
(2012) 4 CALLT 378

Calcutta High Court

Case No: S.A. No. 27 of 1967 and CAN No. 5704 of 2012

Smt. Mala Mukherjee

APPELLANT

Vs

Sm. Nilima Debi and
Others

RESPONDENT

Date of Decision: July 24, 2012

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 22, 148, 151
- Limitation Act, 1963 - Section 5
- Transfer of Property Act, 1882 - Section 114
- West Bengal Premises Tenancy Act, 1956 - Section 12, 17(1), 17(3), 39

Citation: (2012) 4 CALLT 378

Hon'ble Judges: Tarun Kumar Gupta, J

Bench: Single Bench

Advocate: Jiban Ratan Chatterjee, Mr. Piyus Chaturvedi, Mr. Sanjoy Mukherjee, Ms. Anwesha Saha and Mr. Prajnadeepta Roy, for the Appellant; Priyabrata Ghosh and Mr. Sephali Bhattacharya, for the Respondent

Final Decision: Dismissed

Judgement

Tarun Kumar Gupta, J.

This appeal is directed against the judgment and decree of eviction passed by learned District Judge, Purulia in Title Appeal No.60 of 1965 reversing the judgement and decree of learned Munsif, Purulia in Title Suit No.73 of 1964. The original plaintiff's being owner landlords filed said suit being Title Suit No.73 of 1964 alleging that original defendant Fanindra Deb Manna was a tenant under them in respect of the suit room at a rental of Rs.14/- per month according to English calendar month and that said tenant defaulted in payment of rent from December 1963 to March, 1964 and was also guilty of causing damage to the suit premises. It was further case that the landlords reasonably required the suit room for their own use and occupation. The suit was filed after sending a

statutory notice to quit.

2. The original defendant tenant contested said suit by filing written statement denying material allegations of the plaint and contending inter alia that the rents for the month of December, 1963 after adjusting therefrom sum of Rs.12.5 paise which was paid towards monthly tax by the defendant, and the rent for the month of January, 1964 were sent to the landlords by M. O. but they refused to accept the same. It is further stated that thereafter the defendant tenant deposited the same in the office of Rent Controller on 3rd March, 1964. It is further case that the plaintiffs demanded enhancement of rent @ Rs.18/- per month but the defendant tenant refused to pay said enhanced rent. It was asserted that after service of notice of the suit, the defendant deposited rents for the month of December, 1963 to May, 1964 with interest in the Court and that the suit was liable to be dismissed.

3. Learned Trial Court observed that the landlords were not entitled to get any decree of eviction on the ground of damage or reasonable requirement. Learned Trial Court, however, noted that the defence against delivery of possession to the defendant tenant was struck out u/s 17(3) of the West Bengal Premises Tenancy Act for not depositing the rent for the month of September, 1964 within time vide No.30 dated 10th of July, 1965. But the learned Trial Court declined to pass any decree for eviction on the ground of default as the defendant tenant filed a petition dated 3rd August, 1965 praying for relief against forfeiture u/s 114 of the Transfer of Property Act.

4. Plaintiff landlords preferred an appeal being Title Appeal No.60 of 1965 against said judgment dated 18.09.1965 of dismissal of the suit. Learned Lower Appellate Court concurred with the findings of learned Trial Court that the landlords were not entitled to get any decree of eviction either on the ground of damages or on the ground of reasonable requirement. However, learned Lower Appellate Court decreed the suit for eviction on the ground of default by the impugned judgment and decree.

5. Hence is this second appeal.

6. The only point is to be considered as to whether learned Lower Appellate Court substantially erred in law by reversing the judgment of dismissal of learned Trial Court by passing a decree of eviction on the ground of default by applying correct legal test. Learned counsels of the parties restricted their arguments only on this issue.

6. During pendency of this appeal the appellant tenants filed an application being CAN No.5704 of 2012 praying for condonation of delay in depositing rents for the period December 1963 to March, 1964.

7. Mr. Jiban Ratan Chatterjee, learned senior counsel for the tenants, submits that alleged arrear of rent for the period December, 1963 to May, 1964 together with statutory interest was deposited by the defendant tenant in the learned Trial Court within one month from the date of receipt of the summon of the suit and that there was ample

compliance of the provisions of Section 17(1) of the West Bengal Premises Tenancy Act, 1956.

