

Jayant Kumar Chakraborty Vs. Xth Additional District Judge and ors.

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Court : Allahabad

Decided On : Nov-18-2003

Reported in : 2004(1)AWC498

Judge : S.U. Khan, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 15, Rule 5

Appeal No. : C.M.W.P. No. 10785 of 1995

Appellant : Jayant Kumar Chakraborty

Respondent : Xth Additional District Judge and ors.

Advocate for Def. : S.C.

Advocate for Pet/Ap. : R.G. Padia and ;Prakash Padia, Advs.

Disposition : Petition allowed

Judgement :

S.U. Khan, J.

1. The suit in between landlord and tenant filed 31 years before, i.e., in the year 1972 is still pending. Landlords are also at fault for this undue delay in disposal as they are more interested in getting the defence of the tenant struck off than decision of the suit.

2. Kamla Devi landlady since deceased and survived by respondent Nos. 3 to 8 filed a suit being suit No. 194 of 1972 against tenant Anpurna Chakravorty since deceased and survived by petitioner and respondent Nos. 9 to 12. The suit was later on transferred to the Court of J.S.C.C., Varanasi and registered there as S.C.C. Suit No. 611 of 1975. Kamla Devi initially mortgaged the house in dispute to Anpurna Chakravorty in April or June, 1967, thereafter she let out the house to Anpurna Chakravorty in August, 1967 at the rate of Rs. 90 per month. According to plaint allegations the tenant was in arrears of rent from 1.5.1971 to 31.3.1972, that on oral demand the tenant refused to pay the rent and gave a notice to the landlady that the rent was adjusted in the interest on the mortgage, that thereafter, landlady by notice dated 1.4.1972 formally demanded the rent from 1.5.1971 to 31.3.1972 at the rate of Rs. 90 per month (total Rs. 990) and terminated the tenancy of the tenant through the said notice, that the tenant did not pay the rent in response to the notice and gave a wrong reply on 27.4.1972 to the effect that the entire rent had been adjusted in the interest on the mortgage. It was further pleaded in paragraphs 6, 7 and 8 of the plaint that the house in dispute was mortgaged by the plaintiff to the tenant through the deed of simple mortgage for a sum of Rs. 6,000 out of which plaintiff paid Rs. 2,540 to the defendant in cash and amount of Rs. 3,960 was adjusted in rent from 1.8.1967 till 30.4.1971 and in this manner the entire amount under the mortgage stood paid and mortgage stood redeemed. The tenant filed the written statement admitting the rate of rent to be Rs. 90 per month. However, in paragraph 20 of the written statement it was stated that the mortgage did not stand redeemed and that rent payable to the plaintiff had been adjusted towards the interest of the mortgaged loan with the consent and desire of the plaintiff and that nothing was due to the plaintiff on account of arrears of the rent.

3. A suit between the parties regarding mortgage also appears to have been filed (Suit No. 106 of 1972). It is not clear whether the said suit has been decided or not?

4. Plaintiff filed an application dated 4.9.1974 paper No. 37C under Order XV Rule 5, C.P.C. for striking off the defence of the tenant for non-deposit of consolidated, admitted rent and monthly rent which was second of its nature. The said

application was rejected on 7.1.1975 and revision filed against the same being Civil Revision No. 164 of 1975 was also dismissed on 4.3.1977. Both the orders are Annexure-S.A. I and S.A. III to the supplementary-affidavit. In Annexure-S.A. III it is mentioned that first application for striking off defence was filed on 7.3.1973 numbered as 20C and was rejected by trial court on the ground that 'the defence is that no rent is due by defendant to the plaintiff. File.' Plaintiff thereafter filed third similar application No. 174C under Order XV Rule 5. C.P.C. which was allowed by J.S.C.C., Varanasi, on 24.4.1990 (Annexure-6 to the writ petition). Against the said order tenant filed revision being Civil Revision No. 91 of 1990. In the said revision the counsel for the tenant moved an application on 1.3.1995 seeking time to deposit the rent. The revision was disposed of in terms of the said application on 4.3.1995 (Annexure-10 to the writ petition). Through the said judgment it was provided that the file should at once be sent to the J.S.C.C. with the direction that after providing opportunity of hearing to both the parties the suit must be decided in accordance with law. In the last but one paragraph of the said judgment it was ordered that the request of learned counsel for the revisionist (tenant) that at least ten days time should be given to make deposit in accordance with his application was accepted and it was directed that the defendant within ten days of the said order should deposit whatever amount he desired to deposit. Tenant-revisionist filed an application on 29.3.1995, before the revisional court (XI A.D.J.. Varanasi) for recall of the order dated 4.3.1995 on the ground that he did not authorise his counsel to move application dated 1.3.1995 and the said application was filed without his instructions. The said application was rejected on 31.3.1995.

