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Court : Mumbai Nagpur

Decided On : Oct-05-2015

Judge : R.K. Deshpande

Appeal No. : Writ Petition No. 4690 of 2015

Appellant : Salim and Another

Respondent : Majlis Madarsa-Elslamia Society, through its Secretary and Others

Judgement :

Oral Judgment:

1. Rule, made returnable forthwith. Heard finally by consent of the learned counsels appearing for the parties.

2. The Court of Small Causes trying a suit between the landlord and the tenant under Section 33 of the Maharashtra Rent Control Act has passed an ex parte decree for eviction and possession on 19.09.2013 against the petitioner “ tenant. The tenant preferred M.J.C. No.01 of 2014 under Order 9 Rule 13 of the Code of Civil Procedure on 20.12.2013 for setting aside ex parte decree along with the application for condonation of delay. The Court of Small Causes dismissed it solely on the ground that there was non-compliance of Section 17(1) of the Provincial Small Cause Courts Act, 1887 to deposit the decretal amount or to

furnish the security as required by the said provision. The order dated 30.06.2014 was challenged by the petitioner in Misc. Civil Appeal No.206 of 2014 filed under Section 34 of the Maharashtra Rent Control Act. This appeal has also been dismissed on 27.07.2015 by the lower Appellate Court. Hence, the tenant is before this Court in this writ petition.

3. The learned counsel for the petitioner submits that the provision of Section 17 of the Provincial Small Cause Courts Act, 1887 is not at all attracted in the present case, for the reason that the application is filed under Order 9 Rule 13 of the Code of Civil Procedure and the suit in question was tried by the Court of Small Causes exercising jurisdiction under Section 33 of the Maharashtra Rent Control Act. According to him, the Court was not exercising the jurisdiction under the Provincial Small Cause Courts Act and there is no provision in the Code of Civil Procedure to deposit any such amount or to furnish security, as is under Section 17 of the Provincial Small Cause Courts Act. He further submits that even otherwise, the amount was deposited before dismissal of the application under Order 9 Rule 13 of the Code of Civil Procedure on 30.06.2014. The courts below ought not to have therefore, rejected the application filed by the petitioner.

4. Shri Paliwal, the learned counsel for the petitioner has opposed the aforesaid contentions. He, however, does not dispute the fact that the decretal amount was deposited in the Court of Small Causes before the decision of the application on 30.06.2014 under Order 9 Rule 13 of the Code of Civil Procedure. He submits that the provision of Section 17 of the Provincial Small Cause Courts Act is applicable and the proviso therein contains the mandatory requirement of depositing the decretal amount or to furnish security in respect of it at the time of presenting of the application. He, therefore, supported the findings recorded by the courts below.

5. The questions to be decided are “

(i) whether the provisions of Section 17 of the Prevention of Small Cause Courts Act are applicable in the present case and (ii) whether the Courts below were right in rejecting the application under Order 9 Rule 13 of the Code of Civil Procedure for failure to deposit the decretal amount or to furnish the security as contemplated

by proviso to Section 17(1) at the time of presenting an application under Order 9 Rule 13 of the Code of Civil Procedure.

6. Section 33 of the Maharashtra Rent Control Act confers jurisdiction upon the Courts of Small Causes to entertain and try any suit or proceeding between a landlord and a tenant relating to the recovery of rent or possession of any premises and to decide any application made under the said Act. The procedure to decide a suit by the Court of Small Causes under Section 33 of the Maharashtra Rent Control Act, is governed by Section 17 of the Provincial Small Cause Courts Act and hence, the said provision being relevant is reproduced below:

17. Application of the Code of Civil Procedure

(1) The procedure prescribed in the Code of Civil Procedure, 1908 (5 of 1908), shall, save insofar as is otherwise provided by that Code or by this Act, be the procedure followed in a Court of Small Causes in all suits cognizable by it and in all proceedings arising out of such suits:

Provided that an applicant for an order to set aside a decree passed ex parte or for a review of judgment shall, at the time of presenting his application, either deposit in the Court the amount due from him under the decree or in pursuance of the judgment, or give such security for the performance of the decree or compliance with the judgment as the Court may, on a previous application made by him in this behalf, have directed.

(2) Where a person has become liable as surety under the proviso to sub-section(1), the security may be realised in manner provided by section [145] of the Code of Civil Procedure, [1908 (5 of 1908)].?

In view of sub-section (1) of Section 17 reproduced above, the procedure prescribed in Code of Civil Procedure, 1908 is required to be followed by the Court of Small Causes in all suits cognizable by it and in all proceedings arising out of such suits. The application under Order 9 Rule 13 of the Code of Civil Procedure is therefore, required to be entertained by the Court of Small Causes by virtue of the provision of sub-section (1) of Section 17 of the Small Cause Courts Act.

When suit under Section 33 of the Provincial Small Cause Courts Act is tried by the Court of Small Causes, the provision of Section 17 therein has to be complied with and merely because such is not the requirement under the Code of Civil Procedure, the applicant is not exempted. The requirement in the proviso contained below sub-section (1) is additional and therefore, becomes applicable. The contention of the learned counsel appearing for the petitioner that Section 17 is not applicable to the proceedings before the Court of Small Causes conferred with the jurisdiction under Section 33 of the Maharashtra Rent Control Act, is therefore, rejected.

7. No doubt, that in terms of proviso below sub-section (1) of Section 17, an applicant for an order to set aside a decree passed ex parte has to either deposit in the Court, the amount due from him under the decree or in pursuance of the judgment, or to give security for performance of the decree or compliance with the judgment at the time of presenting the application, as the Court may have directed on a previous application made by the applicant in this behalf. The Court has therefore such jurisdiction and the application cannot be rejected without first issuing such direction to the applicant. Merely, because the amount was not deposited at the time of presentation of the application that by itself is not enough to dismiss the application under Order 9 Rule 17 of the Code of Civil Procedure. Undisputedly, before passing the order by the trial court on 30.06.2014 the entire decretal amount was deposited on 27.02.2014 by the petitioner "tenant". The trial court could not have dismissed the application. The court has to decide the same on its own merits. The Appellate Court has also subscribed to an error of law hence, the judgment and order delivered by both the courts cannot be sustained, the same will have to be set aside.

8. In the result, the writ petition is allowed. The judgment and order dated 30.06.2014 passed by the learned Additional Judge, Small Cause Court at Nagpur dismissing M.J.C. No.1 of 2014, is hereby quashed and set aside along with the judgment and order dated 27.02.2014 passed by the learned District Judge-3, Nagpur in Misc. Civil Appeal No.206 of 2014. Since the decretal amount has already been deposited the Court of Small Causes shall decide M.J.C. No.1 of 2014 on its own merits in accordance with law. The petition is accordingly,

allowed. The parties to appear before the of Small Causes Court on 26.10.2015.

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