

(1984) 02 CAL CK 0023

Calcutta High Court

Case No: Civ. Rev. No. 3041 of 1982

SK. Muzibul Haque

APPELLANT

Vs

Sudarsan Pal and Another

RESPONDENT

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**Date of Decision:** Feb. 16, 1984**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 115, 151
- Constitution of India, 1950 - Article 132(1), 133(1)
- Limitation Act, 1963 - Section 5
- West Bengal Premises Tenancy Act, 1956 - Section 17, 17(1), 17(1), 17(2a), 17(2A)(b)

**Citation:** 88 CWN 538**Hon'ble Judges:** S.N. Sanyal, J**Bench:** Single Bench**Advocate:** A.N. Roy and Debaprosad Adhikary, for the Appellant; Puspendu Bikash Sahu and Sudhakar Biswas for the Opposite Party No. 1, for the Respondent

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**Judgement**

S.N. Sanyal, J.

The plaintiff-petitioner filed Suit No. 247 of 1981 for eviction against the defendant-opposite party on the ground of default and reasonable requirement. The suit was instituted on August 25, 1981. Summons was served upon the defendant opposite-party no. 1 on September 8, 1981 and he appeared on December 23, 1981 and prayed for time for filing written statement. Thereafter on January 15, 1982 the defendant no. 1 filed an application before the court stating that he had deposited rent upto November 1981 with the Rent Controller and he had deposited in court from December 1981. On February 3, 1982 the defendant no. 1 filed an application u/s 17 (2A) of the Premises Tenancy Act praying for instalment. On the same date he filed another application u/s 5 of the Limitation Act and in this application he prayed for condensation of the delay in depositing all arrears of rent on account of wrong legal advice. The said application u/s 5 of the Limitation Act was subsequently amended by another application. The applications were opposed

by the plaintiff-petitioner. The learned Munsif, 3rd Court, Tamluk by the impugned order dated July 26, 1982 allowed the application u/s 5 of the Limitation Act and condoned the delay and gave liberty to the defendant to deposit the arrears of rent u/s 17(1) of the West Bengal Premises Tenancy Act. The learned Munsif has directed the hearing of the application u/s 17(2A) of the West Bengal Premises Tenancy Act (hereinafter referred to as the Act.) Mr. Roy, learned Advocate for the petitioner has argued that the learned Munsif has acted illegally and with material irregularity and the impugned order should be set aside. His argument is that the defendant no. 1 did not show any cause as to why there was delay in filing the application u/s 17 (2A) of the premises Tenancy Act. The defendant no. 1 has to explain each day's delay as the application u/s 17 (2A) should have been filed within one month of the service of the writ of summons. Mr. Roy has argued that the delay in making deposits cannot be condoned u/s 5 of the Limitation Act.

2. Mr. Sahu, learned Advocate for the opposite party has argued that the application u/s 5 of the Limitation Act Was for condensation of delay in filing the application u/s 17 (2A) of the Act. The learned munsif had every jurisdiction to consider the said application and he was satisfied about the grounds urged and this Court should not, in exercise of the power u/s 115 of the Code of Civil procedure, interfere with the said order. It has been further argued that the plaintiff has not at all been prejudiced as the application u/s 17 (2A) is awaiting decision. Mr. Sahu has referred to the case of [State of Bihar Vs. Birla Gwalior P. Ltd. and Others](#), and the case of Shanti prosad Gupta vs. Deputy Director of Consolidation Camp at Meerut & Ors. 1981 (Supra) S.C.C. 73 in support of his contention. Mr. Sahu has further argued that the defendant has given reasons why he could not file the application during the prescribed period but through mistake the prayer portion had not been properly made. The defendant should be given an opportunity to make further amendment of the application u/s 5 of the Limitation Act to make a proper prayer therein.

3. The present suit was instituted on August 25, 1981. Summons was served upon the tenant on September 8, 1981 and the tenant appeared on September (sic), 1981. There is no dispute regarding the tenancy and rate or rem. On January 15, 1982 The tenant (sic) no.-1 (sic) an application stating that he had (sic) rent upto November 1981 with the Rent Controller and it was necessary to dependent the rent for December 1981 in court. On February 3, 1982 the defendant no. 1 filed an application u/s 17(2A) or the Act praying for instalment. On the said date the defendant no. 1 also died an application u/s 5 of the Limitation Act for condonation of the delay in depositing the arrears ox rent. The application u/s 5 of the Limitation Act was amended by an order of the learned Munsif dated July 2, 1982. The dispute between the parties is whether the application u/s 5 was for condonation of delay in depositing the rent or for condonation of delay in filing the application u/s 17 (2A) of the Act. Mr. Roy argues that no application u/s 5 can be riled for condonation of the delay in deposit. The contention of Mr. Roy further is that in the application u/s 5 of the Limitation Act the defendant no. 1 has not explained the delay in filing the

application u/s 17(2A) of the Act. The defendant has to satisfy the court that he was prevented by sufficient cause from filing the application u/s 17(2A) of the Act within the statutory period and in such a case each day's delay has to be satisfactorily explained. The application u/s 5 of the Limitation Act does not contain necessary averments in this respect. Mr. Sahu contends that the application u/s 5 of the Limitation Act is in reality an application for condonation of delay in filing the application u/s 17(2A) of the Act. According to Mr. Sahu, the entire application has to be considered. Simply because the prayer portion has not been properly drawn up the application should not be dismissed on that ground. Mr. Sane argues that the learned Munsir has (sic) the application u/s 5 and thus the delay in (sic) the application under section 17(2A) of the Act has been condoned and the said application u/s 17 (2A) is to be heard now.

