ITEM NO.13 COURT NO.6 SECTION III-A

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (C) No.2542/2023

(Arising out of impugned final judgment and order dated 21-09-2022 in MUA227 No. 3536/2022 passed by the High Court Of Judicature at Allahabad, Lucknow Bench)

SHYAM KUMAR GUPTA & ORS. Petitioner(s)

VERSUS

SHUBHAM JAIN Respondent(s)

(IA No. 16156/2023 - EXEMPTION FROM FILING C/C OF THE IMPUGNED JUDGMENT AND IA No. 16158/2023 - EXEMPTION FROM FILING O.T.)

Date : 02-02-2023 This matter was called on for hearing today.

CORAM :
HON'BLE MR. JUSTICE DINESH MAHESHWARI
HON'BLE MS. JUSTICE BELA M. TRIVEDI

For Petitioner(s) Mr. Prateek Kumar, AOR
Mr. Ruchir Ranjan Rai, Adv.
Mr. Desh Deepak Singh, Adv.
Mr. Ravindra Vikram, Adv.

For Respondent(s) Mr. Vinayak Mohan, Adv.
Mr. Yatish Mohan, Adv.
Mr. E. C. Vidya Sagar, AOR

UPON hearing the counsel the Court made the following

O R D E R

Leave granted.

The appeal is allowed in terms of the signed reportable judgment.

Pending applications also stand disposed of.

(NEETU KHAJURIA)
ASTT. REGISTRAR-cum-PS

(RANJANA SHAILEY)
COURT MASTER

(Signed reportable judgment is placed on the file.)

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.765 OF 2023
(ARISING OUT OF SLP(C) NO. 2542 OF 2023)

SHYAM KUMAR GUPTA & ORS. **APPELLANT(S)**

VERSUS

SHUBHAM JAIN **RESPONDENT(S)**

JUDGMENT

DINESH MAHESHWARI, J.

Leave granted.

2. This appeal, by the legal representatives of deceased defendant in the civil suit bearing No. 1 of 2015 for recovery of arrears of rent and for ejectment, is directed against the order dated 21.09.2022 passed by the High Court of Judicature at Allahabad, Lucknow Bench in the petition bearing No. 3536 of 2022, whereby the High Court has declined to interfere with the order dated 01.09.2022 passed by the Court of Additional District and Sessions Judge (POCSO Act)-II, Raebareli, rejecting an application under Order IX Rule 13 of Code of Civil Procedure, 1908 ('CPC') for setting aside *ex parte* judgment and decree dated 09.03.2016/16.03.2016.

3. Shorn of unnecessary details and briefly put, the relevant background aspects of the matter are that the respondent herein, asserting his capacity as owner and proprietary right holder, filed the suit

aforesaid against the late father of present appellants in the Small Causes Court, stating that the defendant was a tenant in the suit shop at a monthly rent of Rs. 2,000/- per month and had failed to make payment of rent from the month of February, 2015 to the month of May, 2015, amounting to Rs. 8,000/- and 15% municipal tax despite notice.

4. It appears that in the said civil suit, the Trial Court held the service of summons on the defendant sufficient and proceeded *ex parte* for want of appearance on behalf of the defendant; and after taking evidence, on 09.03.2016, decreed the suit with costs, for recovery of arrears of rent in the sum of Rs. 8,000/- and for eviction of the defendant from the suit shop while also holding the plaintiff entitled to receive damages from the defendant, for use and occupation of the suit shop, at the rate of Rs. 2,000/- per month until delivery of actual vacant possession. The operative part of the judgment dated 09.03.2016 reads as under: -

> "The suit of the plaintiff is decreed ex-parte with cost against the defendant for recovery of the rent Rs. 8,000/- and for eviction of the shop in question and the defendant is ordered that he to hand over the vacant possession of the plaintiff's shop which is at present situated in Municipality House No. 62/3, Ward No. 24, Malikmau Road, near Beliganj Phatak within the jurisdiction of the Municipality, Pargana, Tehsil and District Raebareli, the four boundaries of which are – North by: Malikmau Road, South by: rest building of the plaintiff, East by: House of the plaintiff, West by: House of Hariom are situated, within two months. The plaintiff would be entitled to Receive Rs. 2,000/- per month as the compensation for use of the aforesaid shop during the suit and till handing over the actual vacant possession and occupation of the said shop after paying the Court Fee in the Execution Department."

