

Before Hon'ble G. S. Singhvi, J.

JAI BHAGWAN,—Petitioner.

versus

CHANDRA MOHAN AND OTHERS,—Respondents.

C.R. No. 2109 of 92

19th April, 1995

Code of Civil Procedure, 1908—Order 15, Rl. 5—Whether retrospective in nature, if so, its affect on pending cases.

Held, that a look at the provisions contained in Rule 5(1), read with Rule 5(2) shows that the rule making authority has not thought it proper to make it expressly retrospective and as has been observed above, being a substantive provision, it cannot be treated as retrospective by implication. The impossibility of the defendant in a pending suit to comply with the requirement of deposit of the amount of rent or compensation together with interest at or before the first date of hearing of the suit and his inability to make a representation in terms of rule 5(2) also supports the conclusion that the rule is prospective in nature.

(Para 19)

Further held, that Order XV, Rule 5, C.P.C. as introduced by the notification dated 10th May, 1991 published in the official Gazette dated 14th May, 1991 is prospective in nature and the said provision cannot be applied to the suits pending on the date of publication of the said notification.

(Para 34)

Code of Civil Procedure, 1908—Order 15, Rl. 5—Failure of lessee to deposit rent together with interest on first date of hearing—Discretion with Court to strike off or not to strike off defence.

Held, that no doubt Order XV Rule 5(1) in terms does not contain any provision authorising the Court to extend the time for deposit of rent etc. but the very use of the expression may strike off his defence shows that the rule making authority has reserved discretion with the Court not to strike off the defence if it is satisfied that the defendant was prevented from making deposit of the arrears of rent etc. for good and sufficient reasons. Order XV, Rule 5 merely vests power in the Court to strike off the defence. This means that the Court is not obliged to strike off the defence in each

and every case where the defendant defaults in making the deposit of the entire amount together with interest.

(Para 23)

Further held, that it must be held that the provision contained in Order 15, Rule 5(1) does not make it obligatory for the Court to strike off the defence in each and every case where the tenant defaults in the deposit of rent or compensation together with interest. The Court is vested with the discretion to strike off the defence or not to do so.

(Para 31)

1989 (2) Allahabad Rent cases 21.

dissented.

M. L. Sarin, Sr. Advocate, with Alka Sarin, Advocate, for the
Petitioner.

B. R. Gupta, Advocate, for the Respondents.

ORDER

G. S. Singhvi, J.

(1) Two interesting questions which arise for determination in this revision petition are as to whether Order 15, Rule 5 Code of Civil Procedure is retrospective so as to affect pending cases and whether the court has no discretion to extend the time for deposit of arrears of rent etc.

(2) The suit filed by the respondents for possession of the shop in dispute is pending trial before the Court of learned Sub Judge, Charkhi Dadri. The plaintiff-respondents have claimed themselves to be the owners of the shop in question and have pleaded that after termination of tenancy of the tenant-petitioner, the latter has no right to continue with the possession on the suit property. The defendant-petitioner has contested the suit by alleging that the plaintiff-respondents do not have any right to seek his eviction. During the pendency of the suit, the defendant-petitioner filed an application under Order VI, Rule 17, Code of Civil Procedure, for amendment of the written statement and the plaintiff-respondents filed an application to strike off the defence of the defendant petitioner under Order XV, rule 5, Code of Civil Procedure, on the ground of non-payment of rent/compensation for use and occupation of the suit premises.

(3) After considering the cases set up by the parties, the learned Sub Judge rejected the application for amendment filed by the defendant-petitioner and allowed the application filed by the plaintiff-respondents to strike off the defence of the petitioner. The learned Sub Judge held that the provision contained in Order XV,

Rule 5, C.P.C. introduced by notification dated 10th May, 1991 is retrospective in character. The learned Sub Judge further held that as the defendant-petitioner has failed to pay the rent/compensation together with interest for use and occupation of the shop in dispute his defence is liable to be struck off.

