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Calcutta High Court

Case No: C.O. No. 772 of 1986

Sabitri Shaw and Others		APPELLANT
	Vs	
Kalyan Kumar Bose and Others		RESPONDENT

Date of Decision: April 30, 1993

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 115, 148
- West Bengal Premises Tenancy Act, 1956 - Section 17(1), 17(3)

Citation: 97 CWN 1124

Hon'ble Judges: Samaresh Banerjea, J

Bench: Single Bench

Advocate: Shyama Prosanna Roychowdhury, Amalesh Kanti Ghosal and Dilip Samanta, for the Appellant;Prabir Kumar Samanta and Moloy Chakraborty, for the Respondent

Final Decision: Allowed

Judgement

Samaresh Banerjea, J.
In the instant revisional application order no. 137 dated 9.10.85 and order no. 146 dated 6.3.86 passed by the Learned Munsif, 2nd Additional Court. Alipore in Title Suit No. 34 of 1972 are under challenge. The opposite parties filed an Ejectment Suit against the petitioner being Title Suit No. 280 of 1969 in 4th Court of the Learned Munsif at Alipore on the ground of default and subletting. The petitioner is contesting the suit by filing a written statement denying the material allegations in the plaint.

2. In the aforesaid suit the opposite parties filed an application u/s 17(3) of the West Bengal Premises Tenancy Act for striking out the defense of the petitioner against delivery of possession, firstly on the ground that the petitioner did not comply with the provisions of Section 17(1) of the said Act by not depositing the rent for the months of March 1976. May 1977, September 1978, March 1979 and May 1980 within the

prescribed period and secondly on the ground that the opposite parties did not deposit the rent for the month of April 1979. January and February 1975, April and May 1973 at all.

3. The aforesaid application u/s 17(3) of the said Act was allowed by the Learned Munsif by order no. 137 dated 9.10.85 inter alia on the finding that the deposits made by the petitioner for the month sic May 1977 and for May 1980 having been made beyond the prescribed period on 18th June 1977 and 15th July 1980 respectively; such deposits were bad deposits. Further more as the challans showing deposits for the month of February 1975. April 1973 and May 1973 and April 1979 was not traceable on the record, the Learned Munsif held that no deposit was made in respect of the aforesaid months.

4. Subsequent to passing of the aforesaid Order No. 137 dated 9.10.85 striking out the defence, the petitioner filed an application before the Learned Munsif for setting aside the aforesaid order inter alia on the ground that although such order striking out defence was passed on the ground that the rent for April and May 1973 and February 1975 were not deposited, in fact the rents for the aforesaid months were deposited by challan nos. 2822(v) dated 15.5.73, 4817(v) dated 14.6.73 and 26102(v) dated 15.3.75 respectively all of which were already on record. In the said application the petitioner also offered explanation as to the delayed deposit and non-deposit of rent and made a prayer for acceptance of such deposits after condonation of delay. As regards the delayed deposits for the month of May 1977 which was made on 18th June 1977, the pettier contended that such deposits could not be made within time because of closure of the Court for election to the State Assembly from 15th June 1977 to 16th June 1977. As to the delayed deposit for May 1980 and non deposit for April 1979 it was contended by the petitioner inter alia that after appearance in the suit all along rents were being deposited through the clerk of the Learned Advocate of the petitioners and for the aforesaid purpose the petitioners were all along handing over the requisite amount to the said clerk well ahead of the prescribed time. The rent for the May 1980 as also for April 1979 were also handed over to the said clerk well ahead of the proscribed period and accordingly the petitioners were under the impression that such rents were also duly deposited; but now they had come to know that the rent for May 1980 was deposited after a month of the due date and for April 1979 was not deposited at all. In support of such contention the petitioner also relied on an affidavit affirmed by the said clerk Joydev Mallick who after admiting the fact that one of the defendants being Amar Math Shaw has been handing over the requisite amount equivalent to monthly sic him will in advantage each month for depositing the same in Court and amount equivalent to rent for the month of April 1979 and May 1960 were also handed over to him well in advance, further admitted his responsibility in depositing the rent for the month of May 1980 on 15th July 1980 and in stead of 15th June 1980 and is not depositing the rent for the month of April 1979 at all. In the said application the petitioner also pointed out to the Court that after coming to know of such fact of non-deposit of rent for the month of April 1979, they have deposited such rent by challan no. 51192(v) dated 1.2.86.

