

Radha Kisan Vs. Viith Additional District Judge, Kanpur Nagar and Others

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Court : Allahabad

Decided On : Feb-08-2000

Reported in : 2000(1)AWC843

Judge : Sudhir Narain, J.

Acts : Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 - Sections 7 and 20(4); [Code of Civil Procedure \(CPC\), 1908](#) - Order 15, Rule 5

Appeal No. : C.M.W.P. No. 9743 of 1999

Appellant : Radha Kisan

Respondent : Viith Additional District Judge, Kanpur Nagar and Others

Advocate for Def. : Sakti Dhar Dubey, ;S.C.

Advocate for Pet/Ap. : B.D. Mandhyan and ;S.C. Mandhyan, Advs.

Judgement :

Sudhir Narain, J.

1. This writ petition is directed against the order of Judge, Small Causes Court, respondent No. 2, dated 20.1.1998, whereby he struck off the defence of the petitioner and the order of respondent No. 1 dated 17.2.1999, dismissing the

revision against the said order.

2. The petitioner is a tenant of the disputed premises. Smt. Vidya Devi, the erstwhile owner, gave a notice dated 31.8.1990 to the petitioner demanding arrears of rent Rs. 575 for the period 19.9.1988 to 18.8.1990 at the rate of Rs. 25 per month and Rs. 106 towards house tax and water tax. The petitioner sent money order for Rs. 600 which was accepted by her. She filed Suit No. 150 of 1999 for recovery of arrears of rent, ejectment and damages with the allegations that the petitioner had not paid the entire amount which included the house tax and water tax after service of the notice. He was defaulter and was liable for eviction. The summons was issued to the petitioner wherein 5.8.1991 was the date fixed for filing written statement. The suit was dismissed in default of plaintiff on 19.9.1991. He filed an application for restoration of the suit. The Court restored the suit on 22.1.1993. The plaintiff sold the property to respondent Nos. 3, 4 and 5 on 17.8.1993. They filed application for their impleadment as plaintiffs. The Court allowed their impleadment application on 9.12.1993. On 17.3.1994 the petitioner filed written statement. It was alleged that he had remitted the rent by money order and had not committed any default in payment of arrears of rent.

3. The plaintiffs filed an application to strike off the defence on the ground that the petitioner had not deposited the entire arrears of rent as claimed by the plaintiff on the date fixed for filing written statement, i.e., on 5.8.1991. It was further alleged that the petitioner did not continue to deposit monthly rent regularly and on that ground also his defence was liable to be struck off. The petitioner filed objection. It was stated that the entire arrears of rent had been remitted to the erstwhile landlady and no rent was due against him. He had further paid rent for the period till 17th March, 1994 to the previous landlady. As regards deposit of monthly rent, it was stated that it was being deposited but there was delay in deposit of the amount as he was running in financial difficulty on account of treatment of her daughter-in-law and secondly the lawyers never advised him to deposit every month within time as provided under Order XV, Rule 5 of the Code of Civil Procedure. The trial court struck off the defence holding that the petitioner failed to establish that he had paid the rent to the previous landlady for the period prior till 17th March, 1994 and the explanation submitted by him for deposit of delayed

monthly rent was not acceptable. The revision filed by the petitioner against this order was dismissed by respondent No. 1 on 17.2.1999.

4. The first question is as to what is the date of first hearing in the facts and circumstances of the present case. The Courts below have held that 5.8.1991, the date fixed for filing written statement was the date of first hearing. The meaning of the words 'date of first hearing' has been considered in various decisions of the Supreme Court and this Court. In Jagannath and another u. Ram Chandra Srivastava and others, 1982 (1) ARC 665, the Division Bench of this Court, considering Explanation (1) added to Order XV, Rule 5 of the Code of Civil Procedure by U. P. Act No. 57 of 1976, held that the date of first hearing would be the date or dates specifically mentioned in the summons, namely, if the summons mentions the date for filing written statement, it shall be the date for hearing and if in the summons a date is fixed for filing written statement and another date for hearing of the matter, it is the last of the dates mentioned. The Full Bench decision in Siya Ram v. District Judge, Kheri and others. 1984 (1) ARC 410, affirmed this decision while interpreting the expression 'first hearing' as given under Explanation to Section 20 (4) of U. P. Urban Buildings (Regulation of Letting. Rent and Eviction) Act, 1972. In Shri Nath Agarwal v. Shri Nath, 1983 (2) ARC 422, the same meaning was given as in the decision of Jagannath's case (supra). This question came up for consideration before the Apex Court in Siraj Ahmad Siddiqui v. Prem Nath Kapoor. 1993 (2) ARC 451, the Supreme Court interpreting the expression 'first hearing' as given in Explanation to Section 20 (4) of U. P. Act No. 13 of 1972, held that the date of first hearing cannot be taken to be the date for filing written statement though the date for that purpose may be mentioned in the summons. The date on which the Court proposes to apply its mind to determine the points in controversy between the parties to the suit and to frame issues, if necessary will be the date of first hearing. The Court observed as follows :

'Does the definition of the expression 'first hearing' for the purposes of Section 20 (4) mean something different? The 'step or proceedings mentioned in the summons' referred to in the definition should, we think, be construed to be a step or proceedings to be taken by the Court for it is, after all, a 'hearing' that is the subject-matter of the definition, unless there be something compelling in the said