5. Later on, the defendant, predecessor of the appellants, moved an application under Order IX Rule 13 CPC alongwith an application under

Section 5 of the Limitation Act, 1963 on 20.08.2016. He also moved an application under Section 17 of the Provincial Small Cause Courts Act, 1887 ('the Act of 1887'), alongwith a tender seeking permission to deposit the decretal amount to the tune of Rs. 11,212/-, inclusive of the amount of costs. An objection was taken by the plaintiff-respondent against the application so moved by the defendant with the submissions, *inter alia*, that under the decree in question, he was entitled not only to the said arrears of rent and costs but also to damages at the rate of 2,000/- per month until possession continued with the defendant; and necessary deposit towards damages having not been made, the application for setting aside *ex parte* decree was not maintainable. It is noticed that during pendency of the application aforesaid, the defendant, father of the appellants, expired on 26.09.2017; and an application was moved by the present appellants on 12.03.2018, for their substitution as applicants in place of the deceased applicant.

6. The Trial Court took note of the respective submissions of the parties and upheld the objections of the plaintiff-respondent while observing, *inter alia*, as under: -

> "The applicant Mata Prasad by submitting an application 7g2 in the file of the present Miscellaneous Suit applied for depositing the decretal amount Rs. 8,000/- and cost of the suit Rs. 3212/- total amount Rs. 11,212/- on which an order was passed by the Court that the applicant can deposit the amount on which risk. Thus, it is clear that an amount of Rs. 11,212.00 has been deposited by the applicant Mata Prasad, whereas it is clear from perusal of the passed in the Small Cause Case no. 01/2015 and the decree dated 25-03-2016 passed in the pursuance of it, an order passed

has passed for paying the due rent from the month of February, 2016 to the month of May, 2016 (Total four months) @ Rs. 2,000/- per month which is total Rs. 8,000/- and payment 15% Municipality Tax to be paid @ 9%. Apart from it, it is also mentioned in the decree that until the defendant gives the possession and occupation of the shop in question by vacating it to the plaintiff, till then, compensation of use @ Rs. 2000/- per month be given to the plaintiff from the defendant and the cost of the case be given to the plaintiff from the defendant.

It is clear from integrated perusal of the aforesaid judgment and decree that the judgement and decree have not been complied by the applicant Mata Prasad. Neither the Municipality Tax nor the interest accrued on it and nor the compensation for use till the date of filing the application under Section 13 have been paid by him. Only the rent due since the month of February to the month of May, 2015 @ Rs. 2,000/- per month and the cost of the case Rs. 3212/- total amount Rs. 11,212/- has been deposited by him, the balance amount which was payable by the applicant Mata Prasad to the Opposite Party in compliance of the aforesaid decree and judgment, in that regard, neither any amount has been deposited by the applicant Mata Prasad and nor any permission has been sought from the court by filing any application with regard to submitting any undertaking about the compliance of it. Hence, it is clear that Section 17 of the Provincial Small Causes Court Act, 1887 which imposes compulsory liability on the applicant that the applicant after paying the total amount due under the ex-parte decree and judgment will file the application under Order 9 Rule 13 C.P.C. Word by word and complete compliance of the aforesaid legal provision has not been done by the applicant Mata Prasad and nor any undertaking/guarantee in this regard has been submitted in the Court by him that he is ready and willing to comply with the aforesaid Judgement and decree. In such situation, it is the opinion of the Court that the instant Miscellaneous Civil Suit due to not complying with Section 17 of the Provincial Small Causes Court Act, 1887 is liable to be dismissed and the preliminary objection application 36g2 filed by the Opposite Party is liable to be allowed."

7. Being aggrieved by the aforesaid order dated 01.09.2022, appellants approached the High Court by filing a petition under Article 227

of the Constitution of India, *inter alia*, with the submissions that the defendant had not been served in the said civil suit, and the plaintiff-respondent obtained the decree with concealment of facts. Further, it was submitted that father of the appellants had moved the application immediately after coming to know about *ex parte* decree, and complied with the requirements of Section 17 of the Act of 1887. It was also submitted that the Trial Court had failed to examine if the plaintiff-respondent at all informed the defendant about his ownership after purchasing the shop in question.

8. The High Court, however, agreed with the Trial Court about non-compliance of the requirements of Section 17 of the Act of 1887 and, with reference to the decision of this Court in the case of ***Kedarnath v. Mohan Lal Kesarwari and Ors.*: 2002 ALL CJ 145 [= (2002) 2 SCC 16]**, proceeded to dismiss the petition essentially for want of requisite compliance by the defendant, of depositing the amount due and payable under the decree in question. The High Court, *inter alia*, observed and held as under: -

> "Having heard learned counsel for the parties and having perused the records, what emerges is that the SCC Suit filed by the respondent had been decided ex-parte vide order dated 09.03.2016 against which an application under Order IX Rule 13 of the CPC was filed by the petitioners. Admittedly, the petitioners did not comply with the provisions of Section 17 of the Act, 1887, which provides that the applicant, at the time of presenting the application, shall deposit in 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 in this behalf, had directed.

