

BIMAL CHAND JAIN

v.

SRI GOPAL AGARWAL

July 27, 1981

[R.S. PATHAK, O.CHINNAPPA REDDY AND
BALARUL ISLAM, JJ.]*Civil Procedure Code Rule 5 Order XV—Default in payment of arrears of rent during the pendency of suit—Court if competent to strike off defence.*

Rule 5 of Order XV C.P.C. was re-enacted by the U.P. Act 1976 and it provided that the defendant shall deposit the entire amount of rent due from him together with interest at or before the first hearing of the suit for eviction and also continue to deposit the monthly amount regularly and that on failure to do so, his defence was liable to be struck off. Another rule provided that before striking off the defence, the Court may consider any representation made in that behalf.

The respondent filed a suit against the appellant for ejectment and recovery of arrears of rent. The appellant filed written statement and resisted the suit. The appellant during the pendency of the suit committed default in depositing the rent regularly and the respondent filed application under Rule 5 Order XV C.P.C. for striking off the appellant's defence. The appellant attempted to show that he had been depositing the rent as required by law. The trial court accepted the application and held that the appellant had failed to make any representation permitted by him under sub-rule (2) of Rule 5 of Order XV within time. The trial court accordingly struck off the defence and the High Court affirmed the order of the trial court on the ground that where no representation was made or if made was filed beyond time, the Court was bound to strike off the defence and enjoyed no discretion in the matter.

Allowing the Special Leave Petition,

HELD : An order under sub-rule (1) striking off the defence is in the nature of a penalty. 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 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. [128 C-D]

Puran Chand v. Pravin Gupta, Civil Revision No. 356 of 1978 decided on October 30, 1980 All. H.C. overruled.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1759 of 1981

Appeal by special leave from the judgment and order dated 3rd December, 1980 of the Allahabad High Court in Civil Revision No. 525 of 1980

F.S. Nariman and *K.K. Mohan*, for the Appellant.

R. K. Garg, *Pramod Swarup* and *Sunil Kumar Jain*, for the Respondent.

The Judgment of the Court was delivered by

PATHAK, J. In a suit for ejectment of a lessee and for recovery of arrears of rent, does the court enjoy any discretion not to strike off the defence in case the defendant has defaulted in depositing the rent and has also failed to make any representation within the terms of Rule 5 of Order XV, Code of Civil Procedure? That question is raised in this defendant's appeal by special leave against an order of the Allahabad High Court maintaining in revision that the trial court has no discretion in the circumstances but must strike off the defence.

The respondent as lessor filed a suit against the appellant as lessee for his ejectment and for recovery of arrears of rent. The appellant filed a written statement and resisted the suit. During the pendency of the suit the respondent filed an application praying that the appellant's defence be struck off in view of Rule 5 of Order XV, Code of Civil Procedure, inasmuch as the appellant had committed default in depositing the rent regularly. The appellant opposed the application and attempted to show that he had been depositing the rent as required by the law. The trial court held that while the rental arrears admitted by the appellant to be due had been deposited in accordance with the relevant provision of sub-rule (1) of Rule 5 of Order XV, he had failed to make regular deposits of the monthly rent accruing during the pendency of the suit as required by the other provision of the said Rule. The trial court also noted that the appellant had failed to make any representation permitted him by sub-rule (2) of Rule 5 of Order XV within the time prescribed in that provision. Following a ruling of the Allahabad High Court

A that in those circumstances the court was obliged to strike off the defence, that trial court did exactly that. The appellant applied in revision to the High Court, and the High Court, in view of the view taken by a Division Bench in *Puran Chand v. Pravin Gupta*,⁽¹⁾ affirmed the order of the trial court.

B Rule 5 of Order XV, Code of Civil Procedure, was enacted by the U.P. Civil Laws (Amendment) Act 1972. It provided that unless the defendant deposited the admitted rent or compensation at or before the first hearing of the suit and also deposited the monthly rent regularly, his defence was liable to be struck off. There was a further provision entitling a defendant to make a representation and obtain further time to make the deposit. The Rule was repealed by C U.P. Act No. 57 of 1976 and was re-enacted as follows :

D *"Striking off defence on failure to deposit admitted rent, etc.—*(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 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.

F *Explanation 1*

Explanation 2

Explanation 3

G (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

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(1) Civil Revision No. 356 of 1978 decided on October 30, 1980.
(Allahabad High Court)

expiry of the week referred to in sub-section (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 security for such sum before he is allowed to withdraw the same".

The High Court held in *Puran Chand* (supra) that if the representation contemplated by sub-rule (2) was not made within the time prescribed therein the court had no jurisdiction to entertain a representation made beyond time and to condone the delay in making it. It held further that where no representation was made, or if made was filed beyond time, the court was bound to strike off the defence and enjoyed no discretion in the matter.

It appears on the facts in this case that no representation under sub-rule (2) was made by the appellant. The only question raised before us is whether, in the absence of such representation, the court was obliged to strike off the defence of the appellant.

It seems to us on a comprehensive understanding of Rule 5 of Order XV that the true construction of the Rule should be thus. Sub-rule (1) obliges the defendant to deposit, at or before the first hearing of the suit, the entire amount admitted by him to be due together with interest thereon at the rate of nine per cent per annum and further, whether or not he admits any amount to be due, to deposit regularly throughout the continuation of the suit the monthly amount due within a week from the date of its accrual. In the event of any default in making any deposit, "the court may subject to the provisions of sub-rule (2) strike off his defence". We shall presently come to what this means. Sub-rule (2) obliges the court, before making an order for striking off the defence to consider any representation made by the defendant in that behalf. In other words,

A the defendant has been vested with a statutory right to make a representation to the court against his defence being struck off. If a representation is made the court must consider it on its merits, and then decide whether the defence should or should not be struck off. This is a right expressly vested in the defendant and enables him to show by bringing material on the record that he has not been guilty of the default alleged or if the default has occurred, there is good reason for it. Now, it is not impossible that the record may contain such material already. In that event, can it be said that sub-rule (1) obliges the court to strike off the defence? We must remember that an order under sub-rule (1) striking off the defence is in the nature of a penalty. 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 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. To that extent, we are unable to agree with the view taken by the High Court in *Pu'an Chand* (supra). We are of opinion that the High Court has placed an unduly narrow construction on the provisions of clause (1) of Rule 5 of Order XV.

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F In the circumstances, the appeal is allowed, the order dated December 3, 1980 of the High Court is set aside and the case is remanded to the High Court for fresh consideration. In the circumstances, there is no order as to costs.

N.K.A.

Appeal allowed.