5. The Learned Munsif although by his order no. 146 dated 6.3.86 noted the fact that challans showing deposits for April 1973, May 1973 and February 1975 are on record and therefore he admitted, that the defence could not have been struck out on the ground of non deposit of rent for the aforesaid months, the Learned Munsif in stead of recalling the said order no. 137 striking out the defence of the petitioner, only modified the said order no. 137 to that extent and did not consider the explanation of the petitioners for late deposit for May 1980 and non deposit for April 1979 and the prayer for condonation of the same on the ground that he was unable to consider such explanation the same not being apparent on the record, he, however, considered the explanation of the late deposit of the rent for the month of May 1977, but did not accept such explanation.

6. Mr. Shyama Prosanna Roy Chowdhury, the Learned Counsel for the petitioner has contended inter alia that the Learned Munsif in passing the impugned order has failed to exercise his jurisdiction properly in not considering at all that in view of the decision of the Supreme Court in the case of M/s. B. P. Khemka Pvt Ltd. vs. Birendra Kumar Bhowmick and Anr. reported in AIR 1987 Supreme Court page 1010, the provisions for striking out defence as laid down u/s 17(3) of the West Bengal Premises Tenancy Act is not mandatory, but directory and consequentially under the aforesaid provisions of the Act. the Court has the discretion to order either striking out of the defence or not depending upon the facts and circumstances of each case and interest of justice and as a necessary corolary to the same, the Court has further discretion to condone the de it and extend the time for payment or deposits. Mr. Roy Chowdhury has further submitted that in the instant case admittedly the Learned Munsif having committed mistake in striking out defence of the petitioner interalia on the ground that rent for April 1973, May 1973 and February 1975 were not deposited by the petitioner although in fact, the same were actually deposited within time and challans showing such deposits were also on record, the order no. 137 dated 9.10.85 striking out defence of the petitioner was liable to be recalled by the Learned Munsif and not merely modified to such extent as it has been done in the instant case and the Learned Munsif was required to consider afresh after considering the explanation made by the petitioner for other delayed deposits or non deposits whether the discretion for striking out defence u/s 17(3) of the said Act is at all to be exercised or not; but the Learned Munsif in the instant case has proceeded in complete disregard of the aforesaid provision of the law laid down by the Supreme Court as if the provision for striking out defence u/s 17(3) of the said Act is mandatory and the Court is bound to strike out defence in case of any default. Relying on the aforesaid case of M/s. B.P. Khemka Pvt Ltd. -vs- Birendra Kumar Bhowmick (Supra) Mr. Roy Chowdhury has further submitted that in exercise of such discretion under the aforesaid provision of the Section 17(3) of the said Act if the Learned Munsif finds a default to be a technical one and only for a few months and therefore inconsequential in nature, the same would not warrant an order striking out the defence.

7. Mr. Prabir Kumar Samanta, the Learned Counsel for the opposite party, while not disputing such position of law viz. that the Court has discretion to strike out or not the

defence u/s 17(3) of the said Act, has contended inter alia relying on the decision of the Supreme Court in the case of Manmohan Kaur -vs- Surya Kant Bhagwani reported in AIR 1989 Supreme Court page 291 that if the delay in making deposits or non deposits is not explained or explanation in respect thereof is not accepted by the Court then It is no more discretion of the Court and the Court must strike out the defence. Mr. Samanta has further submitted that in the instant case the explanation offered by the petitioner for deposit or non deposit of the rent was not accepted by the Learned Munsif and therefore there was no question of exercising any discretion by the Court and consequentially to recall the order no. 137 dated 9.10.85 and under such circumstances there is no scope of interference by this Court u/s 115 of the CPC no jurisdictional error having been committed by the Learned Munsif. Mr. Samanta has also emphasized the conduct of the petitioner in offering such explanation for late deposit or non deposit only after passing of the order striking out the defence and the attempt to put blame upon the clerk of the Learned Advocate of the petitioner and has submitted that because of such conduct of the petitioner also no interference is called for by this Court u/s 115 of the Code of Civil Procedure. Mr. Samanta has relied on the decision of the Supreme Court reported in AIR 1977 Supreme Court page 1217 and of this Hon''ble Court reported 1988(2) Calcutta Law Journal page 276.