(4) During the course of hearing, Shri Sarin made a statement that he is not challenging the order passed by the learned Sub Judge in so far as it relates to rejection of the application filed by the defendant-petitioner under Order VI, Rule 17. On the issue of applicability of the provision of Order XV, Rule 5, Shri Sarin argued that the suit was filed by the respondents in the year 1989 and as the provision of Order XV, Rule 5, has been inserted by notification dated 10th May, 1991, the same can have no application to the pending proceedings. Shri Sarin argued that Order XV, Rule 5, introduces a penal provision and, therefore, it cannot be applied to the pending cases. According to the learned counsel, Order XV, Rule 5, is prospective in character and, therefore, the learned Sub Judge was in error in invoking the said provision for striking off the defence of the petitioner. Shri Sarin argued that it was impossible for the tenant to comply with the provision of Order XV, Rule 5, because the first date of hearing of the suit was much prior to the date of insertion of Order XV, Rule 5, and it could not have been possible for the tenant to avail of the opportunity envisaged in that provision in order to avoid the penalty which he could suffer in case of his failure to avail the opportunity to deposit the entire amount of rent etc. An alternative contention raised by Shri Sarin is that even if the provision contained in Order XV, Rule 5, is held to be retrospective, it was not open to the learned Sub Judge to have straightaway passed an order striking off the defence of the petitioner without giving him a reasonable opportunity to deposit the arrears of rent etc. Shri B. R. Gupta, learned counsel appearing for the respondents argued that Order XV, Rule 5, is only a procedural provision and as the procedural provision is always retrospective in nature, the learned trial Court was right in applying the provisions of Order XV, Rule 5, to the case of the petitioner. Shri Gupta argued that a similar provision introduced by the State of Uttar Pradesh has been held to be retrospective in *Kashi Ram v. Hari Chand*, Allahabad Rent Cases, 1982 (Civil Revision No. 1522 of 1979 decided by Allahabad High Court on November 18, 1981), and *Smt. Mehrun Nisan and others v. IXth Additional District Judge, Kanpur, and others* (1).

(1) 1989 (2) Allahabad Rent Cases 21.

He also placed reliance on the decision of the Supreme Court in *K. S. Paripoornan v. State of Kerala and others* (2).

(5) In order to decide as to whether the provisions of Order XV, Rule 5, in prospective or retrospective, it will be useful to refer to that provision.

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 to 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 for 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-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 the security for such sum before he is allowed to withdraw the same."

(6) A plain reading of the above quoted provisions shows that in a suit filed for ejection of a lessee the Court can strike off the defence in case the defendant defaults in depositing the entire amount of rent or compensation for use and occupation and continues to deposit the monthly amount due with effect from the date of its accrual. Explanation 1 elaborates the expression 'first hearing', which means the date of filing written statement or for hearing mentioned in the summons. Explanations 2 and 3 define expressions 'entire amount admitted by him to be due' and 'monthly amount due'. Sub-section (2) gives power to the Court to consider the representation made by the defendant within 10 days of the first hearing or of the expiry of the week referred to in sub-section (1).

(7) The expression 'first hearing' has been used in various enactments and has been interpreted by the Supreme Court as well as the High Courts in a large number of cases. In *Ved Parkash v. Vishwa Mohan* (3), their Lordships dealt with the expression 'first hearing' used in the U.P. Urban Buildings (Regulation of Letting Rent and Eviction) Act, 1972. After analysing the provisions of the said Act, the Supreme Court held—

“The question of law raised before us may perhaps be pronounced upon as it is of general importance. Section 20(4) of the Act which we have excepted above fixes the crucial date for deposit of rent as ‘at the first hearing of the suit’. What is ‘the first hearing of the suit’ ? Certain decisions have been cited before us of the Allahabad High Court which indicate that ‘the first hearing of the suit’ is when, after framing of issues, the suit is posted for trial, that is, production of evidence..... We seen none here and, therefore, adopt as correct the decision of the High Court regarding the meaning of the expression ‘at the first hearing of the suit’. We may however add that the expression ‘at the first hearing of the suit’ is also to be found in Order 10, Rule 1, Order 14, Rule 1(5) and Order 15, Rule 1 of the Code of Civil Procedure. These provisions indicate that ‘the first hearing of the suit’ can never be earlier than the date fixed for the preliminary examination of the parties (Order 10, Rule 1) and the settlement of issues (Order 14, Rule 1(5)).”

