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(1967) 04 CAL CK 0001

Calcutta High Court

Case No: Appeal from Original Decree No. 523 of 1960

Nazrul Islam — APPELLANT

Vs

Manna Singh — RESPONDENT

Date of Decision: April 4, 1967

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 27, Order 47 Rule 1, 151
- Limitation Act, 1963 - Section 5
- West Bengal Premises Tenancy Act, 1956 - Section 17(1), 17(2), 17(3), 21, 25

Citation: (1968) 1 ILR (Cal) 170

Hon'ble Judges: Sinha, C.J; Arun K. Mukherjea, J

Bench: Division Bench

Advocate: Jitendra Kumar Guha, Radha Kanta Bhattacharya and Ajit Kumar Roy, for the Appellant; T.P. Das and Sudhansu Kumar Bose, for the Respondent

Judgement

Sinha, C.J.
This is a tenant"s appeal against a decree for ejectment passed by the Fifth Bench of the City Civil Court, Calcutta, on July 29, 1960. The facts are briefly as follows: The Respondent Manna Singh is the owner of premises No. 4/2, Nawab Abdul Latif Street, Calcutta. The Appellant Dr. Nazrul Islam was a monthly tenant under the Respondent of the said premises, according to the English calender month, at a monthly rent of Rs. 145. On May 19, 1958, the Respondent served a notice to quit upon the Appellant asking him to quit and vacate the said premises on the expiry of the last day of the month of June 1958. As he did not comply with the said notice, a suit for ejectment was brought by the Respondent against the Appellant in the City Civil Court, Calcutta, on or about January 2, 1959. In the plaint in the said suit it was stated that the Appellant was not protected against eviction under the provision of the West Bengal Premises Tenancy Act (XII of 1956) (hereinafter referred to as the "said Act"), inasmuch as he had sub-let and/or transferred his interest in respect of various portions of the said premises to various tenants without consent and knowledge of the Respondent and had also defaulted in the

payment of rent for and from the month of March 1957. It was also alleged that he was guilty of acts of waste and negligence, as a result of which the said premises had materially deteriorated. The Appellant filed written statement denying the allegations and, in particular, that he had sub-let any part of the premises without the knowledge and consent of the Respondent, or that he had received a notice to quit or that he had made any default in payment of rent. As regards default, he put forward two specific defence. Firstly, he said that at the time that the Respondent leased out the said premises" it was in a dilapidated state and the Appellant made necessary repairs at the cost of Rs. 2,200, but of which the Respondent agreed to pay Rs. 500 which was not paid to him. He, accordingly, on June 7, 1958, sent a notice through his pleader Shri S.N. Guha demanding that amount and stating that unless the amount was paid up or adjusted the Appellant could not be held to be a defaulter. The second defence was that the Appellant used to pay rent regularly, but the Respondent failed to grant receipt. It is not mentioned in the written statement, for which month a receipt was not granted but reference was made to a case filed by the Appellant before the Rent Controller, Calcutta, but no particulars of the case was set out. I have already mentioned that the suit was filed on or about January 2, 1959. On February 25, 1959, summons was served. On April 2, 1959, the Appellant filed his written statement. On June 8, 1960, the Respondent filed a petition u/s 17(3) of the said Act. Section 17(1) of the said Act provides that if, when a suit is instituted by the landlord, there exists any default in the payment of rent, the tenant can deposit the same with interest into Court within one month of the service of the writ of summons and must go on depositing month by month by the 15th day of each succeeding month, a sum equivalent to the rent. If there was any dispute in regard to the amount payable as rent, then the tenant may make an application under Sub-section (2) and the dispute would be decided by the Court. Sub-section (3) provides that if a tenant failed to deposit or pay any amount referred to in Sub-sections (1) and (2), the Court shall order the defence against delivery of possession to be struck out and shall proceed with the hearing of the suit. I have already stated that on June 8, 1960, the Respondent filed an application u/s 17(3) for striking out the defence against delivery of possession. On June 8, 1960, the Appellant filed his objection. In the objection he stated that he had paid the rent for March 1957, but the Respondent failed to issue a rent receipt in favour of the Appellant. On July 11, 1960, this application u/s 17(3) was heard upon evidence. The Appellant appeared through his Advocate, who actually cross-examined Tribhubon Singh, son of the Respondent, who was produced and gave evidence on his behalf. A copy of the deposition is at pp. 33 and 34 of the paper-book. It is of the utmost importance to note that this was the only evidence called and that the Appellant neither gave evidence nor called any evidence in support of the case. The witness said as follows:

The Defendant did not pay rent of March 1957 to us, not also April 1957. Rent of April and May 1957 were deposited by the Defendant on 18-6-57. No rent of March 1957 deposited in Court.

2. In cross-examination on behalf of the Appellant, he said that the rent of March 1957 was not paid and an application by the Appellant to the Rent Controller u/s 25 of the said Act was rejected. He said that after the service of summons on February 25, 1959, the first deposit was made in March 13, 1959, in Court, but the rent in arrear for March 1957 was not deposited and hence there was no compliance with Section 17(1) of the said Act. He also stated that there was no deposit for October 1959, December 1959, January 1960, February and May 1960 and the amount of deposit for March and June 1959 were not made in time. It will, therefore, appear that inspite of a definite statement in evidence that rent for March 1957 had not been paid or deposited u/s 17(1), no evidence was adduced to contradict it. In cross-examination it was not even put to the witness that the rent for March 1957 had been paid but no receipt had been issued. It will appear from the order-sheet dated July 11, 1960, that the proceedings were finished, arguments were heard and the matter was adjourned till July 18 for orders. On July 15, 1960, an application was made on behalf of the Appellant stated to be u/s 17(1) & (2) of the said Act. A copy of the petition is at pp. 35 to 37 of the paper-book. In that petition it was stated that there was a bona fide and genuine dispute with regard to the amount of rent for March 1957. It was stated that the Appellant had made an application before the Rent Controller u/s 25 of the said Act for failure of the Respondent to give a receipted bill, but unfortunately that case was dismissed in the Appellant''s absence. It was prayed that the amount due should be determined. In that petition there was no mention of any letter being sent under certificate of posting. On July 18, 1960, both the applications u/s 17(3) & Section 17(2) by the Appellant were disposed of in the Court below. The learned Judge rightly pointed out that if the rent of March 1957 was due and not deposited in Court, then there was a clear violation of Section 17(1) and the Appellant would not be entitled to any relief. The learned Judge then proceeded to consider as to whether there was a bona fide dispute with regard to this question of payment of rent for March 1957. He considered the following facts: The case of the Appellant was that he had paid the rent for March 1957, but the Respondent refused to grant a receipt. Before the Rent Controller the Appellant had made an application u/s 25 of the said Act. Section 25 lays down that every tenant who makes a payment of rent to his landlord shall be entitled to obtain forthwith from his landlord, or his authorised agent, a written receipt for the amount paid by him, signed by the landlord or his authorised agent. If the landlord or his authorised agent refused to grant such a receipt the tenant may, within two months from the date of payment, and after hearing the landlord or his agent, direct them to pay by way of damages such sum not exceeding double the amount of rent paid and costs as also a certificate to the tenant in respect of the rent paid. The Rent Controller held that the application was beyond time and dismissed it. The Appellant invoked Section 5 of the Indian Limitation Act for condonation of delay, but the Rent Controller held that there was no justifying cause for the delay and the application for condonation was dismissed. The next thing considered was that the Appellant had already filed objection to the application u/s 17(3) and had put forward this precise point about payment having been made for March 1957, but that a receipt was not granted and yet on July 11, 1960, when the matter was heard in the presence of his Advocate, he did not support his contention by calling any witness, inspite