8. After considering the rival contention of the parties 1 am of the view that the matter should go back to the Learned Munsif for rehearing of the application u/s 17(3) of the West Bengal Premises Tenancy Act as in my opinion the Learned Munsif has dealt with the entire matter without considering the position of law as enunciated by the aforesaid decision of the Supreme Court in the case of M/s B.P. Khemka Put Ltd.-vs-Birendra Kumar Bhowmick (Supra) that u/s 17(3) of the West Bengal Premises Tenancy Act, namely the Court is not bound to strike out the defence, but such power is discretionary and it is for the Court to decide under the facts and circumstances of each case whether such discretion should be exercised or not and consequentially the Learned Munsif failed to exercise his jurisdiction properly.

9. In the aforesaid case of M/s. B. P. Khemka Pvt. Ltd. -vs- Birendra Kumar Bhowmick (Supra) the Supreme Court in paragraph 14 of the said judgement, after holding that the provision for striking out defence u/s 17(3) of the said Act is not mandatory but directory and the word "shall has" to be read as "may", further held in paragraph 15 of the said judgement that once the word "shall" used in Section 17(3) is read as "may" and consequentially the provision for striking out the defence is to be read as directory and not mandatory, it becomes the discretion of the Court to order either striking out the defence or not depending upon the circumstances of the case and the interest of justice.

10. The said paragraph 15 of the judgement is quoted hereunder :-

Once the word "shall" used in Section 17(3) is read as ''may'' consequentially the provision for striking out of the defence is to be read as directory and not mandatory then it follows that the Court is vested with discretion to order either striking out of the defence

or not depending upon the circumstances of the case and the interests of justice. This Court has sic taken the view that if the Court has the discretion not to strike the defense of the tenant committing default in payment or deposit the rent as sic by a provision in any Rent Restriction Act, then the court sic has the further discretion to condone he default and extend the time for payment or deposit and such a discretion is the necessary implication of the discretion not to strike out the defence. We may only refer in this connection to three earlier decisions of this Court Shyamcharan Sharma Vs. Dharamdas, is a case which arose under the Madhya Pradesh Accommodation Control Act, 1961. Santash Mehta vs Om Prakash (1980) 3 SCR 325; Miss. Santosh Mehta Vs. Om Prakash and Others, and Ram Murthi vs Bholanam (1984) SCC 111; Ram Murti Vs. Bhola Nath and Another, were cases which arose under the Delhi Rent Control Act, 1958. The Rent Control Act of Madhya Pradesh as well as the Rent Control Act of Delhi provided that if a tenant to make payment or deposit as required by the Section the Controller may order the defence against eviction to be struck out proceed with the hearing of the application. In all these cases it has been uniformly held that a power of discretion vested in the Rent Controller give him further right to condone the delay in deposit or payment of rent for the subsequent month.

11. In the said case applying such principle of law the Supreme Court set aside the order of Subordinate Court and High Court striking out the defence for delayed payment of rent for two months as such defaults were technical and inconsequential in nature and therefore were not so serious as to warrant the Court to pass an order striking out the defence.

12. In the instant case the order no. 137 dated 9.10.85 passed by the Learned Munsif striking out the defence, in my view cannot be sustained as the same was passed inter alia on the ground that the rent for the months of April and May 1973 and February 1975 were not deposited by the tenant at all although in fact rents were deposited in the Court and the challans in respect thereof were also on the record. The power to strike out the defence u/s 17(3) of the said Act being discretionary as aforesaid and the aforesaid mistake in striking out defence of the petitioner inter alia on the ground of the non deposit of rent for April and May 1973 and February 1975 being mistake of the Court, after discovery of such mistake the Learned Munsif ought to have recalled the order no. 137 dated 9.10.85 striking out the defence of the petitioner and should have considered afresh as to whether under the facts and circumstances of the case including the nature of default, an order striking out defence should be passed or not. While it is true that such order no. 137 dated 9.10.85 was passed directing striking out defence of the petitioner also on the ground that the deposits for May 1977 and May 1980 were invalid being delayed deposits and the rent for April 1979 was not deposited, the Learned Munsif having found that the rent for the above mentioned three months viz. April and May 1973 and February 1975 were actually deposited, it was necessary for the Learned Munsif to consider afresh whether default in respect of only three months would warrant passing, of an order striking out defences.