(8) A similar expression used in section 13 (2) (i) of the East Punjab Urban Rent Restriction Act, 1949 was interpreted by the Supreme Court in *Sham Lal v. Atma Nand Jain Sabha (Regd.), Dal Bazar* (4). After making a reference to its decision in *Ved Parkash's case* (supra), the Supreme Court held—

“From the objects of the Punjab Act of 1949 it is abundantly clear that the Act was enacted with the object of affording protection to the tenants against arbitrary increase of rent of certain premises within the limits of urban areas as well as from eviction of the tenants from the rented premises. In this context it is imperative that the words ‘the first hearing of the application’ have to be interpreted in a manner which promote the object of this beneficial legislation. Viewed from this aspect it is clear that the words, ‘first hearing of the application’ as used in proviso (i) to sub-section (2) of S. 13 of the Act does not mean the day fixed for return of the summons or the returnable day but the day when the Court applies its mind to the case, which ordinarily would be at the time when either the issues are determined or evidence taken.”

(9) In *Siraj Ahmad Siddiqui v. Shri Prem Nath Kapoor* (5), their Lordships of the Supreme Court again interpreted the expression "date of first hearing" used in the U.P. Act and held that the date of hearing as defined in the Act is the date on which the Court proposes to apply its mind to determine the points in controversy between the parties to the suit and to frame issues, if necessary.

(10) Though the expression used in Order XV, Rule 5, has been given a specific meaning by virtue of Explanation 1 and it means that the date of filing the written statement or for hearing mentioned in the summons, principles laid down by the Supreme Court are quite relevant for the purpose of interpreting the provisions contained in order XV, Rule 5, read with Explanation 1. Viewed in the light of the Supreme Court decisions, it must be held that in order to avoid an adverse order in terms of Rule 5 of Order XV the lessee must deposit the entire amount of rent or compensation on the date fixed by the Court for filing the written statement or the date of hearing mentioned in the summons. This would necessarily mean the date on which the Court applies its mind to the subject-matter of the suit.

(11) However, what is important to be noted in the instant case is that the suit was filed much prior to 14th May, 1991, i.e. the date of publication of the notification dated 10th May, 1991 by which rule 5 has been added to Order XV of the Code of Civil Procedure. For the purpose of the suit filed by the respondents in the year 1989 the date of first hearing had come and gone long before the insertion of rule 5 and, therefore, it was impossible for the petitioner to take advantage of the provision relating to the deposit of the amount of rent, interest etc. on the first date of hearing. This must be the position in majority of the suits which were pending on 14th May, 1991. This impossibility of compliance of the provisions of Rule 5 is a factor which shall have to be kept in view while determining the issue relating to applicability of the said provision. Another important factor which has to be taken note of is that the provision introduced,—*vide* notification dated 10th May, 1991 imposes a penalty/disqualification on the tenant/lessee in case of his failure to comply with the condition of deposit of rent or compensation for the use and occupation of the leased premises. The striking off the defence of a lessee deprives him of his right to contest the suit on merits and, therefore, an order of the Court striking off the defence

has grave consequences. This being the import of Rule 5, it cannot be treated as a procedural provision. To my mind, Rule 5, which creates a new disability for the tenant/lessee in case of his failure to deposit the amount of rent or compensation and which affects the rights of the tenant is a substantive provision and, therefore, it cannot be treated as retrospective.

(12) Whether a statute is prospective or retrospective in character is a matter which cannot be decided easily. While procedural statutes are ordinarily treated as retrospective. The statutes which take away or impair the existing rights or create new obligations or impose new duties or attach new disabilities in respect of transactions of the past or which impose new burden on the parties are ordinarily regarded as prospective. Of course, if the Legislature gives retrospective effect to such a statute, the Court has no option but to give full effect to the legislative intendment.

(13) In *Gardner and Co. Ltd. v. Cone and another* (6), (Chancery Division), retrospective operation of a statute was explained in the following words :—

“ ‘Retrospective’, used with reference to a statute, may mean that the statute affects contracts existing at the date when it comes into operation. A statute may be more properly described as retrospective because it applies to transactions completed, or to rights and remedies accrued, before it came into force. It may apply, again, to such matters as procedure and evidence. But, although a statute may affect an existing contract, it cannot have the effect of making lawful *ex post facto* something which constituted a breach of that contract when it was done. A fortiori is this so when an action for the breach has been committed before the Act came into operation.”

(14) In *The Workmen of M/s Firestone Tyre and Rubber Co. of India P. Ltd. v. The Management and others* (7), the question of applicability of section 11-A of the Industrial Disputes Act, 1947 to the pending proceedings arose for consideration before the Supreme Court. This section came to be inserted in the Industrial Disputes Act, 1947 by the Amending Act which came into force on 14th December, 1971. Their Lordships of the Supreme Court declared

(6) 1928 All England Law Reports 458.

