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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 04th May, 2023*

+ C.R.P. 200/2019 & C.M. APPL. 40486/2019 (stay)

KAMLESH GUPTA Petitioner
Through: Mr. Sachin Gupta & Ms. Swati
Meena, Advocates.

versus

VAKEEL AHMAD Respondent
Through: Mr. Naushad Ahmad Khan,
Advocate.

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

JYOTI SINGH, J. (ORAL)

1. Petitioner has filed the present revision petition laying a siege to an order dated 20.08.2019 passed by the Trial Court by which the application filed by the Petitioner under Order VII Rule 11 CPC has been dismissed. Petitioner herein is the Defendant before the Trial Court while the Respondent is the Plaintiff and parties hereinafter are referred to by their litigating status before the Trial Court.

2. From the facts captured in the revision petition it emerges that Defendant preferred a suit bearing No. 29/2014 against the Plaintiff herein for recovery of possession, arrears of rent, damages/mesne profits, use and occupation charges and permanent and mandatory injunction, wherein Plaintiff admitted that he was in possession of the suit property *albeit* by virtue of having made part payment towards purchase of the property and sought protection under Section 53A of Transfer of Property Act, 1882. The suit was decreed on 28.0.2015 and all reliefs, save and except, the relief of mandatory injunction

were granted in favour of the Defendant. Both parties filed cross-appeals. Defendant appealed against the non-grant of mandatory injunction, but the appeal was withdrawn by her while Plaintiff sought recovery of possession etc. and the appeal was dismissed vide judgment dated 16.05.2018, with an observation that Plaintiff had no independent right in the suit property and he was only a tenant until termination of tenancy vide legal notice dated 01.10.2013.

3. Plaintiff thereafter filed the suit bearing No. 1305/2016 on 03.10.2016, seeking declaration, specific performance and permanent injunction, from which the present petition arises. As per the Defendant, suit was filed one day before expiry of limitation period although summons were not served upon her, seeing the matter in the cause list, she accepted summons and thereafter filed an application under Order VII Rule 11 CPC, seeking rejection of the plaint *inter alia* on the ground that while filing the suit, court fee was not affixed by the Plaintiff and it was only on 23.05.2017 that the court fee was paid i.e. after 08 months of expiry of the limitation period for filing the suit, despite the fact that it was not the case of the Plaintiff that he had no money to pay the court fee.

4. The application was opposed by the Plaintiff and with respect to the court fee it was urged that the Court had granted extension of time to file the court fee and it was with permission of the Court that the court fee was deposited by the Plaintiff and thus the filing would relate back to the date of institution of the suit and there was no question of the suit being barred by limitation.

5. The Trial Court after hearing the parties dismissed the application under Order VII Rule 11 CPC on the ground that the question of limitation was a mixed question of fact and law and could only be decided by evaluating evidence led by the parties. Insofar as

the court fee is concerned, the same was filed on 23.05.2017 after the Court had granted extension of time to the Plaintiff to do so and the Court was well within its powers under Section 149 CPC to enlarge the time for filing the court fee. Trial Court also observed that since court fee was already taken on record by an earlier order, the same shall have effect as if the same was filed at the time of filing the suit.

6. Counsel for the Defendant vehemently contends that the suit would be deemed to be instituted on the date when the court fee is paid and since the suit itself was instituted one day before the expiry of limitation period and court fee was filed by the Plaintiff much later, plaint be rejected on ground of limitation. It is argued that the Trial Court committed serious irregularity in exercising its jurisdiction to dismiss the application Order VII Rule 11 CPC since it was not the case of the Plaintiff that he had no money to pay the court fee and thus no circumstances existed which called for exercise of the discretion by the Trial Court to extend the time for deposit of court fee. It is emphasized that no plausible explanation was rendered by the Plaintiff for non-filing of the court fee for over 08 months. Reliance is placed on the judgement in *Syed Wajid Ali v. Isar Bano, 1950 SCC OnLine All 285*, where the Allahabad High Court held that Section 149 CPC empowers the Court to grant time for making good the deficiency in court fee in its discretion, however, the discretion must be exercised judiciously and not arbitrarily.