8. He next submits that admittedly the rent for the month of September, 1964 which should have been deposited on the very date of opening of the Court after puja vacation i.e., on 07.11.1964, was deposited on 11th November, 1964 i.e., having only four days" delay. He further submits that the defendant tenant filed one application dated 10th July, 1965 u/s 5 of the Limitation Act read with Section 12/39 of the West Bengal Premises Tenancy Act, 1956 together with Section 148 / 151 of the CPC praying for condonation of said technical delay of four days but learned Trial Court without passing any order relating to said application for condonation of delay struck out the defence of the defendant tenants against delivery of possession u/s 17 (3) of the Act of 1956 vide order No.30 dated 10th July, 1965. He further submits that again the original defendant filed a petition u/s 114 of the Transfer of Property Act on 03.08.1965 with a prayer to grant permission to the defendant tenant to pay or deposit arrear rent with interest etc. if any, to protect him against forfeiture of tenancy but learned Trial Court kept the same undisposed. According to him, as those two applications were not disposed of by the learned Trial Court, the order of striking out the defence of the defendant tenant against delivery of possession u/s 17(3) of the Act of 1956 was bad in law. His further contention is that as the learned Lower Appellate Court banked on said order of striking out defence against delivery of possession of the learned Trial Court, the impugned judgment and decree of eviction passed by learned Lower Appellate Court should be set aside.

9. In support of his contention he refers a case law reported in AIR 1979 SC page 566 (Rajendra Nath Kar vs. Gangadas and others) to impress upon this Court that a Court has the power to condone delay in depositing rent u/s 17(1) and other provisions of West Bengal Premises Tenancy Act, 1956 by exercising its discretionary powers u/s 5 of the Limitation Act. He next refers a case law reported in Cal LT. 1991 (2) HC page 391 (Santi Nath Sha versus Santosh Kumar Chatterjee) to impress upon this Court that passing of an ejectment decree keeping an application pending u/s 151 CPC praying for recalling the order of striking out defence u/s 17(3) of the Act of 1956 was not sustainable in law. He next refers a case law reported in [B.P. Khemka Pvt. Ltd. Vs. Birendra Kumar Bhowmick and Another](#),) to show that the provisions of striking out defence against delivery of possession u/s 17(3) of the Act of 1956 was directory and not a mandatory provision. In this connection he further refers a case law reported in 88 C. W. N. page 898 (Amiya Kumar Chakraborty vs. Satyendra Kumar Roy Chowdhury) to submit that the tenant may be permitted by this Court during hearing of the second appeal to file an application for condonation of delay in filing the rents for the month of September, 1964 on showing substantial cause. He further submits that the order No. 30 dated 10th July, 1965 by way of striking out the defence against delivery of possession u/s 17(3) of the Act of 1956 being an interlocutory order can be challenged in the appeal. According to Mr. Chatterjee, learned senior counsel for the appellant tenants, as the impugned judgment and decree of eviction passed by learned Lower Appellate Court was based on the order

of striking out defence of the defendant tenant u/s 17(3) of the Act of 1956 passed by learned Trial Court vide order 30 dated 10th July, 1965, and said order dated 10th July, 1965 was not sustainable in law for keeping pending the applications filed by the defendant tenant for condonation of delay in filing rent for the month of September, 1964, the impugned judgment and decree are liable to be set aside. He further submits that this Court should also condone said delay in depositing said rent in terms of the prayer of the application being CAN No.5704 of 2012 read with the averments made in the affidavit-in-reply filed in this connection.