4. In the instant case as writ of summons was served upon the tenant it was obligatory upon the tenant in view of section 17(l) of the Premises Tenancy Act to deposit in court or with the Rent Controller or pay to the landlord within one month of the service of the writ of summons an amount calculated at a rent at which it was last paid for the period for which the tenant may have made default including the period subsequent thereto upto the end of the month previous to that for which the deposit or payment is made together with interest on such amount calculated at the rate of eight and one third per cent, per annum from the date when any such amount was payable upto the date of deposit. The tenant thereafter is to continue to deposit or pay month by month by the 15th of each succeeding month a sum equivalent to the rent at that rate. In Civil Rule No. 3627 of 1974 (Mahendra Krishna Nerdy vs. Sm. Bella Debi) Chittatosh Mookerjee, J by his judgment dated August 21, 1975 held that section 5 of the Limitation Act is not applicable in the matter of deposit to be made in terms of sub-section (1) of section 17. Section 5 of the Limitation Act thus cannot be applicable in respect of an application u/s 17 (1) of the Act. It appears that on February 3 1982 the defendant no. 1 filed an application u/s 151 C.P. Code for extension of time and condonation or. delay in depositing (sic) of rent u/s x(1) of the Act. According to section (sic) (2A.) (a) of the Act, notwithstanding anything contained in sub-section (1) or sub-section (2), on the application of the tenant, the court may, by order, extend the time spavined in sub-section (1) or sub-section (2) for deposit or payment of any amount referred to therein. Section 17 (2B) of the Act, however, lays down that no application for extension of time for the deposit or payment of any amount under clause (a) of sub-section (2A) shall be entertained unless it is made before the expiry of the time spavined therefore in sub-section (1) or sub-section (2). Thus the application for extension of time for deposit or payment under sub-section (1) or sub-section (2) has to be made before the expiry of the time limited by sub-section (1) or subsection (2). The application was filed beyond the said period and as such there can be no question of extension of time for deposit or payment. As regards condonation of delay in deposit or payment it has been held in the case of Sm. Sitala Debi vs. Man

Bahadur 76 C.W.N. 435 that the Court has jurisdiction to condone the delay in exercise of power u/s 151 of the CPC in the circumstances mentioned in the said decision. It has been held by their lordships that it will 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 requirements of the provisions of the statute or of the court's orders based thereon and the default or failure occurred only because of the supervening circumstances which could not be tided 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 his conduct in the matter had been bonafide all through. If the court is satisfied that there has been sufficient cause for such noncompliance with the requisite period, it may treat the delayed compliance as being in terms of the statutory requirement.

5. The learned Munsif, however, in the matter of condonation of delay has not considered all tense questions and he has proceeded to condone the delay after allowing the application u/s 5 of the Limitation Act. Referring to the case of State of Bihar vs. Birla Gwalior P. Ltd. & Ors. (supra) Mr. Sahu has argued that the order allowing the application u/s 5 of the Limitation Act cannot be challenged in an application u/s 115 of the Code of Civil Procedure. In this case the matter arose in connection with an application for certificate of fitness for appeal to the Supreme Court under Articles 132 (1) and 133 (1) of the Constitution. In Shanti Prosad Gupta's case (supra) it has been held by the Supreme Court that when an order has been made u/s 5 of the Limitation Act by the lower court in the exercise of its discretion allowing or refusing an application to extend time, it cannot be interfered with in revision, unless the lower court has acted with material irregularity or contrary to law or has come to that conclusion on no evidence.

6. In order to succeed with an application u/s 5 of the Limitation Act the defendant no. 1 has to satisfy the court that he had sufficient cause for not making the application within the prescribed period. The delay has to be satisfactorily explained. In the said application u/s 5 the tenant has confined his attention mainly to the delay in making the deposit due to wrong advice of the learned lawyer, in the prayer portion of the application there was no mention that the delay in making the application u/s 17 (2a) of the Act may be condoned. It appears that the learned Munsif acted with material irregularity and the order thus cannot be maintained. The petitioner has been seriously prejudiced, and an application u/s 17 (2A) (b) of the Act the question of default and the total sum required to be paid will arise for decision. The learned Munsif thus completely failed to consider the proper scope of the application u/s 5 of the Limitation Act in the instant case and there was jurisdictional error on his part.

7. The impugned order of the learned Munsif is thus set aside and the case is sent back to the learned Munsif for disposal of the application u/s 5 of the Limitation Act. I express no opinion on the prayer of Mr. Sahu that leave may be granted to the

defendant no. 1 to pray for suitable amendment of the application u/s 5 of the Limitation Act. The defendant no. 1, if so advised, may make such prayer and it will be for the learned Munsif to consider the application on merits. In the result, the Rule is made absolute. The impugned order of the learned Munsif is set aside. The case is sent back to the learned Munsif for disposal of the application u/s 5 of the Limitation Act in accordance with law and thereafter to proceed with the suit. There will be no order as to costs.

Let the records be sent below forthwith.