of the categorical evidence of the witness called on behalf of the Respondent that no rent had been paid for March 1957. In the cross-examination it was not even suggested that he had sent a letter under certificate of posting. Consequently, the learned Judge came to the conclusion that defence was merely "a sham and purposive dispute and was not bona fide". The learned Judge referred to a decision of P.N. Mookerjee, J. in Gujrat Printing Press v. Naraindas Jewraj (1957) 64 C.W.N. 159, where it was held that a tenant could not claim the benefit of the extended period u/s 17(2) merely by raising a dispute however false his allegation may be. If the dispute was sham and mala fide, it was not a dispute at all and would not take the matter out of Section 17(1) and bring it within Sub-section (2) of Section 17. There can be no question that this principle has been correctly laid down. The dispute that has to be raised u/s 17(2) must be bona fide dispute. A sham dispute merely to gain time is no dispute at all and cannot give a fresh period within which to deposit the amounts u/s 17(1) or (2). In view of the materials before him, the learned Judge had correctly came to the conclusion that the dispute raised was a sham one. Therefore, he rightly ordered that the defence against delivery of possession should be struck out u/s 17(3). Immediately after the application was disposed of, and on the same day, the application u/s 17(2) u/s 17(3) was rejected. The suit was directed to be placed for hearing on July 29, 1960. On that date the Appellant filed a petition u/s 151 of the CPC read with Order 47, Rule 1. This application was rejected. On July 29, 1960, the suit came up for hearing and was decreed. On that date the Appellant did not appear and contest the validity of the notice. This appeal is directed against this judgment and decree.

3. Before the Court of Appeal the Appellant made an application for additional evidence to be taken. The petition in respect thereof is set out at pp. 58 to 63 of the paper book. Briefly put, the ground of it was as follows: The Appellant said that he had paid the rent for March 1957 to the Respondent who, however, failed to issue a rent receipt. Then we have the following paragraph:

that as on the 11th July 1960, the date of hearing of the Respondent"s said application, your Petitioner could not come to Court due to unavoidable reason and could not inform his Advocate in due time about his inability to come to Court on that date, the said application was heard ex parte.

In para. 9 of the petition the Appellant stated that on April 23, 1957, he paid to the Respondent the rent for March 1957, but the Respondent did not grant him a receipt on the ground that he had left it in his shop. On May 4, 1957, the Appellant wrote a letter to the Respondent asking him to bring the receipted bill when he would come again to take the rent for the month of April 1957. It is said that this letter was sent under certificate of posting on May 7, 1957. He then proceeded to say that this letter could not be found--

Inspite of due diligence as they were mislaid and after search your Petitioner was able to find this letter and certificate of posting on the 27th of July, 1960.

It is said that certificate of posting dated May 7, 1957, the true copy of the letter dated May 4, 1957, be taken as additional evidence. Upon July 5, 1961, the Court of Appeal directed that the application would be considered at the time of the hearing of the appeal but that the application together with the annexure to be printed in the paper-book. I shall first of all deal with this application for additional evidence. The relevant provision is Order 41, Rule 27 of the Code of Civil Procedure. This provision of law lays down that the parties to an appeal shall not be entitled to produce additional evidence, but if the Court from whose decree an appeal has been preferred has refused to admit evidence which ought to have been admitted or the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment or for any other substantial cause, an Appellate Court may allow such evidence or document to be produced or witness to be examined. So far as we are concerned, we certainly do not require any further additional evidence. On the facts stated above, can it be said that the Court below has refused to admit evidence which ought to have been admitted? It is true that the suit was heard ex parte, but if anybody is to be blamed for, it is the Appellant. As I have stated above, all possible points were put forward including the non-payment of rent for March 1957 in the application u/s 17(3). This application was heard on July 11, 1960, and the order-sheet says that the parties were ready. In fact, evidence was called and the witness, produced on behalf of the landlord, was cross-examined. It must, therefore, be taken to have been a proper hearing. I have set out above the excuse given by the Appellant for not calling any evidence on that date, which is totally unacceptable. All that the Appellant was pleased to inform the Court was that he was unable to come due to "unavoidable reason". He never made an application for setting aside the order dated July 11, 1960, on the ground that he was unavoidably prevented from appearing. As regards the story that he could not produce the copy of the letter and certificate of posting because they were lost, that also is a story that cannot be accepted. If this was true he should have appeared on July 11, 1960, and taken the Court into his confidence explaining the reason why he could not produce the relevant evidence. In his petition dated June 18, 1960, which is set out at pp. 29 to 30 of the paper-book, there is no mention of this fact. There is no mention of this fact also in the objection dated July 11, 1960, at pp. 31 to 32 of the paper-book or in the application by the Appellant u/s 17(2) dated July 15, 1960, at pp. 35 to 37 of the paper-book. In fact, the result is that it cannot be said that the Court had refused to admit evidence which ought to have been admitted. This application of the Appellant, therefore, should be rejected. I shall now refer to the way in which Mr. Guha, appearing on behalf of the Appellant, framed his case. His first point is that the application of the Appellant dated July 15, 1960, u/s 17(2) of the said Act, should be governed by Sub-section (2) of Section 17 before the amendment introduced by Act 26 of 1959 which was published in the Calcutta Gazette on February 29, 1960, because the relevant time according to him would be the date of the filing of the suit, namely January 2, 1959, when the amendment had not come into operation and, therefore, the old Sub-section ought to apply. This Sub-section was as follows:

If in any suit or proceeding referred to in Sub-section (1) there is any dispute as to the amount of rent payable by the tenant, the Court shall determine, having regard to the provisions of this Act, the amount to be deposited or paid to the landlord by the tenant in accordance with the provisions of Sub-section (1).

4. According to Mr. Guha, it was the Court''s duty, before an application u/s 17(3) could be determined, to resolve the dispute about the amount payable by the tenant. I do not see why the pre-amendment Sub-section should apply. This is a mere matter of procedure and, therefore, on July 11, 1960, the amended procedure should apply. In fact, on July 15, 1960, it is the Appellant himself who made an application u/s 17(2) requesting the Court to determine the dispute regarding the amount due. But, even if the pre-amended Sub-section applies, in my opinion, the position is unaffected. Before the Court is called upon to determine the amount under Sub-section (2), either before the amendment or after the amendment, there must be a ''dispute''. If the Court comes to the conclusion that the dispute is a ''sham'' one, then there is no dispute at all. It is merely a purposive device to gain time. It will appear from the facts mentioned above, that the Court below considered the two applications under Sub-section (2) and (3), practically at one and the same time, and the facts concerned were the same. Having rightly come to the conclusion that the dispute was a sham one, there was nothing to determine. The real question in this case, therefore, is as to whether we should uphold this finding of the learned Judge. Mr. Guha has rightly admitted that if we find the dispute to be a ''sham'' one, then nothing further falls to be considered. In our opinion, this finding that the dispute about payment of rent for March 1957 is a sham one is wholly justified. As I have stated above, no real reason had been advanced to justify the alleged non-appearance of the Appellant on July 11, 1960. If he had evidence to show that the payment of rent had actually been made for March 1957 it is inexplicable why he did not appear on that date, give evidence and controvert the categorical statement of the Respondent''s son that no payment was made for March 1957. It is obvious that the Appellant did not dare to come to the box and the defence put forward is indeed a ''sham'' one. A reference to the order-sheet will itself show how the Appellant was playing for time. For example, the suit was filed on January 2, 1959 and on June 8, 1960 the Respondent filed an application u/s 17(3). On that date, it was adjourned to June 8, 1960, for hearing. It was on the date of hearing that an objection was filed and by that means the hearing was further postponed to July 11, 1960. On the crucial date, the Appellant says that he could not appear, although the order-sheet and the records of the Court show to the contrary. After the hearing on July 11, 1960, it was adjourned to July 18, 1960, for orders and immediately before that date another application was made u/s 17(2). Thereafter the Appellant threatened to go to the High Court but he never did. On July 29, 1960, the Appellant did not appear to contest the validity of the notice.

5. In my opinion this point is of no substance and cannot be accepted. The application u/s 17(3) was rightly decided and the defence as to possession was rightly struck out.