13. I am unable to accept the contention of Mr. Samanta that there is no scope of interference by the High Court in exercise of its revisional jurisdiction u/s 115 of the CPC as the explanation in, respect of delayed deposit for two months and non deposit of one month was offered by the petitioner subsequent to the order directing striking out defence and as such explanation was not accepted by the Learned Munsif after consideration of the same by order no. 146 dated 6.3.86. It appears from the order no. 146 dated 6.3.86 that the Learned Munsif did not consider at all the explanation offered by the petitioner in respect of the delayed deposits for the month of May 1980 and April 1979 on the ground that the same did not appear on the face of the record therefore the order striking out defence cannot be recalled. As it has by the Supreme Court in paragraph 15 of its judgment in the aforesaid case of M/s. B. P. Khemka Put Ltd vs Birendra Kumar Bhowmick (Surpa), relying on its three earlier decisions in the case of Shyama Charan Ghosh vs Dharam Das (AIR 1980 Supreme Court, page 587), Miss. Santosh Mehta Vs. Om Prakash and Others, and Ram Murti Vs. Bhola Nath and Another, that "if the Court has the discretion not to strike out the defence of the tenant committing default in payment of deposits of rent as required by a provision in any Rent Restriction Act then the Court surely has further discretion to condone default and extend time for payment for deposit and such discretion is a necessary implication of the discretion not to strike out the defence". This fact that such explanation for delayed deposits or non deposits has been offered by the petitioner by the aforesaid application subsequent to the passing of the order striking out defence by the said Order 137, cannot stand in the way of consideration of such explanation by the Learned Munsif, when in any event the aforesaid order no. 137 cannot be sustained for the reasons as aforesaid. That apart in the aforesaid case of M/s. B. P. Khemka Pvt Ltd. us Birendra Kumar Bhowmick (Supra) although the application by the tenant praying for extension of time for making deposit of rent for three months u/s 148 of the CPC was made after passing of the order, the same did not stand in the way of setting aside the order of the Trial Court and the High Court directing striking out defence, the default having been found by the Supreme Court to be a technical and inconsequential nature therefore do not warranting exercise of power striking out defence. Supreme Court in the case of Manmohan Kaur vs Surya Kant Bhagwani (Surpa), in my view, really did not overrule or differ from its earlier decision in the aforesaid case of M/s. B. P. Khemka Pvt Ltd. vs. Birendra Kumar Bhowmick (Supra). Supreme Court in the case of Manmohan Kaur vs. Surya Kant Bhagwani was really dealing with Bihar (Lease, Rent and Eviction) Control Act. That apart in paragraph 7 of the said judgment after taking note of its earlier decision in the case of M/s. B. P. Khemka Pvt Ltd. vs. Birendra Kumar Bhowmick although in paragraph 8 of the judgment the Supreme Court held that if there is no explanation or the explanation made by the tenant is not acceptable then there is no discretion and the Court must strike out defence, the Supreme Court did not take notice of the fact at all that in the case of M/s. B. P. Khemka Pvt Ltd. vs. Birendra Kumar Bhowmick the tenant concerned merely applied under 148 of the CPC for extension of time for making deposits without however, offering any explanation for the belated deposits and yet Supreme Court in the said case condoned the delay on the ground that such delayed deposits were technical and in consequential

in nature and set aside the order striking out defence. It is note worthy that in an unreported decision of a Division Bench of this Court in the case of Sri Sri Gopal Jew & Anr. vs. Larsen & Tubro Ltd. in Civil Order No. 1931 of 1982, the Hon''ble Division Bench has harmonised the views of the Supreme Court in the aforesaid two cases and upheld the order of the Trial Court declining to exercise the discretion of striking out defence on the ground that the alleged defaults were of technical and inconsequential in nature although the tenant did not offer any explanation for such delayed deposits. The relevant portion of the said unreported judgment is quoted hereunder:-

In an attempt to distinguish B. P. Khemka''s case from the case at our hand, it was pointed out on behalf of the petitioners that in B. P. Khemka''s case the tenant had filed an application u/s 148 of the C. P. Code extension of time for depositing the rents for September, 1968 and March 1969 so as to cover the delays that had occurred in the payment of rents for these two months. True, in that case the application as above was filed by the tenant. But then, such an application was filed after about three months after the defence had been struck out. And the judgment of the Supreme Court does not indicate that the Court took into consideration the above application u/s 148 of the C. P. Code while holding that the deposits were not that serious to warrant striking out the defence. The Court held the default to be in the technical sense and of an inconsequential nature, because the default was not of non payment of rents but of belated payment of the rents (para 16 of the judgment).

