

(1984) 04 CAL CK 0022**Calcutta High Court****Case No:** Decree No. 36 of 1976

Amiya Kumar Chakraborty

APPELLANT

Vs

Satyendra Kumar Roy

RESPONDENT

Chowdhury

Date of Decision: April 26, 1984**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 108
- Limitation Act, 1963 - Section 5
- West Bengal Premises Tenancy Act, 1956 - Section 13(1)(i), 13(6), 17, 17(1), 17(2)

Citation: 88 CWN 898**Hon'ble Judges:** Amitabha Dutta, J**Bench:** Single Bench**Advocate:** Sudish Dasgupta and Saumen Dasgupta, for the Appellant; S.P. Roy Chowdhury, S.K. Roy Chowdhury and Aloke Kr. Bose, for the Respondent**Judgement**

Amitabha Dutta, J.

This is an appeal by the defendant from an appellate decree of reversal and it arises out of a suit for ejectment on the grounds of default in payment of rent at Rs. 50/- per month according to English Calendar month from June 1970 and reasonable requirement of the suit premises for the plaintiff's own use and occupation as owner after service of a notice u/s 13 (6) of the West Bengal Premises Tenancy Act (hereinafter called the Act) requiring the defendant to vacate the suit premises on the expiry of November, 1970. The suit was instituted on 16.2.1971. Both the courts below have concurrently found that a valid notice u/s 13 (6) of the Act had been served on the defendant on behalf of the plaintiff prior to the institution of the suit and that the plaintiff has failed to prove reasonable requirement of the suit premises for his own occupation. The letter finding has not been challenged on behalf of the plaintiff-respondent before this Court.

2. It is not disputed that the defendant deposited rent for June, July and August 1970 in the office of the Rent Controller by one Challan (Ext. "C-7") on 5.10.1970 and in view of Section 22 (1) of the Act the rent for the aforesaid three months was not validly deposited for the purpose of Section 13 (1) (i) of the Act which makes default in payment of rent for two months within a period of 12 months a ground for ejectment of the tenant. A tenant is liable to be evicted on such ground if he is not entitled to the benefit of Section 17 (4) of the Act which provides that if a tenant makes deposit or payment as required by sub-section (1) or sub-section (2) or sub-section (2A) of Section 17 no decree or order for eviction on the ground of default shall be passed against him. In the present case the defendant appeared in the suit on receipt of summons sent by registered post- and made an application on 11.5.1971. The contents of the said application are as follows :--

Application for permission

The applicant Sri Amiya Kumar Chakraborty submits that the suit is fixed on this date. The registered summons has been received. The rent of the suit premises has already been deposited with the Rent Controller, i.e. rent for the period upto March 1977 has been deposited in R.C. Case No. 101 of 1970 with the Rent Controller, Alipore. Permission for deposit of rent for April 1971 may now be granted.

The learned Munsif granted the prayer for permission to deposit the rent for April 1971 at the entire risk of the defendant by his order No. 4 dated 11.5.71.

3. The learned Munsif after hearing the suit on evidence dismissed it as according to him the defendant not being a defaulter for four consecutive months no decree for eviction could be passed. The suit was dismissed on 15.12.1973.

4. In the appeal preferred by the plaintiff it was contended on behalf of the defendant that the trial court ought to have treated the defendant's application filed on 11.5.71 as an application u/s 17 (2) of the Act and directed the defendant to deposit rent for June, July and August 1970 with statutory interest in court. The learned Judge has overruled this contention on the ground that as the defendant did not raise any dispute as to the amount of rent payable the said application could not be treated as an application u/s 17 (2) of the Act and the court was not called upon to make an enquiry as to whether any of the earlier deposits with the Rent Controller was valid or not. He has differed from the finding of the learned Munsif and found the defendant a defaulter for three months within a period of 12 months and liable to be evicted on that ground. So the learned Judge has decreed the suit of 5.2.1975.

