Haripada Kanungo Vs N.N. Shah and Others

Court: Calcutta High Court

Date of Decision: Dec. 5, 1974

Acts Referred: West Bengal Premises Tenancy Act, 1956 â€" Section 17(1)

Citation: 80 CWN 481

Hon'ble Judges: B.C. Ray, J; A.K. Sen, J

Bench: Division Bench

Advocate: P.N. Mitter, A.P. Chakraborty and Milan Bhattacharjee, for the Appellant; M.P. Chowdhury and P.K. Das, for the Respondent

Final Decision: Dismissed

Judgement

Anil K. Sen, J.
This appeal under clause 15 of the Letters Patent is by the defendant tenant and arises out of a suit for eviction. The appeal

is directed against the judgment and decree dated September 1, 1972 passed by our learned brother M.M. Dutt J. in an Appeal from Original

Decree No. 16 of 1972 whereby our learned brother affirmed the judgment and decree dated November 29, 1971 passed by the learned Chief

Judge, City Civil Court Calcutta decreeing the plaintiff Vs suit for eviction, certain facts are not in dispute and may shortly be set out as follows:

The plaintiffs-respondents instituted ejectment suit No. 903 of 1968 in the city Civil Court seeking to evict the tenant-appellant from a shop from at

premises No. 129 Radhabazar Street, Calcutta on various grounds including a ground of default in payment of rent. At this stage, however, we are

only concerned'' with the ground of default as that had been the only ground on which the suit had been concurrently decreed by the courts below.

Plaintiffs alleged that the defendant appellant was in default since January 1967. On the records the summons of suit having been served on the

defendant appellant on July 27, 1968 he appeared on or about August 14, 1968. On that date, the defendant appellant filed an application praying

for permission to deposit the rent for the month of July 1968 in court and also the rents for subsequent months. Court gave him the permission to

do so. It appears that on September 6, 1968 the defendant appellant filed another application pleading that he is in arrears in respect of rents for

the month of January, February and March, 1967 ''and merely prayed for permission to deposit the said arrears along with interest u/s 17(1) of the

West Bengal Premises Tenancy Act. Obviously the application was not filed within 30 days from the date of service of the summons in terms of

section 17(1).On this, the court directed that the defendant-appellant may deposit the said amount ""entirely at his own risk"". Accordingly, the

defendant appellant deposited the said admitted arreras on that date.

2. The plaintiffs-respondents thereupon filed an application on April 8, 1969 u/s 17(3) of the said Act praying for striking out the defence of the

defendant against delivery of possession on the ground that the defendant did not deposit the rent for the month of July 1968 and also the arrears

of rent for the aforesaid three months, namely, January, February and March, 1967 within 30 days from the date of the service of summons upon

him. The tenant appellant contested this application by filing an objection thereto merely pleading that he was not in default as alleged. The learned

Judge in the City Civil Court allowed the aforesaid application of the plaintiffs-respondents by an order dated May 30, 1969 upon a finding that

the rent for the month of July, 1968 being deposited on September 13, 1969 and the rents for the aforesaid three months in arrears having been

deposited on September 6, 1968 both beyond 30 days from the date of service of the summons, the tenant-appellant had failed to comply with

section 17(1) of the Act and as such his defence is liable to be struck out. The tenant-appellant''s defence was accordingly struck out and once the

tenant appellant lost the protection under the Act the suit was contested on other grounds as to the validity of the notice and existence of

relationship between landlord and tenants, The suit was accordingly decreed by the learned Chief Judge on November 29, 1971 on a finding that

the relationship of landlord and tenant had been well established as also the notice of ejectment and suit in accordance with law.

3. Against the aforesaid judgment and decree, the tenant-appellant preferred the aforesaid appeal from original decree No. 60 of 1972 which

came up for hearing before our learned brother M.M. Dutt J. Before our learned brother, two points were only urged on behalf of the appellant.

4. Firstly; it was contended that there was really no default either in the matter of deposit of the rent for the month of July 1968 or of the three

months being January, February and March, 1967.

5. Secondly, it was contended that there was no relationship of landlord and tenant between the plaintiff-respondents appellant.

