
M/S. Hirjee Auto Centre Vs Dinesh Kumar Agarwal**CO 3255 of 2013**

Court: Calcutta High Court**Date of Decision:** April 23, 2014**Acts Referred:**

Civil Procedure Code, 1908 (CPC) â€” Section 151, 17(3)#West Bengal Premises Tenancy Act, 1956 â€” Section 17(1), 17(2), 17(3)

Citation: (2014) 4 CHN 35**Hon'ble Judges:** Subrata Talukdar, J**Bench:** Single Bench

Advocate: Saptangshu Basu, Ld. Senior Counsel, Sri. Srijib Chakraborty, Ld. Counsel, Sri. Ashis Choudhury, Ld. Advocate and Ms. Uma Bagree, Ld. Advocate, Advocate for the Appellant; Sabyasachi Bhattacharya, Ld. Counsel and Ms. Sohini Chakraborty, Ld. Counsel, Advocate for the Respondent

Final Decision: Dismissed

Judgement

Subrata Talukdar, J.

This civil revisional application arises out of order impugned dated 26th June 2013 passed by the learned 1st

Additional Civil Court (Jr. Division) at Alipore in Title Suit no. 31 of 1993. By the said impugned order dated 26th June, 2013 the learned Trial

Court was pleased to decide the two petitions-one filed by the present petitioner-defendant u/s 151 C.P.C. and another by the present opposite

party-plaintiff u/s 17(3) of the West Bengal Premises Tenancy Act, 1956 (for short the 1956 Act).

2. The learned Trial Court was pleased to record at the outset as follows. First, none appears for the defendant on repeated calls. Second, no

challans were found to be filed by the defendant in pursuance of his own undertaking and in compliance of the order of the court made on a

previous date.

3. It is relevant to mention here that Title Suit no. 375 of 1987 renumbered as Title Suit 31 of 1993 as been filed by the present opposite party-

plaintiff against the present petitioner-defendant for eviction and for recovery of khas possession. The suit was contested by the defendant by filing

written statement.

4. By filing the petition u/s 151 CPC the defendant prayed for permission from the learned trial court to allow deposit of arrears of rent assessed at

Rs. 2000/- and, the rent for the month of April 2009. The application u/s 17(3) of the 1956 Act was filed by the plaintiff praying for striking out the

defence against delivery of possession for non-compliance with the provisions Section 17(1) of the 1956 Act by the defendant.

5. According to the learned Trial Court neither the defendant appeared before the court nor filed the challans showing the payment of current rent

as per his own undertaking. The plea taken by the defendant in his application u/s 151 CPC was to the effect that the arrears of rent for the period

between July 1986 to June 1987 assessed by the learned trial Court @ Rs. 160 per month amounting to total arrears of Rs. 2000/- could not be

shown to be deposited as the challans of the said period were misplaced and, in effect destroyed. The defendant further took the plea that in spite

of best effort he could not search out the old challans in the record of accounts department of the learned District Court.

6. Similarly, according to the defendant the challan showing deposit for the month of April 2009 had also been misplaced and leave should be

given to him to re deposit at the rate of Rs. 160/- per month. The petitioner-defendant's further contention was that during pendency of the suit,

the suit property partially collapsed on 24th February, 2003 and several important documents, including most of the challans were destroyed. The

defendant filed an application for repairing of the said collapsed portion of the suit property and vide order no. 132 dated 28th June, 2003 the

learned Trial Court pleased to allow the defendant to repair the collapsed portion.

7. Per contra according to the present OP-plaintiff the application u/s 17(3) is in the nature of a penal section and the learned Trial Court can

always strike out the defence of recovery of possession of the defendant suo motu even without a formal application for the same.

8. The learned Trial Court was pleased to observe that the arrears of the defendant could not be accepted in the absence of a bona fide ground

and without the support of even a single document. The learned Trial Court was also pleased to record that the application u/s 17(2) of the 1956

Act was disposed of on merit on 9th February 1994. Thereafter, the plaintiff filed an application u/s 17(3) of the 1956 Act on the 16th of February

2012. After the filing of the application u/s 17(3) the defendant took several adjournments and thereafter ultimately filed the petition u/s 151 CPC.

The learned Trial Court observed that the plea of the defendant u/s 151 CPC was woefully short of mentioning the time or the approximate period

during with the challans were misplaced. Neither any explanation was forthcoming from the defendant with regard to the cogent reason for

remaining silent for a such a long period of time prior to seeking permission of the court u/s 151 CPC. Besides, in the opinion of the learned trial

court the defendant further failed to prove its bona fides by not appearing in court on 26th June, 2013 that is the date of the impugned order as

well by non-filing of the challans showing payment of the current months.

9. For the afore mentioned reasons the learned Trial Court was pleased to reject the petition of the defendant u/s 151 CPC and allow the petition

of the plaintiff under 17(3) of the 1956 Act thereby striking out the defence against delivery of possession.

10. Sri Saptangshu Basu, learned Senior Counsel appearing for the defendant submits that although the application u/s 17(2) was disposed of on

9th February 1994, the OP-Plaintiff filed the application u/s 17(3) on 16th May 2012, i.e. after a long delay. Reiterating the submission of the

defendant before the learned Trial Court as recorded earlier in this judgment, Sri Basu submits that in the application u/s 17(3) filed by the plaintiff

an annexed to CO. 3255 of 2013 there is no whisper of any allegation by the defendant of non-compliance of the order dated 9th February 1994.