5. The second appeal by the defendant was admitted on 16.7.1975. One of the grounds taken in the second appeal being Groun No. II is as follows :--

For that the language of the application (regarding the purported application u/s 17 (1) of the Act) covers materials for section 17(2) as well as for granting relief in the

beneficial legislation. The learned Judge of the court of appeal below has erred in law in reversing the trial court's judgment upon a misconstruction of the pleadings". Thereafter an application with affidavit sworn by the defendant on 30.8.83 was filed on 8.9.1983 for treating the application of the defendant in the trial court filed on 11.5.71 as one u/s 17 (2) of the Act by adding a prayer for determination of arrears of rent in the said application; in the alternative accepting the present application as one u/s 17(2) of the Act upon condonation of the delay u/s 5 of the Limitation Act; and for determination of the amount of rent and passing the order u/s 17(2) of the Act.

6. It is stated in the said application for permission that the defendant raised a dispute as to the payment of rent for three months and the reason behind its statement ought to have been inquired into by the court as a dispute construing the application as one u/s 17(2) of the Act. It is further alleged that through inadvertent mistake of the learned advocate for the defendant in the trial court a prayer for determination of the arrears of rent was not made in the application filed on 11.5.71. Moreover, in some cases the learned Judges of this Court treated an application of similar nature as an application u/s 17(2) of the Act in substance during the relevant period. The defendant's learned advocate in the trial court did not retain a copy of the application filed on 11.5.71. On 26.8.83 the defendant's learned advocate in this Court looked into the lower court's record to find out the exact terms of the said application and thereafter advised the defendant to make the present application. So the defendant was prevented by sufficient cause from making the present application earlier and unless the delay is condoned the defendant will suffer irreparable loss and injury.

7. The plaintiff-respondent has filed affidavit-in-opposition opposing the said application of the defendant. In the affidavit-in-reply the defendant has annexed a letter from Sri Sachin Pathak, advocate of the defendant in the trial court addressed to the defendant's advocate in the High Court to the effect that he was of opinion that the statement made in the application filed on 11.5.71 raised a dispute within the meaning of Section 17(2) of the Act and required an adjudication in the matter and that due to inadvertence no formal prayer for determination of arrears of rent was made in the said application.

8. It has been submitted by Mr. Dasgupta appearing on behalf of the appellant that at or about the time the purported application u/s 17(1) of the Act was filed on 11.5.71 the law on the point whether such application could be treated as an application u/s 17(2) of the Act was uncertain and that in some cases it was held by this Court that a similar application should have been treated as one u/s 17(2) of the Act. He has referred to the Bench decision in Gunwantrai T. Kandar vs. Satyanarayan Jhunjhunwala 75 CWN 372 indicating the conflict of decision of this Court on that point. The learned Judge P.N. Mookherjee, J. delivering the judgment observed as follows :--

It will appear from the above that this application, Whatever else it might contain, was really an application for permission to make a deposit. There was no other prayer, not even the usual omnibus prayer "such other or further orders may be passed as to the court may seem fit and proper". Section 17(2) of the West Bengal Premises Tenancy Act. as we read it, contains certain requirements, namely, (i) that there must be a dispute raised as to the amount of rent payable (ii) that the tenant must, for purposes of the said Sec., make deposit, of all the admitted arrears within the statutory period; and (iii) - and this is very important, - that the said deposit, if any, must be made along with an application, praying for determination of the (amount of) rent payable. In our view, this third element is an integral and essential part of the Section and, unless this is present, either expressly or at least, impliedly, which may be in the form of the usual omnibus prayer, indicated hereinbefore, the requirement of the section would not be satisfied. This view of ours would be fully and directly supported by the decision of this Court in the case of Adalat Singh v. T.P. Basu, Appeal from Original Decree No. 664 of 1962, decided on November 27, 1968 by A.C. Sen J. and myself. The same view would also be supported by the earlier decision of this Court in the case of Sm Parameswari Debi and ors. v. Nandalal Sharaf and ors., Civil Revision Case No. 3340 of 1966, decided on February 20, 1967 by A.C. Sen and A.N. Chakrabarti, JJ., as, on a close reading of the said decision, it is clear that the same was based on the above reasoning.