5. Through this writ petition orders passed by the J.S.C.C., dated 24.4.1990 and by revisional court dated 4.3.1995 and 31.3.1995 have been challenged.

6. Learned counsel has argued that the application dated 1.3.1995 filed by the counsel of the tenant before the revisional court was dishonestly filed by the counsel and tenant had never authorised him to file said application. Apart from it learned counsel has vehemently argued that the defence of the tenant cannot be struck off for two reasons. Firstly, defendant is not admitting any rent to be due and secondly, the earlier order and judgment passed by the trial court as well as revisional court on similar application of the landlord for striking off the defence

through which the application of the landlord was rejected operates as res judicata.

7. The revisional court did not decide anything. The amount required to be deposited by the tenant was not indicated. It was also left open for the landlords to press the plea of striking off the defence even after the deposit made by the tenant on the ground that deposit was short and was not in accordance with Order XV Rule 5, C.P.C. In my opinion, it is not necessary to decide whether the application dated 1.3.1995 given before the revisional court by the learned counsel for the tenant was given on the instructions of the tenant or otherwise. Through the said application, liability was not admitted and only permission was sought to deposit the amount. Revisional court through judgment dated 4.3.1995, granted liberty to deposit whatever amount the tenant desired to deposit and permitted the trial court to decide the question of striking off the defence thereafter. Subsequently application of the tenant dated 29.3.1995 disowning the application dated 1.3.1995 and praying for recall of order passed by revisional court on 4.3.1995 on the basis of application dated 1.3.1995, may be taken to mean that the tenant was not desirous of depositing any amount. In such situation, even if order of the revisional court dated 4.3.1995 is maintained, still it will have to be seen by the trial court as to whether defence of the tenant is liable to be struck off or not. That is the requirement under the order of revisional court dated 4.3.1995. Directing the J.S.C.C. to decide the question of striking off the defence again after 31 years of filing of the suit will be nothing but travesty of justice. Accordingly, the said question is being decided through this judgment itself.

8. The trial court in its order dated 24.4.1990 has held that there is no evidence that tenant adjusted the interest under mortgage deed in the rent. For deciding the question of striking off the defence under Order XV Rule 5, C.P.C., evidence is not to be looked into. It is only and only the admission of the tenant which is decisive factor. The tenant in the written statement asserted that she was not liable to pay any rent either past or future. In such situation, provisions of Order XV Rule 5, C.P.C., as inserted in the year 1972 or in the year 1976/77, are not applicable. The trial court in its order dated 24.4.1990, distinguished the earlier order dated 7.1.1975 and revisional order dated 4.3.1977 on the ground that provisions of

Order XV Rule 5, C.P.C., had been amended. In my opinion, amendment (substitution) does not affect the point involved in this case. Even under 1976-77 provision of Order XV Rule 5, C.P.C., defence of tenant cannot be struck off if he denies his liability to pay any rent altogether. In this regard, reference may be made to Division Bench authority of this Court in 2003 (1) ARC 637.

9. Accordingly, writ petition is allowed. Orders dated 24.4.1990, passed by the J.S.C.C., Varanasi and dated 4.3.1995 passed by revisional court/XIth A.D.J., Varanasi in Civil Revision No. 91 of 1990 are set aside. It is held that the defence of the tenant is not liable to be struck off. The J.S.C.C., Varanasi, is directed to decide the suit (S.C.C. Suit No. 611 of 1975) as expeditiously as possible as the matter is quite old. Both the parties are directed to appear before the J.S.C.C., Varanasi, on 15.12.2003 along with certified copy of this judgment on which date, date for hearing must be fixed by the J.S.C.C.

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