) SCC 855**.

11. In the light of the said judgements, learned counsel for the petitioner argues that both the impugned orders are liable to be set aside.

12. Considering the arguments as raised by learned counsel for the petitioner what transpires is that the application filed by the petitioner for condonation of delay in depositing the monthly rent as is required under Order XV Rule 5 CPC was accompanied by an application for condonation of delay, which was beyond the period of one week prescribed under Order XV Rule 5(2) CPC. The said application was also rejected by the trial court. It further transpires that before the revisional court no argument with regard to condonation of delay in deposit was raised or argued.

13. It is very well settled position of law that exercise of power

under Article 227 of the Constitution of India is confined to the decision making process and is neither a revision nor an appeal against the impugned orders. From the records there appears to be no pleading whatsoever before the revisional court to consider the benefit of grant of Order XV Rule 5(2) CPC. In the absence of any pleading or argument before the revisional court this issue cannot be raised for the first time before this Court.

14. As such, the writ petition lacks merit and is **dismissed**.

Order Date :- 26.11.2024

J. K. Dinkar