(7) A.I.R. 1973 S.C. 1227.

that the provisions contained in section 11-A cannot be applied to the pending proceedings and will apply only to the references made after 14th December, 1971. The Court held :—

“The words ‘has been referred’ in section 11-A are no doubt capable of being interpreted as making the section applicable to references made even prior to 15th December, 1971. But is the section so expressed as to plainly make it applicable to such references. In our opinion, there is no such indication in the section. In the first place, as we have already pointed out, the section itself has been brought into effect only some time after the Act had been passed. The proviso to section 11-A which is as much part of the section, refers to ‘in any proceeding under this section.’ Those words are very significant. There cannot be a ‘proceeding under this section’, before the section itself has come into force. A proceeding under that section can only be on or after 15th December, 1971. That also gives an indication that section 11-A applies only to disputes which are referred for adjudication after the section has come into force.”

(15) The Supreme Court further held :—

“The section has the effect of altering the law by abridging the rights of the employer inasmuch as it gives power to the Tribunal for the first time to differ both on a finding of misconduct arrived at by an employer as well as the punishment imposed by him. Hence in order to make the section applicable even to disputes, which had been referred prior to the coming into force of the section, there should be such a clear, express and manifest indication in the section. There is no such express indication. An inference that the section applies to proceedings, which are already pending, can also be gathered by necessary intendment. In the case on hand, no such inference can be drawn as the indications are to the contrary.”

(16) In *Govinddas and others v. The Income-tax Officer and another* (8), their Lordships of the Supreme Court held that where assessment of Hindu undivided family was made under the old

Act, the Income-tax Officer was not entitled to invoke the provisions of section 171 of the new Act for the purpose of recovering the tax or any part thereof (as determined in re-assessment proceedings) personally from any member of the joint family.

(17) In *M/s Punjab Tin Supply Co. Chandigarh, etc. etc. v. Central Government and others* (9), their Lordships of the Supreme Court enunciated the principles of interpretation in the following words :—

“All laws which affect substantive rights generally operate prospectively and there is a presumption against their retrospectivity if they affect vested rights and obligations unless the legislative intent is clear and compulsive. Such retrospective effect may be given where there are express words giving retrospective effect or where the language used necessarily implies that such retrospective operation is intended. Hence the question whether a statutory provision has retrospective effect or not depends primarily on the language in which it is couched. If the language is clear and unambiguous effect will have to be given to the provision in question in accordance with its tenor. If the language is not clear then the Court has to decide whether in the light of the surrounding circumstances retrospective effect should be given to it or not.”

(18) In *Pyare Lal Sharma v. Managing Director, Jammu and Kashmir Industries Ltd. and others* (10), the apex Court held that where the rules relating to discipline were amended to make unauthorised absence from duty as misconduct, absence of the employed prior to the amendment cannot be made a ground for taking proceedings against him under the new regulations.

(19) A look at the provisions contained in Rule 5(1), read with Rule 5(2) shows that the rule making authority has not thought it proper to make it expressly retrospective and as has been observed above, being a substantive provision, it cannot be treated as retrospective by implication. The impossibility of the defendant in a pending suit to comply with the requirement of deposit of the amount of rent or compensation together with interest at or before the first

(9) A.I.R. 1984 S.C. 87.

(10) A.I.R. 1989 S.C. 1854.

date of hearing of the suit and his inability to make a representation in terms of rule 5(2) also supports the conclusion that the rule is prospective in nature.

(20) Another look at the matter also leads to the conclusion that the provision is prospective. If it was to be treated as retrospective so as to be applicable to the pending suits, the expression 'at or before the first hearing of the suit' will have to be given two different interpretations, i.e. one for the suits filed on or after 14th May, 1991 and the other in respect of the suits which were pending on that date. In respect of the fresh category of suits the expression 'first hearing' will have to be incorporated in terms of Explanation I read with Rule 5(2) and the lessee will have an opportunity of depositing the amount of rent or compensation in accordance with the expression used in the rule, whereas in respect of pending suits the Court will have to fix some date for the lessee to deposit the amount of rent or compensation etc. This anomalous result could not have been intended by the rule-making authority and since it is possible to avoid such an anomalous situation by interpreting the provisions as prospective, there is every justification to hold that Order XV, Rule 5, is prospective in its application.