Perusal of the impugned order dated 01.09.2022 would indicate that the court below has considered the violation of Section 17 of the Act, 1887 by specifically recording that the petitioners have failed to deposit the amount as was due in pursuance to the order dated 09.03.2016.

The Apex Court in the case of Kedar Nath(supra) has held the provisions of Section 17 of the Act, 1887 to be mandatory, as per the observations in the judgment, which, for the sake of convenience, are reproduced below:-

> "In the case at hand, the application for setting aside ex parte decree was not accompanied by deposit in the court of the amount due and payable by the applicant under the decree. The applicant also did not move any application for dispensing with deposit and seeking leave of the court for furnishing such security for the performance of the decree as the court may have directed. The application for setting aside the decree was therefore incompetent. It could not have been entertained and allowed."

Accordingly, considering the law laid down by the Apex Court in the case of Kedar Nath(supra) and the specific finding given by the court below of the provisions of Section 17 of the Act, 1887 not having been complied with rather having been violated by the petitioners, this Court does not find any illegality or infirmity in the orders impugned. Accordingly, the petition is dismissed."

9. Being aggrieved by the order so passed by the High Court, the appellants have approached this Court. While considering the petition leading to this appeal at the initial stage yesterday, i.e., on 01.02.2023 and after taking note of all the facts and circumstances of the case, when this Court queried learned counsel for the appellants regarding the amount towards rent/mesne profits until now due, it was submitted that appellants were ready and willing to immediately deposit the amount so due and, at request, the matter was adjourned for a day.

10. It has been pointed out that today, a sum of Rs.1,90,000/- (Rupees One Lakh Ninety Thousand) has been deposited by the appellants in the Trial Court, in compliance of this Court's order dated 01.02.2023, which is said to be the amount further payable under the decree in question, being that of rent/mesne profits @ Rs. 2,000/- per month, from the month of June, 2015 to the month of April, 2023. A photostat of the tender presented to the Trial Court, with endorsement of deposit in the bank today, has also been placed before us.

11. Taking note of the steps so taken by the appellants and in the totality of circumstances, while granting leave, we have heard learned counsel for the parties finally at this stage itself.

12. Learned counsel for the appellants has essentially submitted that the Trial Court and the High Court have taken too rigid a view of the matter and have failed to consider that the amount directly due under the decree in question, being a sum of Rs. 8,000/- towards arrears of rent and another sum of Rs. 3,212/- towards costs had indeed been deposited by the defendant; and in the given circumstances, the application for setting aside *ex parte* decree could not have been dismissed only for want of deposit of the amount towards further use and occupation of the suit shop. It has also been submitted that it had not been a case of wilful avoidance of the requirements of Section 17 of the Act of 1887 and in any case, the appellants, having now deposited the amount towards rent/mesne profits until the month of April, 2023, deserve an opportunity

to contest the suit on merits. *Per contra, l*earned counsel for the respondent has duly supported the orders impugned and has contended that for want of specific compliance of the requirements of Section 17 of the Act of 1887 at the time of filing of the application for setting aside *ex parte* decree, the view as taken by the Trial Court, duly affirmed by the High Court, cannot said to be unjustified.

13. Having given anxious consideration to the rival submissions and having examined the record, we are clearly of the view that the impugned orders cannot be approved and the appellants deserve an opportunity to contest the suit on merits.

14. Section 17 of the Provincial Small Cause Courts Act, 1887, on which reliance has been placed by the Trial Court and by the High Court while declining the prayer for setting aside *ex parte* decree, reads as under: -

> "**17. Application of the Code of Civil Procedure.**—(1) The procedure prescribed in the Code of Civil Procedure, 1908 (5 of 1908), shall save in so far 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 realized in manner

provided by Section 145 of the Code of Civil Procedure, 1908 (5 of 1908)."

14.1. Rule 13 of Order IX of the Code of Civil Procedure, 1908 could also be extracted for ready reference as under: -

> "**13. Setting aside decree *ex parte* against defendants.-** In any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:
>
> Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:
>
> Provided further that no Court shall set aside a decree passed *ex parte* merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiffs claim.
>
> *Explanation.* - Where there has been an appeal against a decree passed *ex parte* under this rule, and the appeal has been disposed of an any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside the *ex parte* decree."

15. It could be reasonably noticed that in relation to the suit to which the Act of 1887 applies, an applicant seeking an order to set aside the decree passed *ex parte* is required to deposit the amount due under the decree/judgment or has to furnish security for due performance of the decree or compliance with the judgment. Even under Order IX Rule 13 CPC, while making an order for setting aside the decree passed *ex parte*, the Court may put the defendant to terms as to costs, payment into Court or otherwise. However, these requirements need to be visualized from a

practical standpoint and cannot be applied as if to penalize the defendant for every mistake, even if the amount payable is not explicitly quantified in the decree in question.

