
(1974) 12 CAL CK 0002

Calcutta High Court

Case No: L.P.A. No. 93 of 1973

Haripada Kanungo

APPELLANT

Vs

N.N. Shah and Others

RESPONDENT

Date of Decision: Dec. 5, 1974

Acts Referred:

- West Bengal Premises Tenancy Act, 1956 - 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 arrears 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 attorney and the plaintiffs-respondents for prejudging 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 nor 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 cases be fatal so that if in a particular case the court is satisfied that there exists sufficient cause for non-compliance with the requisite period, the court may nonetheless treat the delayed compliance 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 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 suggest 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 negligence 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 occurred only because of the supervening of circumstances which could not be tide over in spite of his best diligence 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.