10. Mr. Priyabrata Ghosh, learned counsel for the respondent landlords, on the other hand, submits that the petition for condonation of delay in depositing the rent for the month of September, 1964 was not filed together with the challan for depositing said rent, but the same was filed after about one year i.e, on 10th July, 1965. He further submits that learned Trial Court at the time of disposing the landlord's application u/s 17(3) of the Act of 1956 also disposed of said application filed by the tenant praying for condonation of delay by the same order dated 10th July, 1965 and as such, said application was not kept pending. Mr. Ghosh next submits that the subsequent application of the defendant tenant u/s 114 of the Transfer of Property Act, though misdirected one, was entertained by the learned Trial Court at the time of dismissing the suit and hence it cannot be said that said application was kept pending. He next contends that though the Court has power to condone delay in depositing rent u/s 17(1) of the Act of 1956 but the tenant must file the application promptly disclosing the exceptional circumstances under which he failed to deposit the same in time. According to him, in this case no such application was filed promptly that too with any satisfactory explanation. In this connection he refers a case law reported in 92 C.W.N. page 522 (Krishna Gopal Ghosal vs. Mihir Baran Nandy & Ors.). Mr. Ghosh next submits that neither the appellant tenant preferred any revisional application against the order dated 10th July, 1965 allowing the petition u/s 17(3) of the Act of 1956 nor they agitated the matter in the learned Lower Appellate Court during hearing of the first appeal and as such they cannot be permitted to agitate that matter at this stage. Mr. Ghosh next submits that as the application praying for condonation of delay in depositing rent for the month of September, 1964 was rejected by the learned Trial Court, there is no scope for agitating the same issue in this forum either during hearing of this appeal or by filing this application being CAN No.5704 of 2012. In this connection he refers a case law reported in 90 C.W.N. page 880 (Himanshu Kumar Lahiri vs. Gajendra Kumar De).

11. Admittedly, the defendant tenant deposited the entire arrear rent for the period from December, 1963 to May, 1964 together with interest within one month from the date of receipt of the summons of the ejectment suit in due compliance of Section 17(1) of the Act of 1956.

12. Admittedly, the rent for the month of September, 1964 should have been filed on the very date of reopening of the Court after puja vacation i.e. on 7th November, 1964 but the same was deposited on 11th November, 1964 i.e. with a delay of four days. It appears

from the Lower Court record that on 10th July, 1965, the date fixed for hearing of the petition u/s 17(3) of the West Bengal Premises Tenancy Act, 1956 filed by the landlords, the defendant tenant filed an application u/s 39 read with Section 12 of the Act of 1956 read with Section 148 and 151 of the CPC praying for condonation of delay of four days in depositing the rent for the month of September, 1964. It further appears that learned Trial Court disposed of both the applications by said order dated 10th July, 1965 wherein he rejected the application praying for condonation of delay filed by the tenant and allowed the application u/s 17(3) of the Act of 1956 filed by the landlords on the ground of delayed deposit of the rent for the month of September, 1964.

13. Admittedly, the defendant tenant filed an application on 3rd August, 1965 u/s 114 of the Transfer of Property Act praying for relief against eviction on the ground of default and learned Trial Court entertained said application and rather allowed the same by way of refusing any decree of eviction on the ground of default by his judgment dated 18.09.1965. As such it cannot be said that those applications were kept pending by learned Trial Court and allowed the application u/s 17(3) of the Act of 1956. The case laws referred by learned counsels for the appellant tenants on this score are not applicable at all in the facts of this case as stated above.

14. There is no denial that no revision was filed against the order No.30 dated 10th July, 1965 by the appellant tenant. The tenant had also the right to ventilate his grievance against said order No.30 dated 10th July, 1965 during hearing of the appeal in the learned Lower Appellate Court. But it appears from the impugned judgment that the respondent tenant did not challenge said order of striking out defence u/s 17(3) of the Act of 1956 being No.30 dated 10th July, 1965 either by filing any cross-objection under Order 41 Rule 22 of the CPC (before amendment of 1976) or by raising that issue during hearing.

15. Admittedly, learned Trial Court had the discretionary power either to reject the petition u/s 17(3) of the Act of 1956 by allowing the petition filed by the tenant for condonation of the delay in depositing the rent for September, 1964, or to allow the same by rejecting the tenant's condonation petition. Learned Trial Court opted for the second option on the grounds stated in the order No.30 dated 10th July, 1965.

16. Even if his reasoning were erroneous still the same cannot be a ground of this second appeal.

17. Again admittedly Section 114 of the Transfer of Property Act has no application in a case of eviction filed u/s 13 of the West Bengal Transfer of Property Act, 1956. As such, learned Lower Appellate Court was justified in setting aside the judgment of learned Trial Court.

18. As a result, the appeal is dismissed on contest.

19. Accordingly, the application being CAN No.5704 of 2012 is also dismissed on contest.

20. However, I pass no order as to costs.

21. Send down Lower Court record along with a copy of this judgment to the Lower Court at the earliest. Urgent photostat certified copy of this judgment be supplied to learned counsels of the parties, if applied for.