6. Mr. Guha next attempted to go into the facts of payment. In the evidence given by Tribhubon Singh, he has said that no deposits were made for certain months and for other months there were late deposits. Mr. Guha has brought into Court the deposit challans and the receipts for payment into Court. Strictly speaking, we should not look into these receipts. We, however, at the request of Mr. Guha looked into the receipts and the undisputed position seems to be as follows: (i) It is said that the rent for March 1957 had been paid but no receipt given. This amount was never deposited with the Rent Controller or in the Court, (ii) The amounts of rent for December 1957, January 1958, April 1958 and May 1958 were not paid or deposited in time. The respective dates of payment are mentioned below:

December 1957 ...	1st February, 1958
January 1958 ...	1st March, 1958
April 1958 ...	2nd June, 1958
May 1958 ...	2nd July, 1958

If the rent for March 1957 had not been paid as was found by the Court below then of course the suit had been rightly decreed. Apart from that, if the rent for four months mentioned above had not been paid or deposited in time, then also the Appellant fails. The first argument of Mr. Guha is that the payment for May 1958 was all right because May 31, 1958, was a holiday. No such case was made anywhere upon the materials placed before us although it was definitely mentioned in the order dated July 29, 1960, that there was default for May 1958. Mr. Guha then argues that December 1957 is beyond 12 months from the date of the filing of the suit which is January 2, 1959. In my opinion Mr. Guha is not right in his argument. Rent for December 1958 would be payable on January 15, 1959. On January 2, 1959, therefore, if there is default, it must be four months'' default within twelve months for which the rent had become due. Since the rent for December 1958 had not yet become due, the twelve months must be November 1957 to November 1958. Thus December 1957 is a relevant month for counting the four defaults. But apart from the contest as to dates all the payments into the Rent Control are of no avail, because the Appellant did not comply with the conditions laid down in Section 21 of the said Act, inasmuch as there are no tenders to the landlord before making each payment. It is admitted that there were no tenders after the first deposit of April 1957. There were no tenders prior to the deposit for the aforesaid four months. In his evidence Tribhubon Singh said that the rent for October 1959 was not paid into the Court u/s 17(1). That now appears to be so. All the original records are now before us, and there is no challan for October 1959. That also disentitles the Appellant from relief.

7. In our opinion, the application u/s 17(3) having been rightly decided and the defence as to possession being rightly struck out, the suit was rightly decreed. It is really not necessary to consider any other points. But should it be so necessary we hold that there were more than four defaults within 12 months prior to suit, either because they were

deposited without previous tender in each case, or because they were deposited beyond the time permissible.

8. For the reasons aforesaid we are of the opinion that the suit has been rightly decided by the Court below and, therefore, the appeal is dismissed with costs.

9. After the judgment was delivered, Mr. Guha, learned Advocate for the Appellant, informed the Court that his client wishes to accept the verdict of the Court, but he prays for at least one year''s time to vacate the three rooms which are in his actual possession and, as regards the other rooms of the premises in suit, they are in possession of the sub-tenants and he is not asking for any time with regard to them. Having considered all the facts relating to the dispute between the parties we are prepared to grant the Appellant time until the expiry of the month of November 1967 to vacate the three rooms which are in his actual possession provided he gives an undertaking to Court to give up vacant and peaceful possession of the said three rooms which are in the possession by the last day of November 1967 and provided further he gives an undertaking to Court not to realise any money from his sub-tenants and also provided he goes on depositing in the Court below an amount of Rs. 100 (Rupees one hundred) only per month, month by month, until November 1967 as the assessed amount payable for occupation of the three rooms. Mr. Guha says that his client is willing to give the undertaking as suggested.

10. It is recorded that the Appellant comes to the box and gives an undertaking to Court to vacate the three rooms in his possession by the end of November 1967 and not to realise any rents from his sub-tenants from now onwards.

11. Upon the undertaking being recorded, we grant time to the Defendant Appellant to vacate the three rooms in his possession until the last day of November 1967 provided he goes on depositing in the Court below to the credit of the Plaintiff Respondent an amount of Rs. 100 (Rupees one hundred) only every month, month by month, by the 15th of each succeeding month, the amount for the month of November 1967 being paid by the 20th of that month. If the money is deposited as directed above, the execution of the decree, in so far as the three rooms in the actual possession of the Appellant are concerned, will remain stayed until that time, but with regard to the other rooms, the decree may be executed at once. In default of any one of the payments being made within the time allowed, the stay will stand vacated.

Arun K. Mukherjea, J.

12. I agree.