

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR.

O R D E R

Om Prakash v. Devendra Kumar & Ors.

S.B.CIVIL WRIT PETITION NO.277/2004
under Articles 226 and 227 of the
Constitution of India.

Date of order : 31st January, 2006

P R E S E N T

HON'BLE MR.JUSTICE GOVIND MATHUR

Mr. Sajjan Singh]
Mr. Durga Ram] for the petitioners.
Mr. D.R.Bhandari, for the respondent.

BY THE COURT :

This writ petition is filed against the order dated 29.8.2003 passed by learned Additional District Judge No.1, Udaipur in Civil Appeal No.35/02 whereby the order dated 12.7.2002 passed by learned Civil Judge (JD), Udaipur City, North, Udaipur has been upheld.

The brief facts necessary to be noticed for disposal of instant writ petition are that the non-

petitioner preferred a suit for arrears of rent and ejectment against the petitioner on the ground of subletting as well as default in payment of rent. The trial court by an order dated 16.1.2001 provisionally determined rent. The non-petitioner preferred an application under Section 13(5) of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 (hereinafter referred to as "the Act of 1950") alleging therein that neither the provisional rent determined has been paid nor deposited, therefore, defence of the petitioner tenant against eviction be struck off. Learned trial court after hearing the parties by an order dated 12.7.2002 struck off the defence of the petitioner. Aggrieved against the order passed by learned trial court the petitioner filed an appeal before the learned District Judge, Udaipur which was transferred for its disposal to learned Additional District Judge No.1, Udaipur who dismissed the same by order dated 29.8.2003. Aggrieved against the orders passed by both the learned courts below instant petition for writ is preferred under Article 227 of the Constitution of India.

It is urged by learned counsel for the petitioner that the appellate court committed a jurisdictional error while failing to appreciate that the plaintiff waived the rights under Section 13(5) of the Act of 1950 by voluntarily accepting the amount of rent during pendency of appeal. According to learned

counsel for the petitioner the trial court instead of deciding the issue with regard to effect of acceptance of provisional rent during pendency of appeal left it open for examination of trial court which is having adverse effect as the petitioner have to bear striking off the defence.

To substantiate the contention, reliance is placed on a decision rendered by Single Bench of this Court in the case of Chetan Das v. Annusuiya, reported in 1995 D.N.J. (Raj.) 686. In the case of Chetan Das (supra) this Court held that on the date of order passed by the trial court under Section 13(5) of the Act of 1950 the cause of action for striking off defence of tenant must be in existence and if the landlord voluntarily accepts provisional rent determined by the court prior to making an order under Section 13(5) of the Act of 1950 by trial court, then the court looses jurisdiction to strike off the defence of the tenant.

I am of the considered opinion that the law laid down by this Court in the case of Chetan Das (supra) is having no application in present set of facts. In the case of Chetan Das (supra) tenant paid provisional rent to the landlord prior to making an order for striking off the defence of tenant, but in the present case till disposal of application under Section 13(5) of the Act of 1950 no amount against

provisional rent was paid by the petitioner tenant to the landlord. The amount was admittedly paid during pendency of appeal. The appellate court rightly refused to examine the effect of payment of provisional rent during pendency of appeal as while exercising appellate jurisdiction it was examining validity and propriety of the order passed by the trial court on 12.7.2002. Learned appellate court while affirming the order passed by the trial court held that the tenant failed to deposit or pay the provisional rent determined by the trial court within the time period specified, as such an order to struck off defence was rightly passed. Section 13(5) of the Act of 1950 puts an embargo upon a trial court to the effect that if a tenant fails to deposit or pay any amount referred to in sub-sec.(4) on the date or within the time specified, the court shall order the defence against eviction to be struck out and shall proceed with hearing of the suit.

In the instant matter it is the position admitted that the petitioner neither paid nor deposited the provisional rent determined till disposal of the application under Section 13(5) of the Act of 1950.

In view of it, I do not find any error in the orders impugned which may warrant interference of this court under Article 227 of the Constitution of India.

The writ petition, therefore, is having no merit and the same, therefore, is dismissed.

(GOVIND MATHUR), J.

kkm/ps.