9. Our attention, however, has been drawn by Mr. Chakraborty appearing on behalf of the petitioner, - and, later on his said submission was reiterated and supported by Mr. Bakshi, who argued the matter in reply, - to the decision of the Court, in the case of Amiya Kumar Banerjee v. Bimalendu Bose, Civil Revision Case No. 2522 of 1963, decided on January 7, 1965 in which Chatterjee and Gupta JJ. were stated to have taken a different view.

10. We have examined this last-mentioned decision and we do not find, on a close reading of the same that this was really a firm decision on the point. As a matter of fact, their Lordships even did not find, on the materials, before, them, that there was a dispute regarding the amount of rent payable between the parties, but they remitted; the matter to the court below for the purpose of finding out that dispute from certain materials, to be placed on the record by the parties, and then considering the matter if necessary, u/s 17(3) of the above Act along with the plaintiff's pending application u/s 17(3). As a matter of fact, their Lordships were making observations in their judgment that when the matter would go back and a dispute would be raised, the court might have to decide the matter in accordance with the provisions of Section. 17(2). As we have stated above, we do not treat this decision as a firm decision on the point that a mere application for deposit under Section. 17(1) of the, above Act would have to be treated by the court, irrespective of other circumstances, as an application u/s 17(2). That in our opinion, would be ignoring the section altogether and making it infructuous and we do not think.- that their Lordships, in their above judgement, intended to go so far. We do not,

therefore, feel oppressed in the instant case by the said decision.

11. We were also referred to certain decisions of this Court by learned Judges, sitting singly. But, as" we have considered the matter on the terms of the section itself, and as we have agreed with the view, expressed by the Division Bench in *Adalat Singh vs. T.P. Basu*, Appeal from Original Decree No. 664 of 1962, referred to above, we would, with respect, differ from the" contrary view, if any, expressed in the said single Bench Decisions.

12. On behalf, of the appellant reliance has also been placed on decision in *Biswanath Chatterjee v. A.K. Sarkar* 1970 Cal. 52 in which in the purported application u/s 17(2) of the Act filed by the tenant alleging deposit of pre-suit arrears of rent with the Rent Controller there was the omnibus prayer of the nature referred to in *Gunwantrai*'s case 75 CWN 372. The learned Judge S.K. Dutta J. observed as follows :--

In the present case against the background of the plaint case that the defendant was a defaulter, there was a positive statement that all rent from November 1966 had been duly deposited with the Rent Controller. There was thus a dispute implicit in the said application which was raised by the defendant and by the omnibus prayer the defendant impliedly prayed for determining the amount of rent payable as was pointed out in the said decision. The trial court accordingly erred in not passing appropriate orders on the said application before passing a decree on the ground of default and the appellate court also erred in confirming the said decree which thus cannot be sustained.

13. Mr. Dasgupta has also relied on *Narhari and Others Vs. Shankar and Others*, and *Bhagwan Swarup Vs. Municipal Board, Ujhani and Others* . to support his contention that Conflict of decision is a ground for condonations of delay. He has also cited *The State of West Bengal Vs. The Administrator, Howrah Municipality and Others*, and *Udayan Chinubhai v. P.C. Bali* AIR 1977 S.C. 2319 in support of the proposition that the mistake or wrong advice by Counsel or indifference of Counsel is sufficient cause for condonation of delay.

14. On the other hand Mr. Roychowdhury appearing for the plaintiff respondent has contended that the lower court records would show that another set of advocates appeared for the defendant besides Mr. Pathak, in the trial court shortly after 11.5.71, that the law on the point that a purported application u/s 17(1) without any prayer for determination of rent could not be treated as an application u/s 17(2) of the Act was settled by the Bench decision reported in 75 CWN 372 and the same view was taken in *Jitendra Chandra Dey Vs. Tarak Nath Mullick and Others*, and in *Hindusthan Industrial Co. Vs. Chandi Prosad More*, and several other subsequent Bench decisions of this Court. It is next argued that the present application of the defendant is not maintainable at this stage as no suit is pending and the appeal is not a continuation of the suit for the purpose of Section 17 of the Act. In support of