7. It is also contended that the Defendant had relied on four judgments, however, the Trial Court has not comprehensively discussed or distinguished the same and each of the judgments were squarely applicable to the case of the Defendant. In *State Bank of India v. M/s. Indian Utility Products & Ors., 2000 SCC OnLine Del 363*, this Court has held that the date of filing of court fees shall be

deemed to be the date of institution of the suit and to the same effect is the judgment in *J.L. Gugnani v. Krishna Estate & Ors., 2011 SCC OnLine Del 3007*. Trial Court has erroneously distinguished the judgments by observing that while in the High Court Registry, the filing takes place at the filing counter and the suit is returned for curing the defects but in the District Courts, the stage of scrutiny is only before the Court after the matter is listed. This distinction drawn by the Trial Court is wholly misconceived as the role of the Registry or the Court would come in only when there is deficiency in the court fee whereas in the present case, no court fee was paid at all by the Plaintiff. Moreover, on the first date itself, Trial Court had pointed out to the Plaintiff that court fee was not affixed and time was granted to do the needful, but there was delay in compliance.

8. Mr. Khan, *per contra*, appearing on behalf of the Plaintiff defends the impugned order and submits that once the Trial Court had extended the time for deposit of the court fee exercising the discretion which it was empowered to exercise and the court fee was filed on 23.05.2017, there was no justifiable reason for the Defendant to seek rejection of the plaint under Order VII Rule 11 CPC on this ground. Section 149 CPC is in the nature of proviso to Section 4 of the Court Fees Act, 1870 (hereinafter referred to as the 'Act 1870') and the power is generally exercised liberally in the interest of justice. Order-sheets would indicate that Plaintiff was unable to file the court fee at the initial stage as he could not withdraw the money from the Bank because of demonetization of currency at the relevant time and subsequently when the court fee was handed over to the counsel, it could not be filed immediately as the counsel had to suddenly rush to his native place. On this score the Trial Court permitted extension of time in filing the court fee and finally took it on record and issued

summons in the interest of justice. It cannot therefore be said that the Trial Court has acted arbitrarily or illegally.

9. I have heard the learned counsels for the parties and examined their respective contentions.

10. As the chronology of dates goes, the suit was filed by the Plaintiff on 03.10.2016 *albeit* without affixing any court fee. On 14.10.2016 when the suit was listed before the Court, time was sought by the Plaintiff to file court fee, which was granted by the Court. On 28.10.2016 an adjournment was sought by the Plaintiff as his counsel was unavailable. On 06.12.2016, Plaintiff informed the Court that money could not be withdrawn from the Bank on account of demonetization and the matter was adjourned for further proceedings. Finally, after a few adjournments on one count or the other including the Court being on leave, the court fee was filed by the Plaintiff on 23.05.2017. On 23.05.2017, Court took the court fee on record and issued summons of the suit to the Defendant. Summons were accepted by the Defendant in Court on 31.05.2017 and time was granted to file the written statement, subsequent to which an application was filed by the Defendant under Order VII Rule 11 CPC, seeking rejection of the plaint. Order-sheets reveal that time was extended by the Court and once the court fee was filed within the extended time, the same was taken on record by the Court in its discretion and wisdom.

11. Section 4 of Act 1870 has been held to be mandatory in several judicial decisions and the language itself shows that payment of court fee prescribed in the Schedules to the Act 1870 is mandatorily required to be filed before a plaint or any other document or instrument is proceeded with or acted upon. Therefore, the language of Section 4 of Act 1870 proscribes the Court to proceed with a document or a suit in the absence of payment of the prescribed court

fee and there can be no exemption from court fee. Order VII Rule 11(c) CPC falls in place with the ethos of Section 4 of Act 1870 *albeit* provides that where the relief claimed is properly valued but plaint is upon an insufficiently stamped paper and the Plaintiff on being required by the Court to supply the requisite stamp paper within the time fixed by the Court fails to do so, the plaint shall be rejected. However, as per the proviso, the time fixed by the Court can be extended for reasons to be recorded, if it is satisfied that Plaintiff was prevented by any cause of exceptional nature in supplying the requisite stamp paper and that refusal to extend time would cause grave injustice to the Plaintiff. The provisions of Order VII Rule 11 CPC along with Section 149 CPC came up for consideration before Division Bench of this Court in *M/s. Sahara India Airlines Ltd. v. R.A. Singh & Anr., 1997 SCC OnLine Del 736* and the Court held as follows:-

“10. These provisions of the Court Fees Act and the Code of Civil Procedure, in our view, do not leave any power with the Court to grant exemption from payment of prescribed court fees. The only power which can be exercised in cases of grave injustice or hardship is to extend time for payment of court fee and if the plaintiff fails to do the needful even within the extended time, the plaint is liable to be rejected. The way proviso contained in Order VII Rule 11 C.P.C. is worded, even the power to extend time for payment to pay requisite court fee has been restricted to a large extent which means that in any case there is no power to grant total exemption from payment of court fee. Of course, in the impugned order it has been observed that on the success of the plaintiff the balance amount of requisite court fee can be deducted from the decretal amount, yet one cannot lose sight of a possibility of failure of the plaintiffs in the suit. In that event how will the court fees be realised? The law does not envisage such a situation. The nature of the suit before the Court attracts the appropriate provision of the Court Fees Act and there can be no escape from payment of the requisite court fee.