6. Our learned brother found that there was some confusion as to the actual date of deposit of rent for the month of July 1968 but he did not

proceed to find out whether the said deposit was validly made or not as in his opinion the other admitted deposit of arrears was beyond time. So

far as the deposit of the admitted arrears for the months of January, February and March 1967 is concerned it was not disputed before our learned

brother that the said amount was deposited on September 6, 1968 which would be nearly 10 days out of time on the provisions of section 17(1)

of the Act the summons having been served on July 27, 1968. Faced with this situation what was sought to be contended before our learned

brother was that there was no service of summons effected on the defendant. But such a point not having been raised in the trial court, our learned

brother refused to entertain such a point raised for the first time in the appeal. In that view, our learned brother held that the court below was right

in its conclusion that the deposit made by the tenant appellant of the arrears of rent for the months of January, February and March 1967 was

invalid deposit and as such his defence was rightly struck out u/s 17(3), so far as the other point of relationship is concerned our learned brother on

consideration of evidence came to the conclusion that such relationship had been well established and the findings of the trial court on that issue are

well justified. In the result, our learned brother affirmed the judgment and decree of the court below and dismissed the appeal of the tenant

appellant. Aggrieved by this judgment and decree, the tenant-appellant has preferred this appeal under clause 15 of the Letters Patent.

7. Mr. Mitter appearing in support of this appeal has not disputed the concurrent findings on the issue of relationship between the parties. Only

point which has been canvassed before us by Mr. Mitter is to the effect that the courts below were in error in thinking that deposit of rent for the

months of January, February, and March 1967 was an invalid deposit under the provisions of the Act so as to entail the liability of the defence

being struck out. Mr. Mitter has not disputed the fact that the rent for the three months as aforesaid was deposited on September 8, 1968 which

would be beyond time if the summons had been served as claimed on July 27, 1968. Accepting this as a fact Mr. Mitter has, however, contended

firstly that this court should have held that the summons not having been served on the tenant-appellant such deposit within 30 days from the date

of appearance was in due compliance with the requirement of section 17(1) of the Act. Alternatively, it has been contended by Mr. Mitter that

under the provisions of section 17(2A) (which had come into effect at the relevant time) it was open to the court to extend the time specified by

section 17(1) for the deposit and when the court permitted the tenant-appellant to make the deposit on his application dated September 6, 1968 it

should be treated as a case where the court had extended the time for the deposit. These are the only two contentions which have been strongly

passed before us by Mr. Mitter on behalf of the appellant.

8. The appeal is being contested by the plaintiff respondents. An application has been filed on their behalf pleading on the basis of some claimed

subsequent events that the appeal has become infructuous. The subsequent events referred to in the application are that pending the appeal under

clause 15 it is alleged that the consented attorney of the tenant-appellant namely his brother had delivered vacant possession of the suit property in

which a third party tenant had been inducted and that the said constituted attorney had given an undertaking to withdraw the present appeal.

Allegations made in this application have been strongly controverted by the tenant-appellant in an affidavit wherein it has been claimed that the

constituted attorney had no authority to surrender the tenancy, that the authority had been revoked prior to the surrender and that there was really

a collusion between the constituted attorny and the plaintiffs-respondents for prejudcing the cause of the appellant in this appeal. That application is

also being heard along with this appeal.

9. In our opinion, on the context put forward between the parties on this application would be difficult for this court to come to any conclusion or

arrive at any finding on the issues controverted strongly by the parties merely on affidavit evidence. Such being the position we are unable to

entertain the application as such and take notice of events alleged by the plaintiffs-respondents, and controverted by the tenant-appellant. We

have, therefore, decided to dispose of the appeal on its merits.

10. On merits, we are unable to accept the contention of Mr. Mitter that there was no service of summons upon the tenant appellant. Whether

such a summons was at all served or not is in question of fact, decision whereon could be arrived at only on evidence. The appellant at no stage of

the trial before the City Civil Court raised any such issue. On the other hand, the service return on record clearly indicate that the summons was

duly tendered to the applicant''s constituted attorney and brother who having refused to accept the same, service was effected by hanging. The

court accepted such service as due service. The tenant appellant on such summons appeared on August 14, 1968 by filing an application wherein

no plea was raised that the summons was not served. Even in the objection to the plaintiffs-respondents application u/s 17(3) of the Act no plea

was raised by the tenant appellant that as there was no service of summons effected on him, the deposits made by him within 30 days from the

date of his appearance should be accepted as due deposit in accordance with the provisions of the statute. In this state of records we cannot but

observe that Mr. Mitter has no materials on the basis whereof he could contend that the summons was not served on the tenant-appellant. That

apart, in our opinion, our learned brother M.M. Dutt J. was fully justified in holding that such an issue of fact could not be raised for the first time in

an appeal before this Court which was never raised in the trial court. We would accordingly, overrule the first contention of Mr. Mitter.