14. B. P. Khemka''s case was taken note of by the Supreme Court while deciding the case of Manmohan Kaur Vs. Surya Kant Bhagwandi, The Court did not differ with the views taken in B. P. Khemka''s case. But the Court mentioned that the delay in B. P. Khemka''s case was found by the Court to be technical in nature. But proceeding the Court says that if the delay is not explained, the defence should be struck off. The Court, it seems to us, was referring to such delay or default which is not of a technical nature but in the real sense. Otherwise, it is difficult to harmonize the views expressed in B. P. Khemka''s case with those expressed in Manmohan Kaur''s case. It may be pointed out here that the delay in B. P. Khemka''s case had not actually been explained, only an application for extension of time to make the deposits was filed, and that too alter the defence had been struck off''.

15. In my view, therefore, following the aforesaid decision of the case of Supreme Court in the case of B. P. Khemka vs. Birendra Kumar Bhowmick, the Court has the discretion not to strike out defence if it is found that the default is of technical or inconsequential in nature and not so serious warranting an order striking out defence. The other decisions relied upon by Mr. Samanta reported in 1988(2) C.L.J. page 276. AIR 1977 Supreme Court page 1217 and 90 Calcutta Weekly Notes page 638, in my opinion do not come to aid of Mr., Samanta. In the decision reported in AIR 1977 Supreme Court the Supreme Court disapproved the judgment of the High Court inter alia on the ground that the only objection of the High Court was that the defendant instead of handing over the amount to the Nazir should have himself deposited the amount, without holding a proper enquiry into

the matter of delay of deposits. In the decision reported in 1978(2) Calcutta Law Journal (Dilip Sur vs Smt. Puspa Mitra), the Learned Single Judge of this Court held that without enquiring into the truth of explanation of delay in making deposits Court should not strike out the defence against delivery of possession u/s 17(3) of the West Bengal Premises Tenancy Act and that in case of such deposits the litigant has to depend upon the clerk of the Advocate and unless it is established that no such amount was ever deposited, in time, it is hard to disbelieve the tenant''s case that the amount was duly deposited with the Advocate''s clerk in time. In the aforesaid two decisions, therefore, reported in 1988 (2) Calcutta Law Journal page 276 and AIR 1977 Supreme Court page 1217 and our High Court and the Supreme Court respectively realty accepted the position that the litigant has to depend upon the clerk of his Learned Advocate and if the amount to be deposited in the Court by the tenant is found to have been handed over to the clerk of the Learned Advocate within time by the tenant, tenant should not be penalised for default of the clerk in making such deposits in the Court.

16. In the case reported in 90 Calcutta Weekly Notes page 638 which was delivered before the judgment of the Supreme Court in the aforesaid case of M/s. B. P. Put Ltd us. Birendra Kumar Bhowmick, a Division Bench of this Hon''ble Court held on the facts and circumstances of the case that the order striking out defence was rightly passed and the Court below was not competent to condone delay in making deposits as the application in respect thereof was made after conclusion of the argument. But the decision of the Supreme Court in the aforesaid case of M/s. B. P. Khemka Put Ltd. vs. Birendra Kumar Bhowmick in subsequent to the aforesaid decision of this Court reported in 90 Calcutta Weekly Notes page 638, obviously will prevail. In the result, this application succeeds. The order no. 137 dated 9.10.85 and order no. 146 dated 6.3.86 passed by the Learned Munsif, 2nd Additional Court at Alipore in Title Suit No. 34 of 1972 are set aside. The Learned Munsif is directed to hear the application u/s 17(3) of the West Bengal Premises Tenancy Act made by the landlord/opposite parties, denovo and dispose of the same after considering the explanation of the petitioner for delayed deposit or non deposit and in the light of the principles of law as discussed hereinabove, within two months of the receipt of this order. There will be order as to costs.