
Before V.S. Aggarwal, J.

M/S KARM ENGINEERING WORKS,—*Petitioner*

versus

M/S M.S. ENTERPRISES,—*Respondent*

C.R. No. 2697 of 1998

The 29th September, 1998

Code of Civil Procedure, 1908—Order 15 Rl. 5—Suit for eviction filed—No specific prayer made for arrears of rent—Trial Court directing payment of arrears of rent within a time bound period and future rent from month to month, failing which plaintiff's defence shall be deemed to be struck off—Order 15 would come into play only where both eviction and recovery of rent are prayed for—In the absence of prayer for arrears of rent the impugned order could not be passed threatening to strike off defence—In any event it is not mandatory for the trial Court to strike off defence, which is a matter of discretion.

Held, that a perusal of Order 15 Rule 5 of the Code of Civil Procedure reveals that it opens with the words “in any suit by a lessor for the eviction of a lessee after the determination of his lease and for the recovery from him of rent...”. It is abundantly clear that Order 15 Rule 5 of the Code which permits the Court to strike off the defence on failure of the tenant to deposit the arrears would come into play if suit is for the recovery of possession and for recovery of rent or compensation for use and occupation. The expression “and” occurring is well known to be conjunctive. Both the conditions, namely, it has to be a suit for eviction and also for recovery of the arrears, must be satisfied. If the suit was only for eviction of lessee and not for recovery, in that event Order 15 Rule 5 of the Code will have no role to play. If in every suit for eviction of the lessee, the arrears were directed to be deposited, in that event there was no point for the Legislature to add that the suit has to be for recovery of rent or compensation for use and occupation.

(Para 10)

Further held that when the arrears of rent were not being claimed in the suit in question, in that event, the respondent was not justified in filing application under Order 15 Rule 5 of the Code. The order of the trial Court, therefore, must be withdrawn.

(Para 11)

Mrs. Abha Rathore, Advocate,—*for the Petitioner*

Jagdev Sharma, Advocate,—*for the Respondent*

V.S. Aggarwal, J.

(1) The present revision petition had been filed by Karm Engineering Works, hereinafter described as the petitioner, directed against the order passed by the learned Additional Civil Judge (Senior Division) Faridabad, dated 15th May, 1998. By virtue of the impugned order, the learned trial Court in exercise of its powers under Order 15 rule 5 of the Code of Civil Procedure (for short “the Code”) directed the petitioner to pay the arrears of rent within three months failing which the defence of the petitioner would be deemed to have been struck off.

(2) The relevant facts are that respondent M/s M.S. Enterprises had filed a suit for ejectment against the petitioner with respect to the property in dispute. It has been alleged that the property in question was let to the petitioner. Initially the rent was Rs. 10,630 per month which was increased to Rs. 20,661 per month. It was further asserted that though petitioner is in arrears of rent but the civil suit is being filed for ejectment of the petitioner only reserving the right to file a suit for recovery. The suit as such was being contested and in the written statement filed, it was pointed out that it is obligatory on the part of the respondent firstly to terminate the tenancy. It was further the case of the petitioner that it had set up construction of the shed and entitled to the cost of this construction. As regards the claim for the recovery of the arrears of rent petitioner’s plea was that such a right cannot be reserved and under Order 2 Rule 2 of the Code, a suit for recovery would be barred.

(3) During the pendency of the suit, an application was filed by the respondent for striking off the defence of the petitioner. It was alleged that the rent is Rs. 20,661.75 per month. It is due from October, 1992 onwards. The petitioner has not deposited the said amount and, therefore the defence of the petitioner should be struck off. The said application had been contested and in the reply filed it was alleged that in the plaint itself only possession has been claimed and no arrears of rent and, therefore, Order 15 Rule 5 of the Code of Civil Procedure will not come into play. It was further contended that the civil suit is not maintainable because of the provisions of the Haryana Urban (Control of Rent & Eviction) Act, 1973.

(4) Learned trial Court *vide* the impugned order held that once the arrears of rent are due, the petitioner must pay the same and directed the petitioner to pay the arrears of rent within three months and further rent month by month by 10th of succeeding month failing which the defence of the petitioner-defendant shall be deemed to have been struck off. Aggrieved by the same, the present revision petition has been filed.

(5) Learned counsel for the petitioner assailed the order of the trial Court on the ground that in the facts, Order 15 Rule 5 of the Code of Civil Procedure is not attracted because arrears of rent have not been claimed specifically and once the arrears of rent are not claimed, such an order i.e. the impugned order cannot be passed.

(6) In the facts of the present case, the contention so raised has merit and cannot be ignored. Order 15 Rule 5 of the Code has been inserted and made applicable *vide* notification dated 10th May, 1991. It reads as under :—

“Order XV, Rule 5

- (1) In any suit by a lessor for the eviction of a lessee after the determination of his lease and for the recovery from him of rent or compensation for use and occupation, the defendant shall, at or before the first hearing of the suit, deposit the entire amount admitted by him to be due together with interest thereon at the rate of nine per cent per annum and whether or not he admits any amount to be due, he shall throughout the continuation of the suit regularly deposit the monthly amount due within a week from the date of its accrual, and in the event of any default in making the deposit of the entire amount admitted by him to be due or the monthly amount due as aforesaid, the Court may, subject to the provisions of Sub Rule (2) strike off his defence.

Explanation 1 : The expression first hearing means the date of filing written statement or for hearing mentioned in the summons or where more than one of such dates are mentioned the last of the dates mentioned.