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13. Thus, when a plaintiff approaches the Court in the normal course, i.e. without recourse to the provisions of Order XXXIII C.P.C. he/she has to comply with the relevant provisions of the Court Fees Act and the Code of Civil Procedure. In other words a suit cannot be tried without payment of the prescribed court fee. It

was held by a Division Bench of this court in Mangal Sen v. Union of India, AIR 1970 Delhi 44 (1), that before a document can be filed in the High Court it must bear the court fee chargeable within the First Schedule or Second Schedule of the Court Fees Act. Of course as envisaged in the proviso to Order VII Rule 11 time for making up the deficiency in court fee can be extended by the Court subject to limitations contained in the proviso. But that provision does not envisage an order that the payment of court fee be exempted and court fee may be deducted out of the decretal amount in the event of the success of the plaintiff which means that the suit proceeds to trial and to final decision without payment of the prescribed court fee.

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16. Next we have to examine how far Section 149 C.P.C. can help the plaintiffs in the facts of the present case. Section 149 is reproduced as under:—

“Power to make up deficiency of court-fees. 149. Where the whole or any part of any fee prescribed for any document paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part as the case may be of such court-fee; and upon such payment the document in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance.”

17. This provision is meant to give temporary relief to a plaintiff where for no fault of his, he is unable to affix the required court fee on the plaint. This may be on account of paucity of time in obtaining the requisite court fee, closure of the treasury where the court fees is available, on account of some unforeseen reason, nonavailability of the requisite amount of court fee in the treasury etc. etc. This provision does not clothe the Court with the power to exempt payment of court fee. Further, the power under Section 149 C.P.C. cannot be exercised contrary to the specific mandate contained in the Court Fees Act and Order VII Rule 11 C.P.C. Section 149 is a sort of transitory provision to take care of an interim period. In the present case the reason for not paying the prescribed court fee as given by the plaintiffs is their inability to pay the same on account of paucity of funds or lack of means. It was held in *Buta Singh v. UOI*, (1995) 5 SCC 284(3) that “mere poverty or ignorance or inability to pay the court fee at the time of presenting the appeal is not always a good ground for indulgence under Section 149”. In *Mannan Lal v. Mst. Chhotka Bibi*, (1970) 1 SCC 769 : AIR 1971 SC 1374 (4), it was held that Section 149 C.P.C. mitigates the rigour of Section 4 of the Court Fees Act and it is for the Court to harmonise the provisions of both the Court Fees Act and C.P.C. by reading Section 149 C.P.C. as proviso to Section 4 of the Court Fees Act and allowing the deficit to be made good within a period of time fixed by it. Thus, we are of the considered view that Section 149 C.P.C. does not empower the Court to pass an order exempting the plaintiffs from payment of requisite court fee and directing that on the success of the plaintiffs

the requisite balance of court fee be deducted from the decretal amount. Such a power can be found only where Order XXXIII C.P.C. applies and nowhere else.”

12. In **Manhoaran v. Sivarajan and Others, (2014) 4 SCC 163**, the Supreme Court held as follows:-

“7. Section 149 of the Civil Procedure Code prescribes a discretionary power which empowers the court to allow a party to make up the deficiency of court fee payable on plaint, appeals, applications, review of judgment, etc. This section also empowers the court to retrospectively validate insufficiency of stamp duties, etc. It is also a usual practice that the court provides an opportunity to the party to pay court fee within a stipulated time on failure of which the court dismisses the appeal. In the present case, the appellant filed an application for extension of time for remitting the balance court fee which was rejected by the learned Sub-Judge. It is the claim of the appellant that he was unable to pay the requisite amount of court fee due to financial difficulties. It is the usual practice of the court to use this discretion in favour of the litigating parties unless there are manifest grounds of mala fides. The court, while extending the time for or exempting from the payment of court fee, must ensure bona fides of such discretionary power. Concealment of material fact while filing application for extension of date for payment of court fee can be a ground for dismissal. However, in the present case, no opportunity was given by the learned Sub-Judge for payment of court fee by the appellant which he was unable to pay due to financial constraints. Hence, the decision of the learned Sub-Judge is wrong and is liable to be set aside and accordingly set aside.”