11. So far as the alternative argument of Mr. Mitter is concerned, it is no doubt true that though section 17(1) prescribes 30 days from the date of

the service of summons as the time limit for deposit of arrears, the amended provision in sub-section 2A authorises the court to extend the time on

an application being made by a tenant. Strong reliance is placed by Mitter on this provision in contending that when the law permits relaxation of

the time limit on an application by a tenant and when the tenant-appellant made an application for deposit on September 6, 1968 leaving apart

technicalities this Court should construe the application as an application u/s 17(2A)and also hold that the permission to deposit by necessary

implication is a permission on relaxation of the time limit. Mr. Mitter had to argue in this light because on the application of the tenant-appellant

itself there was no prayer for relaxation or extension of time non did the trial court treat it as such. In our opinion for the ends of justice it may be

permissible for this Court to construe the tenant"s application dated September 6, 1968 in the manner suggested by Mr. Mitter but for the

statutory bar u/s 17(2B). Section 2B of the Act again prescribes that no application under Sub-section 2A can be entertained unless made before

the expiry of the time specified in the sub-section (1). Or, in other words, the application of the tenant-appellant dated September 6, 1965 cannot

be treated as an application under sub-section 2A as it was not filed within 30 days from the date of service of summons as prescribed, by section

17(1). The mandate of the statute prohibits the court from considering the. application as such. Faced with this difficulty Mr. Mitter has strongly

relied on a Bench decision of this Court in the Case of Sm. Sitala Debi Vs. Man Bahadur, , No doubt, this decision is an authority for a

proposition that a delayed compliance with section 17(1) may not in all oases be fatal so that if in a particular case the court is satisfied that there

exists sufficient cause for non-complance with the requisite period, the court may nonetheless treat the delayed complaince as being in terms of the

statutory requirement. Relying on the principle laid down in this decision Mr. Mitter has contended that for the ends of justice this Court should

condone 19 days delay in the matter of deposit of arrears for the three months as aforesaid and accept such deposit it as in due compliance with

the requirement of law. In our considered opinion, however, a distinction must not be overlooked between the court"s arbitrary authority by way

of grace to extend the time and the authority enunciated in the aforesaid decision conferred on the court to condone the delay if based on sufficient

grounds. The authority relied on by Mr. Mitter does not for a moment suggested that the court possessed any inherent power to extend grace by

condoning the delayed compliance with the provisions of section 17(1). This position is made clear at paragraph 18 of the reports where it was

observed :

It will, however, be for the defaulting party on the facts of his case to establish that there has been no negligance or inaction on his part in

complying with the requirement of the provisions of the statute or of the Court"s order based thereon and the default or failure occured only

because of the supervening of circumstances which could not be tided over in spite of his best deligence and further as soon as the obstacles had

been removed, he had taken all steps as was required under the law and his conduct in the matter had been bonafide all through.

12. Therefore, condonation does not follow as a matter of course or as a matter of grace. Condonation will be available only on proof of

circumstance pointed out by their Lordships in the aforesaid observation. Considering the present case we cannot but hold that no such case at any

time had been pleaded or proved and now to uphold the contention of Mr. Mitter and hold the delayed deposit to be in due compliance with the

provisions of the statute is to do it by way of grace without proof of any sufficient cause at all. This, we are unable to do. We have carefully

considered the different applications filed by the tenant-appellant but we have failed to find out any grounds made out by the appellant which could

justify this Court to come to the conclusion that the delay in complying with the provisions of the statute was due to circumstances beyond the

control of the tenant-appellant. No such circumstances having been established we cannot ignore the mandate of the statute and render the

provision wholly nugatory by condoning the delay at our will by way of grace. For this reason, we are unable to accept even the alternative

contention of Mr. Mitter so strongly urged before us.

On the conclusions as above, this appeal fails and is dismissed.

There will be no order as to costs.

B.C. Roy, J.

I agree.