According to Sri Basu, the OP-Plaintiff always carried the impression that the petitioner-defendant was depositing rent as directed by the learned

Trial Court and therefore found no reason to file any application u/s 17(3) until in the year 2012.

11. In support of his submission Sri Basu relies upon a judgment of the Hon"ble Apex Court in M/s. B.P. Khemka Pvt. Ltd. Vs. Birendra Kumar

Bhowmick & Anr. (AIR 1997 SC page 1010). He submits that it has been made clear in Khemka"s Judgment (supra) that the word "shall"

appearing in Section 17(3) of the 1956 Act must be read to be directory and not mandatory. The Court is vested with the discretion to order

either striking out the defence or not depending upon the circumstances of the case and the interests of justice. Alternatively, the court has the

discretion to condone the default and extend the time for payment of deposit.

12. Sri Basu also relies on Gaya Prasad Kar Vs. Subrata Kumar Banerjee, . Relying on Paragraphs 15 to 18 of 2005 8 SCC Page 14 (Supra).

Sri Basu submits that in 2005(8) SCC 14(3) Hon"ble Apex Court has held that under the 1956 Act the Court vested with ample authority to

extend the time for making the deposit of rents in cases of default.

13. Per contra Sri Bhattacharya appearing for the OP-plaintiff points out that the effect of Section 17(3) of the 1956 Act automatically follows and

is not dependent upon the filing of any formal application. He further submits that Khemka"s case (Supra) is distinguishable on the facts of this

case. Relying on the written objection filed on behalf of the plaintiff against the application of the defendant u/s 151 CPC he draws the attention of

this Court to the conduct of the defendant who has not used the suit property, which is an godown and kept it under lock and key for the past 26

years. He also submits that the story of the defendant with regard to the misplacement of the challans is dubious and the defendant has taken a

decade to place this alleged fact before the learned Trial Court.

14. Sri Bhattacharya reiterates that the defendant also failed to comply with the terms of order No. 49 dated 9th February 1994 passed in an

application u/s 17(2). He submits that nothing could be shown from the records of the proceeding and the records of the Accounts Department of

the District Judges Court that the challans were actually deposited.

15. In support of his submissions Sri Bhattacharya relies upon a decision of a Division Bench of this court reported in Santi Nath Sha Vs. Santosh

Kumar Chatterjee, . Sri Bhattacharya submits that the said decision is an authority on the point that when the learned Trial Court on perusal of the

record finds that there are no challans for depositing either the current rent or any rent, the learned Trial Court shall be justified in arriving at the

conclusion that there are sufficient materials before the Court to hold in favour of striking out the defence against delivery of possession. The

learned Division Bench, according to Sri Bhattacharya was pleased to observe the ratio in Khemka"s Case (supra) before arriving at its

conclusion.

16. Heard the parties. Considered the materials on record.

17. In the opinion of this Court the learned Trial Court is justified in exercising its discretion u/s 17(3) of the 1956 Act against the present

petitioner-defendant based on the materials before the Court. This Court finds that the plea of the petitioner-defendant with regard to the

explanation of his conduct pertaining to the deposit of challans after the order passed on the application u/s 17(2) on the 9th of February 1994 did

not inspire the confidence of the learned Trial court to exercise its discretion in favour of the defendant and correctly so.

18. This Court also finds substance in the allegation of the present OP-plaintiff that no materials are forthcoming from the records of the

proceedings of Title Suit 31 of 1993 and from the records of the Accounts Department of the learned District Court at Alipore to the effect that

the defendant took steps for depositing arrears and current rents. As rightly noted by the learned Trial Court the present Petitioner-Defendant

failed to act in terms of his own undertaking before the learned Trial court.

19. In short, in order to qualify for the exercise of discretion in its favour, the present petitioner-defendant ought to have shown bona fides before

the learned Trial Court which correctly took judicial notice of the fact that on 26th January 2013 when the court was scheduled to take up the

important petition of the petitioner defendant u/s 151 CPC and of the OP-plaintiff u/s 17(3) of the 1956 Act, the defendant was absent on

repeated calls.

20. This court is also in respectful agreement with the observations of the Hon"ble Division Bench in Shanti Nath Sha" Case (supra) on the

application of the ratio of Khemka"s Case (supra) and affirms the view that in the facts and circumstances of the present case the learned Trial

Court correctly exercised discretion by dismissing the Petitioner-Defendant" application u/s 151 CPC and allowing the OP-Plaintiff" application u/s

17(3) of the 1956 Act.

21. CO 3255 of 2013 is thus dismissed. There will be, however, no order as to costs.

22. Since the suit is of the year 1993 this court directs the learned 1st Additional Civil Court (Jr. Division) Alipore to decide the same expeditiously

and in accordance with law within a period 6 months from date without granting any unnecessary adjournment to the parties.

23. Urgent certified photocopies of this judgment, if applied for, be given to the learned advocates for the parties upon compliance of all

formalities.