13. Relevant would it be in this context to refer to another judgment of the Supreme Court in **A. Nawab John and Others v. V.N. Subramaniam, (2012) 7 SCC 738**, where the Supreme Court held as follows:-

“35. Therefore, from the language of Section 149 CPC it follows that when a plaint is presented to a court without the payment of appropriate court fee payable thereon, undoubtedly the court has the authority to call upon the plaintiff to make payment of the necessary court fee. Such an authority of the Court can be exercised at any stage of the suit. It, therefore, appears to us that any amount of lapse of time does not fetter the authority of the court to direct the payment of such deficit court fee. As a logical corollary, even the plaintiff cannot be said to be barred from paying the deficit court fee because of the lapse of time.

36. This Court in **Mannan Lal v. Chhotaka Bibi [(1970) 1 SCC 769 : AIR 1971 SC 1374]** interpreting Section 149 CPC held: (SCC

p. 776, paras 12-13)

“12. The above section therefore mitigates the rigour of Section 4 of the Court Fees Act and it is for the court in its discretion to allow a person who has filed a memorandum of appeal with deficient court fee to make good the deficiency and the making good of such deficiency cures the defect in the memorandum not from the time when it is made but from the time when it was first presented in court.

13. In our view in considering the question as to the maintainability of an appeal when the court fee paid was insufficient to start with but the deficiency is made good later on, the provisions of the Court Fees Act and the Code of Civil Procedure have to be read together to form a harmonious whole and no effect should be made to give precedence to provisions in one over those of the other unless the express words of a statute clearly override those of the other.”

It was further held: (SCC pp. 776-77, para 14)

“14. ... there can in our opinion, be no doubt that Section 4 of the Court Fees Act is not the last word on the subject and the Court must consider the provisions of both the Act and the Code to harmonise the two sets of provisions which can only be done by reading Section 149 as a proviso to Section 4 of the Court Fees Act by allowing the deficiency to be made good within a period of time fixed by it. If the deficiency is made good no possible objection can be raised on the ground of the bar of limitation; the memorandum of appeal must be treated as one filed within the period fixed by the Limitation Act subject to any express provision to the contrary in that Act and the appeal must be treated as pending from the date when the memorandum of appeal was presented in court. In our view it must be treated as pending from the date of presentation not only for the purpose of limitation but also for the purpose of sufficiency as to court fee under Section 149 of the Code.”

(emphasis supplied)

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44. It is well settled that the judicial discretion is required to be exercised in accordance with the settled principles of law. It must not be exercised in a manner to confer an unfair advantage on one of the parties to the litigation. In a case where the plaint is filed within the period of limitation prescribed by law but with deficit court fee and the plaintiff seeks to make good the deficit of the court fee beyond the period of limitation, the court, though has discretion under Section 149 CPC, must scrutinise the explanation offered for the delayed payment of the deficit court fee carefully because exercise of such discretion would certainly have some bearing on the rights and obligations of the defendants or persons claiming through the defendants. (The case on hand is a classic example of such a situation.) It necessarily follows from the above that Section 149

CPC does not confer an absolute right in favour of a plaintiff to pay the court fee as and when it pleases the plaintiff. It only enables a plaintiff to seek the indulgence of the court to permit the payment of court fee at a point of time later than the presentation of the plaint. The exercise of the discretion by the court is conditional upon the satisfaction of the court that the plaintiff offered a legally acceptable explanation for not paying the court fee within the period of limitation.”

14. Therefore, what emerges from a reading of the aforesaid judgments is that the Courts have the discretion to extend the time for deposit of the court fee, wholly or in part, in the given facts of a case where declining the request for extension of time would result in injustice to the Plaintiff. In ***P.K. Palanisamy v. N. Arumugham and Another, (2009) 9 SCC 173***, the Supreme Court was dealing with a suit for recovery of money where the plaint was accompanied by a court fee of Re.1/- only. An application was filed for extension of time for payment of deficit court fee, which was granted by the Trial Court. Subsequently, two more extensions were granted and the deficit court fee was paid by the Plaintiff. One of the issues for consideration before the Supreme Court was the discretion of a Court to permit the Plaintiff to file the requisite/deficient court fee and the hiatus between Section 149 CPC and Order VII Rule 11 CPC.

