

**(1971) 06 CAL CK 0010**  
**In the Calcutta High Court**  
**Case No : A.F.A.D. No. 359 of 1970**

Biswanath Chatterjee

APPELLANT

Vs

Ajit Kumar Sarkar

RESPONDENT

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**Date of Decision :** 07-06-1971

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 100  
West Bengal Premises Tenancy Act, 1956 — Section 13(1), 17(1), 17(2)

**Citation :** AIR 1972 Cal 52

**Hon'ble Judges :** Salil Kumar Datta, J

**Bench :** Single Bench

**Advocate :** Tapash Chandra Roy, for the Appellant; N.C. Chakraborty, Asoke Guha, Pramatha Chandra Roy, Sitaram Bhattacharjee and Binoy Bhushan Choudhury, for the Respondent

**Final Decision :** Allowed

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## Judgement

Salil Kumar Datta, J.—This is defendant-tenant's appeal against a concurrent judgment, decreeing plaintiff's suit for recovery of possession. The plaintiff's case is that he is the owner of premises No. 11-D, Monoharpukur Road and the defendant had been a tenant under him in respect of Suit No. 1 in the ground floor thereof at a rental of Rs. 75/- per month and pump charge of Rs. 5/- per month, the tenancy being according to English Calendar month. The defendant became defaulter in payment of rent from November 1966 as alleged deposits with the Rent Controller were invalid. It was alleged, that the defendant was guilty of conduct which was a nuisance or annoyance to neighbours including the landlord as he forcibly prevented landlord's men from using a passage leading to the pump room and inspecting the reservoir of water which supplied water to seven flats of the said premises and if the pump and motor were damaged supply of water to tenants would be curtailed. It was alleged that the tenancy was duly determined by a notice to quit but as the defendant failed to vacate, the suit was instituted praying a decree for recovery of possession on eviction of the defendant therefrom on the aforesaid grounds.

2. The suit was contested by the defendant, who filed written statement denying all material allegations in the plaint. It was stated that he was not a defaulter in payment of rent as rent for November, 1966 was deposited with the Rent Controller as the landlord refused to accept rent and rent thereafter was duly deposited with the Rent Controller. As to the passage leading to the pump room, it was stated that the said passage was within his tenancy and it was also denied that he was guilty of any conduct which would amount to nuisance or annoyance as alleged. An additional written statement was filed by the defendant and it was stated that rent was tendered every month to the landlord and on his refusal it was being deposited with the Rent Controller and as such he was not a defaulter. In those circumstances it was submitted that the suit should be dismissed.

3. The suit was tried in evidence before the learned Munsif, who held that the notice determining the tenancy was valid and legal and was duly served. It was further held that the passage leading to the pump room was not a part of the defendant's tenancy and it was unthinkable that it could be used only on permission of the defendant as claimed. It was found that the defendant was guilty of causing nuisance or annoyance to the landlord and inmates of the house. The learned Munsif further found that there was no evidence to indicate that the landlord refused any Money Order in respect of rent remitted to him. The rent for October, 1966 was sent by Money Order which was duly accepted but as far as rent for November, 1966 the story of tender by the tenant was a myth. Accordingly it was held that the tenant was a defaulter from November, 1966. In those circumstances the suit was decreed for recovery of possession as also for mesne profits from Nov., 1968 to be ascertained in a proper proceeding under Order 20, Rule 12 of the Code of Civil Procedure.

4. An appeal was preferred against the said decision by the tenant and it was held by the appellate court, in concurrence with the trial court, that the plaintiff was never unwilling to receive rent as would also appear from Ext. 7 and other letters. The defendant's story of tender was thus a "simple falsehood" and the deposits with the Rent Controller were invalid. The defendant accordingly was held to be a defaulter. As to the other grounds of eviction it was held that the passage was not included within the tenancy of the defendant and the defendant often obstructed the work of inspecting the reservoir through the said passage. P. W. 1 the plaintiff's engineer, who inspected the reservoir, stated that if the water level fell and the pump was operated then the entire machinery would be burnt out. The appellate court held that the defendant was prone to give obstruction and such systematic obstruction amounted to nuisance or annoyance. In that view the appeal was dismissed and the trial court's order was affirmed. The present appeal is against the said decision.

5. Mr. Tapash Chandra Roy, the learned Advocate appearing for the defendant, challenged the findings of the Courts below as to the acts of nuisance and annoyance by the tenant-defendant. He referred to the evidence of P. W. 1 according to whom the obstruction to the inspection of the pump room and

reservoir was done in October, 1966 and It is to be remembered that the suit was instituted on 7th November, 1968. There is no oral evidence that there was such obstruction on earlier occasions and according to Mr. Roy there was no material for the appellate court for its findings that there was systematic obstruction by the tenant which was accepted as causing annoyance and nuisance. Mr. Chakraborty the learned Advocate for the respondent referred me to the correspondence wherein the landlord has referred to systematic obstruction to inspection of pump room and reservoir. Mr. Chakraborty contended that the findings are based on materials on record and being finding of fact cannot be challenged in second appeal.