Act to indicate otherwise ; and we do not find in the said Act any such compelling provision. Further, it is not possible to construe the expression 'first date for any step or proceeding' to mean the step of filing the written statement, though the date for that purpose may be mentioned in the summons, for the reason that, as set out earlier, it is permissible under the Code for the defendant to file a written statement even thereafter but prior to the first hearing when the Court takes up the case, since there is nothing in the said Act which conflicts with the provisions of the Code in this behalf. We are of the view, therefore, that the date of first hearing as defined in the said Act is the date on which the Court proposes to apply its mind to determine the points in controversy between the parties to the suit and to frame issue, if necessary'.

5. Again this decision was considered in *Adwaitanand v. Judge. Small Causes Court, Meerut and others*, 1995 (1) ARC 563. It was held that though the date for filing written statement by the defendant may be mentioned in the summons but the expression used is 'first hearing of the suit' which means the date on which the Court proposed to apply its mind to determine the points in controversy between the parties to the suit and to frame issues, if necessary. The view taken by the Full Bench decision of this Court in *Siya Ram v. District Judge, Kheri*, 1984 (1) ARC 410 was not approved. This view has been again reiterated by the Supreme Court in *Sudarshan Devi and others v. Sushila Devi and others*, 1999 (2) ARC 668. The emphasis is on the words 'hearing' and it is for the Court to consider as to what was the date fixed for hearing when the Court proposes to apply its mind for hearing the matter.

6. In the context of the above decisions, the view of the Courts below that 5.8.1991, the date for filing written statement, was the date of first hearing, cannot be upheld. On 5.8.1991 the petitioner filed an application that he had not received the copy of the plaint. The application was, however, rejected on the ground that on the back of the summons there was a note made by the process server that a copy of the plaint was also attached. The case was adjourned by the Court permitting the petitioner to file written statement. The suit in the meantime was dismissed for default on 19.9.1991 and it was restored on 22.1.1993.

7. The petitioner in his objection had stated that he had paid the rent to the erstwhile owner. The Court considered the evidence on merits and took the view that the petitioner had failed to prove that he had paid the rent to the previous landlady for the period prior to 17.3.1994 as she had already sold the property to the respondents 3 to 5 on 17.8.1993. The version of the petitioner was that he had not received any notice from the previous landlady regarding sale of the property. It is not necessary to go into the controversy as the matter was not to be decided on merits. The petitioner was to deposit the rent admitted by him to be due.

8. The real controversy in the suit is as to whether there was an agreement between the parties to pay house tax and water tax in addition to rent as part of rent. The plaintiff had sent notice on 31.8.1990 demanding arrears of rent Rs. 575 at the rate of Rs. 25 per month for the periods 19.9.1988 to 18.8.1990 and also Rs. 106 towards house tax and water tax. The petitioner is alleged to have remitted Rs. 600 by money order. This was in excess of the rent demanded by the landlady. The contention of the petitioner is that he was not liable to pay water tax in addition to the rent under Section 7 of U. P. Act No. 13 of 1972 as under the proviso to said section, a tenant is not liable to pay water tax as rent did not exceed Rs. 25 per month. It was for the plaintiff to plead and prove by adducing evidence that there was a separate agreement between the parties to pay tax in addition to rent as part of the rent.

9. The Courts below have further found that the petitioner had not deposited monthly rent within the time as prescribed under Order XV, Rule 5, C.P.C. The petitioner had submitted explanation firstly, that he was under financial difficulty due to expenses being incurred by him on the treatment of his daughter-in-law and secondly, the counsel had not advised him to deposit the amount within certain specified time. The Court took the view that there was no ample evidence to prove this fact. The Court has to consider the explanation in totality of all the circumstances. The provision of Order XV, Rule 5 of the Code of Civil Procedure has not been engrafted to penalise the defendant but it is in order to ensure that the tenant deposits monthly rent and not unnecessarily prolong the hearing of the suit. If there is any reasonable explanation offered by the tenant, the Court can accept such explanation and condone the delay in depositing such rent. The

tenant had deposited monthly rent but there was some delay in depositing the rent. It was his case that it was due to his financial difficulty and secondly, he did not receive any advice from the counsel that the amount has to be paid in the specified time. The Court was to consider whether in such circumstances, the discretion should be exercised to strike off the defence. The Court did not examine this aspect of the matter. It is settled principle that the Court is not bound to strike off the defence and the discretion is to be exercised considering the various aspects of the matter vide *Sudhir Kumar Gupta v. Dr. S.K. Rajan and others*, 1988 (1) ARC 545 ; *Prem Nath v. Dr. Chandra Prakash Saxena*, 1999 (1) ARC 301 : *Ashok Kumar Baranwal and another v. 1st Additional District Judge. Gorakhpur and others*, 1990 (2) ARC 465.

10. In view of the above the writ petition is allowed. The impugned orders are hereby quashed. The trial court shall decide the suit taking into consideration the defence of the petitioner. As the suit was filed in the year 1991, the hearing of the suit shall be expedited and the same may be decided possibly within six months.