this contention reliance is placed on the Special Bench decision of this Court in Sriniwas Sureka Vs. Madanlal Sekhsaria and Others, in which it has been held that in view of the definition of tenant in section 2(h) of the Act and the scheme of the Act the liability of a tenant u/s 17(1) to deposit rent does not continue during the pendency of the appeal after a decree for eviction has been passed although that does not absolve the tenant of his liability to pay rent or mesne profit which is independent of Section 17 of the Act. In the said decision reference was made to Radharani vs. Angur Bala 67 CWN 501 in which it was held that in landlord's appeal in a suit for ejectment there was no liability of the tenant to deposit rent u/s 17(1) of the Act. Mr. Roychowdhury has also cited Sharadchand and Others Vs. Vishnupant, in which a Full Bench of the Madhya Pradesh High Court has held that Section 13 of the M.P. Act (which is pari materia with Section 17 of the West Bengal Act) does not apply in appeal whether the appeal is by the tenant or the landlord and it is not correct to think that for all purposes an appeal is to be treated as a continuation of the suit. It is also submitted on behalf of the respondent that the grounds given for condonation of the delay are not at all reasonable or sufficient.

15. After considering the submissions made on behalf of the parties and the facts and circumstances of the case I find that the defendant was misled by the wrong advice of his learned advocate in the trial court who was also negligent in not keeping a copy of the application filed on 11.5.71. The defendant was also misled by subsequent lapse on the pari of his learned advocate in the first appellate court in not considering the decision in 75 CWN 372 reported in 1971 for taking necessary steps for amending the application filed on 11.5.71. The special Bench decision of this court in Sriniwas Sureka Vs. Madanlal Sekhsaria and Others, and the Full Bench decision of the Madhya Pradesh High Court in Sharadchand and Others Vs. Vishnupant, deal with the question of liability of the tenant to deposit amount equivalent to rent u/s 17(1) of the West Bengal Act and corresponding provision of the M.P. Act during the pendency of the appeal and whether for that purpose the appeal is a continuation of the suit. It cannot be said on the basis of the aforesaid decisions that in an ejectment suit an appeal is not a continuation of the suit for the purpose of exercise of the power of the court in second appeal u/s 108 of the CPC to allow amendment of the pleading. The normal rule is that the legal pursuit of remedy by suit, appeal, second appeal which are really but steps in a series of proceedings all connected by an intrinsic unity and is to be regarded as one proceeding (vide Garikapatti Veeraya Vs. N. Subbiah Choudhury). No doubt there has been considerable delay in making the application for amendment. But the delay has been sufficiently explained. The defendant made delayed deposit of rent for June, July and August 1970 with the Bent Controller in the purported application u/s 17(1) of the Act which had a far reaching effect in that his application could not be treated as one u/s 17(2) of the Act and he did not get an opportunity to re-deposit the rent for those three months with statutory interest to get relief u/s 17(4) of the Act. In my view it will not be just and proper to decree the eviction of the

defendant from the suit premises without allowing his prayer to amend the application filed on 11.9.71 in the special circumstances of the present case.

16. I, therefore, allow the application for amendment by addition of a prayer for determination of the amount of rent payable in the application filed on 11.5.71 for permission to deposit rent in which a dispute as to the rent payable for the months of June, July and August 1970 was impliedly raised so that the said application for permission to deposit but shall now be dealt with by the trial court as an application u/s 17(2) of the Act. Consequently the appeal is allowed. The judgment and decree of the court of appeal below relating to and based on the ground of default in payment of rent are set aside. The suit is sent back to the trial court with a direction to take up the application filed by the defendant on 11.5.71 as amended as one u/s 17(2) of the Act and dispose of the said application as also the suit in accordance with the provisions of sub-sections (3) or (4) of Section 17 of the Act and in accordance with law. It may be mentioned that the defendant had no liability to comply with section 17(1) of the Act after 15.12.73 when the suit was dismissed by the trial court and that such liability will accrue after the suit is re-admitted by the trial court consequent on the order of remand passed by this Court. There will be no order as to costs in this Court. Let the records be sent down to the court of appeal below as expeditiously as possible.