Explanation 2 : The expression entire amount admitted by him to be due means the entire gross amount whether as rent or compensation for use and occupation, calculated at the admitted rate of rent for the admitted period of

arrears after making no other deduction except the taxes, if any, paid to a local authority in respect of the building on lessor's account and the amount, if any, deposited in any Court.

Explanation 3 : The expression Monthly amount due means the amount due every month, whether as rent or compensation for use and occupation at the admitted rate of rent, after making no other deduction except the taxes, if any, paid to a local authority, in respect of the building on lessor's account. (2) Before making an order for striking off defence, the Court may consider any representation made by the defendant in that behalf provided such representation is made within ten days of the first hearing or, of the expiry of the week referred to in Sub-sec. (1) as the case may be. (3) The amount deposited under this rule may at any time be withdrawn by the plaintiff; provided that such withdrawal shall not have the effect of prejudicing any claim by the plaintiff disputing the correctness of the amount deposited :

Provided further that if the amount deposited includes any sums claimed by the depositor to be deductible on any account, the Court may require the plaintiff to furnish the security for such sum before he is allowed to withdraw the same.

(7) The provisions of Order 15 Rule 5 of the Code have been interpreted and at the outset it deserves observation that it not mandatory to strike off the defence. The Supreme Court in the case of *Bimal Chand Jain Vs. Gopal Agarwal* (1), held that this discretion is to be exercised carefully. In paragraph 6 of the judgment, it was held as under :—

“...A serious responsibility rests on the court in the matter and the power is not to be exercised mechanically. There is a reserve of discretion vested in the court entitling it not to strike off the defence if on the facts and circumstances already existing on the record it finds good reason for not doing so. It will always be a matter for the judgment of the court to decide whether on the material before it, notwithstanding the absence of a representation

(1) A.I.R. 1981 S.C. 1657

under sub-rule (2), the defence should or should not be struck off. The word "may" in sub-rule (1) merely vests power in the court to strike off the defence. It does not oblige it to do so in every case of default..."

(8) Even this Court in the case of *Jai Bhagwan vs. Chandra Mohan and others* (2), held that it is the discretion of the Court to strike off the defence or not to do so. The findings are as under :—

"(2) that while exercising power under Order XV, Rule 5, the Court is not always bound to strike off the defence in the case of failure of a lessee to deposit the amount of rent or compensation together with interest. Rather, the Court has the discretion to strike off or not to strike off the defence after considering the representation, if any, made by the defendant and the relevant facts brought on record of the Court."

(9) Such a discretion, of course, exists with the trial Court. But the basic question, as already referred to above, is as to whether the Court was justified in passing the order in question or not? If the provisions of Order 15 Rule 5 of the Code are not applicable, then such an order directing the tenant to pay the arrears cannot be passed. As a corollary, it follows that defence could also be not struck off.

(10) A perusal of Order 15 Rule 5 of the Code reveals that it opens with the words "in any suit by a lessor for the eviction of a lessee after the determination of his lease and for the recovery from him of rent...." It is abundantly clear that Order 15 Rule 5 of the Code which permits the Court to strike off the defence on failure of the tenant to deposit the arrears would come into play if suit is for the recovery of possession and for recovery of rent or compensation for use and occupation. The expression "and" occurring is well known to be conjunctive. Both the conditions, namely, it has to be a suit for eviction and also for recovery of the arrears, must be satisfied. If the suit was only for eviction of lessee and not for recovery, in that event Order 15 Rule 5 of the Code will have no role to play. If in every suit for eviction of the lessee, the arrears were directed to be deposited, in that event there was no point for the Legislature to

add that the suit has to be for recovery of rent or compensation for use and occupation. In the present case in hand, as referred to above, specifically the respondent alleged that arrears of rent were not being claimed. The respondent pleaded in so many words and the relevant portion of the plaint reads as under :—

“.....The plaintiff has already instituted a complaint under Section 138 of the Negotiable Instruments Act against the defendant, which is pending in the court of Sh. N.K. Kashyap, Additional Chief Judicial Magistrate, Faridabad. *Vide this suit the plaintiff is only seeking ejection and it has reserved its right to file a suit for recovery for the arrears of rent at a later stage, if the need arises.*”
(emphasis added).

(11) When the arrears of rent were not being claimed in the suit in question, in that event, the respondent was not justified in filing application under Order 15 Rule 5 of the Code. The order of the trial Court, therefore, must be withdrawn.

(12) Reliance was placed by the respondent on two decisions of this Court to contend that when arrears of rent are not deposited, the defence deserves to be struck off. But both the decisions to be referred to herein are distinguishable. In the case of *Suresh Kumar vs. Prem Chand* (3), the defence of the tenant was struck off and similar was the position in the subsequent decision rendered in the case of *Mrs. Ablinder Chawla vs. Shri R.K. Gupta* (4). However, in both these cases, the suit was filed for eviction of the tenant and for recovery of the arrears of mesne profits. It is not so in the present case. Herein, at the risk of repetition, it is mentioned that no arrears of rent or damages for use and occupation were claimed. Order 15 Rule 5 of the Code does not apply. The trial Court, therefore, was not justified in passing the impugned order.

(13) For these reasons, the revision petition is allowed and the impugned order is set aside.

R.N.R.

(3) 1993 (2) P.L.R. 408

(4) 1994 (2) P.L.R. 219