15.1. For the purpose of the case at hand, as regards the amount payable, a sum of Rs. 8,000/- towards arrears of rent had been quantified in the decree and another sum of Rs. 3,212/- towards costs could have been taken as quantified. Of course, the plaintiff was further held entitled to receive Rs. 2,000/- per month towards rent/mesne profits during the suit and until getting the actual vacant possession of the suit shop after payment of requisite court fees but, the Trial Court did not specifically quantify the amount payable by the defendant even until the date of decree. In the given circumstances, when the defendant, predecessor of the appellants, immediately moved the Court after noticing the decree in question and deposited the amount directly quantified thereunder i.e., the sum of Rs. 8,000/- towards arrears of rent and Rs. 3,212/- towards costs, totalling to Rs. 11,212/-, while seeking the order for setting aside *ex parte* decree, it had not been a case where the defendant had ignored the requirements of deposit altogether. Moreover, the decree in question had not been merely a money decree but had been for eviction too. Looking to the subject-matter of the suit and the overall circumstances, a practical view was required to be taken and if all any further deposit or furnishing of security was considered necessary, appropriate orders could have been passed in that regard. Putting it differently, in terms of Section 17 of the

Act of 1887 read with Order IX Rule 13 CPC, the Court could have extended the time for making deposit if so required, or could have put the defendant to the terms of security for performance of the decree.

15.2. However, for what has been noticed and extracted hereinabove, it is apparent that Trial Court and the High Court have viewed the requirements of Section 17 of the Act of 1887 from such an exacting and rather impractical standpoint that the bonafide attempt of the defendant to seek a merit decision of the suit after due contest has been totally ignored. In our view, in the present set of facts and circumstances, prayer of the defendant to set aside *ex parte* decree could not have been denied for want of further deposit in terms of the decree in question.

15.3. The High Court, while dismissing the petition filed by the appellants and endorsing the views of the Trial Court, has proceeded to rely upon the decision of this Court in the case of ***Kedarnath*** (supra), that the provisions of Section 17 of the Act of 1887 are held to be mandatory. In our view, reference to the said decision remains inapposite in the present case. Even if the requirements of Section 17 of the Act of 1887 are held to be mandatory, the present one had not been a case where the defendant had altogether ignored those requirements. In ***Kedarnath*** (supra), in the very passage reproduced by the High Court, it was clearly noticed that the applicant did not make any deposit and did not move any application for dispensing with deposit or seeking leave of the Court for furnishing security. In the backdrop of such facts, showing total non-

compliance of the requirements of Section 17 of the Act of 1887, this Court held the application for setting aside the decree as incompetent. It is difficult to apply the decision in ***Kedarnath*** (supra) to the facts of the present case.

16. Apart from the above, where we find that the Trial Court and the High Court had taken too technical and impractical a view of the matter, there is another strong reason for which we are inclined to accept the prayer for setting aside the decree passed *ex parte* in this case. As noticed, in response to the queries of this Court, the appellants have immediately taken bonafide steps and have deposited the amount which may be relatable to rent/mesne profits until the month of April, 2023. For this bonafide and prompt step (albeit taken after approaching this Court), in our view, they do deserve an opportunity to contest the suit on merits, particularly when the matter relates to a shop where the predecessor of the appellants had been continuing as tenant and the plaintiff-respondent is seeking the decree for eviction only on the ground of default in payment of rent.

17. Accordingly and in view of the above, this appeal succeeds and is allowed in the manner that while setting aside the impugned orders dated 01.09.2022 and 21.09.2022, the application filed by the appellants under Order IX Rule 13 CPC is allowed and thereby, the *ex parte* judgment and decree dated 09.03.2016/16.03.2016 are set aside. Consequently, the said suit shall stand restored for being considered on its own merits.

18. For the purpose of proceedings in the suit, looking to the time that has elapsed, it shall definitely be required of the Trial Court to assign the same a reasonable priority and to proceed expeditiously, while curbing against unnecessary delay. Further, in the interest of justice, it is also considered appropriate and hence provided that it shall be required of the appellants to submit their written statement(s) on or before 28.02.2023 and thereafter, the Trial Court shall proceed with expedition, as indicated above.

19. As regards the amount deposited by the appellants, we leave it open for the respondent-plaintiff to apply for its withdrawal, if so advised; and if any such prayer is made by the plaintiff, the same may be given due consideration by the Trial Court in accordance with law.

20. The parties through their respective counsel shall stand at notice to appear before the Trial Court on 28.02.2023.

21. Pending applications also stand disposed of.

…….....,J.
(DINESH MAHESHWARI)

…….....,J.
(BELA M. TRIVEDI)

NEW DELHI;
FEBRUARY 02, 2023.