(21) The two decisions of the Allahabad High Court, on which reliance has been placed by the learned counsel for the respondents, do not really provide any guidance for interpretation of rule 5 as introduced by Notification dated 10th May, 1991. Neither of the two decisions show that the learned Judges have made an in-depth examination of the issue of retrospective applicability of Rule 5 as introduced by the U.P. Amendment. Rather, both the learned Judges decided the cases on the assumption that order XV, Rule 5, is merely procedural. With great respect, I find myself unable to follow the view taken by the Allahabad High Court in the two cases referred to above.

(22) The decision of the Supreme Court in *K. S. Paripoornan v. State of Kerala and others* (supra) relates to the applicability of section 23(1-A) of the Land Acquisition Act. Their Lordships of the Supreme Court held that the provision by which additional compensation became payable to the land-holders in lieu of their lands was prospective and had no applicability to the awards pronounced by the Collector prior to the commencement of the provision. The general proposition of law laid down in that case does not in any manner help the cause of the respondents.

(23) The second question which requires determination is as to whether it is mandatory for the Court to strike off the defence of a lessee in every case where the lessee fails to deposit the amount of

rent or compensation together with interest, or any discretion vests with the Court concerned to extend the time for deposit of the amount of rent etc. No doubt Order XV, Rule 5(1) in terms does not contain any provision authorising the Court to extend the time for deposit of rent etc. but the very use of the expression "may strike off his defence" shows that the rule-making authority has reserved discretion with the Court not to strike off the defence if it is satisfied that the defendant was prevented from making deposit of the arrears of rent etc. for good and sufficient reasons. In my opinion, Order XV, Rule 5, merely vests power in the Court to strike off the defence. This means that the Court is not obliged to strike off the defence in each and every case where the defendant defaults in making the deposit of the entire amount together with interest. Moreover, sub-rule (2) of rule 5 enables the defendant to make a representation within the stipulated time and the Court is required to consider such a representation before passing an order to strike off the defence. This also shows that in every case the Court is not obliged to strike off the defence. Rather, it is a matter in which the Court has to judiciously consider the representation/request, if any, made by the defendant for allowing him time to deposit the rent. In every case the Court has to decide whether on the basis of the material placed before it the defence of the defendant should or should not be struck off. A somewhat similar provision contained in Order XV, Rule 5, as inserted by the U.P. (Civil Laws) Amendment Act, 1972, has been interpreted by the Supreme Court in *Bimal Chand Jain v. Gopal Aggarwal* (11). The Supreme Court held that the Court has the discretion not to strike off defence if on the facts and circumstances already existing on record there is good reason for not doing so.

(29) In *Shyamcharan Sharma v. Dharamdas* (12), the provision of the Madhya Pradesh Accommodation Control Act providing for striking off the defence was considered by the Supreme Court and it was held that the mere delay of few days is not sufficient to strike off the defence and that the Court had the discretion to condone the delay.

(25) In *Santosh Mehta v. Om Prakash* (13), the provisions contained in the Delhi Rent Control Act have been interpreted and

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

(12) A.I.R. 1980 S.C. 587.

(13) A.I.R. 1980 S.C. 1664.

it has been held that striking off the defence of a tenant is extremely harsh and having regard to the benign scheme of legislation this power is meant for use in grossly recalcitrant situation where a tenant is guilty of disregard in paying rent. There must be wilful failure, deliberate default or volitional non-performance. Same view was reiterated in *Ram Murti v. Bhola Nath*, A.I.R. 1984 S.C. 1392, a case in which once again the Supreme Court interpreted the provisions of the Delhi Rent Control Act.

(26) In *Ganesh Prasad Sah Kesari v. Lakshmi Narain Gupta* (14), the word 'shall' used in section 11-A of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 was held to be directory and not mandatory. The Court held that even though the word 'shall' was used by the Legislature, it was liable to be read as 'may'.

(27) In *M/s B. P. Khemka Pvt. Ltd. v. Birendra Kumar Bhowmick and another* (15), the word 'shall' occurring in section 17(3) of the West Bengal Premises Tenancy Act has been held to be directory and not mandatory. In that case also the Supreme Court held that :—

“It has been uniformly held that the powers of discretion vested in the Rent Controller give him further right to condone the delay in deposit of the rent for the subsequent months.”