15. The Supreme Court ruled on various issues but two of them are relevant to the present case and the contentions raised by the Defendant herein. The Supreme Court held that Section 4 of Act 1870 mandates that when a plaint is presented it should be accompanied with the requisite court fee payable. It does not however mean that whenever a plaint is presented with deficit court fee, the same has to be rejected outrightly. Since Section 149 CPC empowers the Court to extend the time and also raises a legal fiction in terms whereof as and when the deficit court fee is paid, the same would be deemed to have been paid in the first instance. Payment of court fee is a matter

between the State and the suitor. It was further held that once an application under Section 149 CPC is allowed, Order VII Rule 11(c) CPC will have no application. Relying on the earlier judgments of the Supreme Court in *Mahasay Ganesh Prasad Ray and Anr. v. Narendra Nath Sen and Ors.*, AIR 1953 SC 431; *Mahanth Ram Das v. Ganga Das*, (1961) 3 SCR 763; *Mannan Lal v. Mst. Chhotaka Bibi (Dead) by LRs. B. Sharda Shankar and Ors.*, (1971) 1 SCR 253; and *Syed Wajid Ali (supra)* as well as a three Judge Bench Judgment in *Ganapathy Hegde v. Krishnakudva and Another*, (2005) 13 SCC 539, the Supreme Court in the facts of the said case held that the Defendants had not raised any issue with regard to the correctness or otherwise of the earlier orders permitting extension in filing the court fee and rightly or wrongly, deficit court fee was paid and the Trial Court had accepted the plaint being satisfied with the *bonafide* of the Plaintiff. Therefore, there was no occasion for invoking the provisions of Order VII Rule 11(c) CPC. In *K.C. Skaria v. Govt. of State of Kerala and Another*, (2006) 2 SCC 285, the Supreme Court held that Section 149 CPC acts as an exception to the bar imposed by Section 4 of Act 1870 and enables the Court to permit the Plaintiff to pay the deficit court fee at a stage subsequent to the filing of the suit and provides that such payment if permitted by the Court, shall have the same effect as if it had been paid in the first instance. In *Mannan Lal (supra)*, the Supreme Court held that Section 149 CPC mitigates the rigor of Section 4 of Act 1870 and Courts should harmonize the two provisions and allow the deficit to be made good within the period fixed by the Court. In view of the aforesaid principles elucidated by the Supreme Court and the Division Bench of this Court, it can hardly be argued by the Defendant that no permission ought to have been granted by the Trial Court to the Plaintiff to

make good the court fee and the plaint ought to be rejected at the threshold.

16. Insofar as the argument that since the court fee was paid belatedly the suit was barred by limitation is concerned, the Supreme Court has clearly laid down that when the court fee is paid in the time allowed by the Court, it would be treated as having been paid at the first instance. *Prima facie*, the suit was filed, even according to the Defendant, one day before the expiry of limitation and therefore the court fee paid by the Plaintiff under permission of the Court and taken on record by the Court, would relate back to the date of filing of the suit.

17. The judgments relied upon by the Defendant in *State Bank of India (supra)* and *J.L. Gugnani (supra)* would not inure to the advantage of the Defendant in view of the judgment of the Supreme Court in *P.K. Palanisamy (supra)* laying down that payment of court fee within the extended time would relate back and would be treated as having been filed in the first instance. Insofar as the judgment in *Syed Wajid Ali (supra)* is concerned, the proposition of law laid down therein can hardly be disputed that discretion must be exercised judiciously. In the present case, this Court finds that there is no infirmity in the order of the Trial Court in taking the court fee on record on the ground that initially the Plaintiff was unable to withdraw the money from the Bank on account of demonetization and subsequently when the money was withdrawn and given to the counsel he had to suddenly rush to his native place. Both the causes were beyond the control of the Plaintiff and refusal to extend the time in depositing the court fee, as rightly held by the Trial Court, would have caused injustice to the Plaintiff, if in these facts and circumstances the plaint would have been rejected.

18. There is an additional reason why the Court cannot agree with the stand of the Defendant. It is a matter of record that the Trial Court had granted extension of time to the Plaintiff for filing the court fee through various orders and subsequently vide order dated 23.05.2017, the court fee was taken on record and summons were issued. None of these orders were challenged by the Defendant and it is only the impugned order dated 20.08.2019, by which the application under Order VII Rule 11 CPC has been rejected, is assailed. In view of the binding dictum of the Supreme Court in *P.K. Palanisamy (supra)*, once the Trial Court has exercised its power to extend the time for deposit of court fee and these orders are unchallenged, application under Order VII Rule 11 CPC cannot be pressed, seeking rejection of the plaint.

19. For all the aforesaid reasons, this Court finds no infirmity in the impugned order and the revision petition is dismissed along with pending application being wholly devoid of merit.

JYOTI SINGH, J

MAY 04, 2023
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