(28) In *M/s Kumar Medical Agencies v. Smt. Nirmal and others* (16), a learned Single Judge of this Court has followed the decision of the Supreme Court in *Bimal Chand Jain's* case (supra) and held that the provision contained in order XV, Rule 5, should not be applied mechanically and that the Court concerned must apply its mind to the relevant circumstances before passing an order to strike off the defence.

(29) A full Bench of the Rajasthan High Court considered a similar provision contained in section 13(4) of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 in *Vishandas v. Savitri Devi* (17). Therein it has been held that it is not mandatory

(14) A.I.R. 1985 S.C. 964.

(15) A.I.R. 1987 S.C. 1010.

(16) 1994 (1) P.L.R. 154.

(17) 1988 (1) Rajasthan Law Reporter 1.

for the Court to strike off the defence where the tenant fails to deposit the arrears of rent together with interest. The Full Bench further held that the Court has power in the interest of justice and equity to extend time beyond the limit prescribed in section 13(4).

(30) In *Ramesh Chandra v. Man Mohan Singh and another* (18), J. S. Verma Chief Justice (as his Lordship then was) held that in view of the decisions of the Supreme Court in *Shyamcharan Sharma's case* (supra), *Santosh Mehta's case* (supra) and a large number of other cases, a subsequent decision of a Bench of smaller number of Judges in *Mrs. Manju Chowdhary and another v. Dulal Kumar Chandra* (19), need not be followed. He held that the decisions rendered by a Larger Bench of the Supreme Court must be followed in preference to a decision by a smaller Bench in case of conflict between the two.

(31) In view of the above, it must be held that the provision contained in Order 15, rule 5(1) does not make it obligatory for the Court to strike off the defence in each and every case where the tenant defaults in the deposit of rent or compensation together with interest. The Court is vested with the discretion to strike off the defence or not to do so. What the court is required to do is to apply its judicial discretion having regard to the facts of the case and then decide whether it is just and proper to strike off the defence. If an order is passed by the Court striking off defence without due application of mind to the relevant principles governing the exercise of discretion, this Court will have the power under section 115, C.P.C. to interfere with the order passed by the trial court.

(32) The order passed by the learned Sub Judge, Charkhi Dadri shows that after holding that the provision contained in Order XV, rule 5, is applicable to the pending proceedings, the learned Sub Judge straightway passed the order striking off the defence of the petitioner. It did not at all apply its mind to the facts of the case. The Court did not even consider the fact that there was a serious doubt about the applicability of the provisions of Order XV, Rule 5 and the tenant was not shown to be guilty of deliberate default in the deposit of the rent. Therefore, there is no escape from the conclusion that the learned Sub Judge has passed the order of

(18) 1988 (2) Rajasthan Law Reporter 194.

(19) 1988 (1) R.C.J. 156.

striking off the defence without application of mind. The order passed by the learned Sub Judge suffers from a material irregularity in the exercise of its jurisdiction and this has occasioned failure of justice.

(33) Argument of Shri Gupta that the petitioner should not have taken chances after the filing of the applications by the respondent on 16th July, 1991, 3rd October, 1991 and 25th November, 1991 does appear to be attractive but it cannot be ignored that the question involving interpretation of Order XV, Rule 5 was very much pending before the Court and if the tenant waited for a decision of the Court, he cannot be held to be guilty of negligence.

(34) As a result of the above discussion, it is held :—

- (1) that Order XV, Rule 5, C.P.C. as introduced by the notification dated 10th May, 1991 published in the Official Gazette dated 14th May, 1991 is prospective in nature and the said provision cannot be applied to the suits pending on the date of publication of the said notification; and
- (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.

(35) In view of the above findings, the revision petition is allowed. The order dated 6th June, 1992 passed by the learned Sub Judge, Charkhi Dadri, is set aside. Taking into consideration the joint request made by the learned counsel for the parties that this Court may not remand the case but may itself pass the order directing the petitioner to deposit the arrears of rent together with interest, I direct that the petitioner shall, if he has not already deposited the amount of rent together with interest, should deposit that amount before the trial Court by 31st May, 1995.

(36) Since the matter has remained pending before this Court for the last almost three years, the learned trial Court is directed to expeditiously decide the suit filed by the respondents.

The parties are to bear their own costs.