6. Clause (e) of Sub-section (1) Of Section 13 of the West Bengal Premises Tenancy Act, 1956 sets out the conduct of the tenant or person residing in the premises which is a nuisance or annoyance to neighbours including the landlord is a ground for eviction of tenant from the premises under his tenancy. Annoyance or nuisance has not been defined in the Act and accordingly it has to be understood in the normal connotation according to plain and sober notions of living. According to judicial decisions, nuisance is anything which interferes with the normal comforts of human life or endangers the health and safety of the neighbour while annoyance is wider and covers anything which reasonably troubles or disturbs the mind or pleasure not of a fanciful or skilled person but of an ordinary sensible person, though it may not amount to physical detriment or discomfort. It is not possible to lay down any rule of law applicable to every case as it will be at all times a question of fact with reference to the surrounding circumstances.

7. Undoubtedly in the facts of the present case, systematic obstruction by the tenant to inspection of pump room and reservoir, would amount both to nuisance and annoyance. On the one hand it will interfere with the normal comforts of neighbours by way of suspension or diminution of water supply, endangering even their health and comfort. On the other hand it will disturb the mind of the landlord and other inmates of the premises, with the prospect of their discomfort and possible damage or loss that may thereby be caused. This position has not been denied, as he could not, by Mr. Roy.

8. The real question for determination is whether there has been such systematic obstruction to the inspection of the pump room and reservoir by the tenant. The landlord admittedly did not accompany his engineer in such inspection and the engineer, who is P. W. 1, had complained that there had been the instance of such obstruction in October, 1968 and prior to that he inspected the pump room and reservoir. The same fact was deposed to by P. W. 3 and apart from this instance of obstruction, there is no evidence of any other obstruction, except what is contained in Ext. 7 (h), a letter which, in absence of evidence in support by the persons who usually carried the inspection, cannot be accepted as proving the systematic obstructions. A single instance of such obstruction in October, 1968, in absence of evidence of any prior obstruction, cannot, in my opinion, be

accepted for holding the tenant guilty of acts of annoyance or nuisance to neighbours including the landlord. The landlord is not accordingly entitled to a decree on this ground. It may be mentioned that the finding about the passage to the pump room as not appertaining to the defendant's tenancy are findings of fact and cannot be challenged and in fact has not been challenged by Mr. Roy.

9. The next question to be considered is whether the defendant is a defaulter from November, 1966. This is undoubtedly a finding of fact and cannot be assailed in second appeal. But Mr. Roy has taken some additional grounds in view of the change of law that has taken place in the meantime. Sec. 17 (4) as it was at the time of the institution of suit is to the following effect :--

"If a tenant makes deposit or payment as required by Sub-section (1) or Sub-section (2) no decree or order for delivery of possession of the premises to the landlord on the ground of default in payment of rent by the tenant shall be made by the Court but the Court may allow such costs as it may deem fit to the landlord :

Provided that a tenant shall not be entitled to any relief under this subsection if he has made default in payment of rent for four months within a period of twelve months."

10. By the West Bengal Premises Tenancy (Amendment) Act, 1969 published in Calcutta Gazette of 31st October, 1969, which was deemed to have come into force on August 26, 1968 (Act 4 of 1968), a new proviso as set out hereunder was substituted in place of the above proviso-

"Provided that a tenant shall not be entitled to any relief under this subsection, if, having obtained such relief once in respect of the premises, he has again made default in the payment of rent for four months within a period of twelve months,"

Further in subsection (4), in place of words "Sub-section (2) or Sub-section (2-A)" were substituted. After the amendment, a default for four months or more would thus be curable on compliance of the provisions of Sub-sections (1), (2) and (2-A) of Section 17 of the Act as the said amendments were made applicable to pending suits including appeals. Mr. Roy drew my attention to an application filed on December 9, 1968 by the defendant in the suit within the time prescribed in which it was stated that the defendant had deposited rent upto November, 1968 and the rent was "now" payable from December 1968 together with the pump charges. In these circumstances it was prayed that the court would be pleased to pass an order for permission to deposit the monthly rent from December 1968 onwards in this Court and there was further prayer to the effect that the Court may "pass such other or further order or orders as your honour may deem fit and proper." This application was disposed of ex parte and such permission was given and the amount equivalent to rent from December 1968 onwards was being deposited in the suit. Mr. Roy contended that the said application though filed u/s 17 (1) of the Act as stated in its title should have been treated as one u/s 17 (2) of the Act and disposed of in accordance with law.

In support of this contention reliance was placed on the decision in *Gunwantra v. Satyanarayan* (1971) 75 CWN 372 in which this Court considered the tests by which an application though purported to have been made u/s 17 (1), could be treated as one u/s 17 (2). According to Mr. Roy the tests laid down in the said decision were satisfied in this instant case. It was accordingly contended that if the application is treated as one u/s 17 (2), the trial court would have determined the amount of rent to be deposited in court or paid to the landlord fixing the time within which the amount should be deposited or paid, so that the defaults if any, could be cured and the tenant could be entitled to relief against a decree for possession. Mr. Chakraborty has disputed the above contention firstly because according to him there was nowhere in the four corners of the petition any dispute as to the amount of rent payable, which was a sine qua non of an application u/s 17 (2) and the same view was taken in the decision stated above. Mr. Chakraborty further contended that the dispute to be raised must be a bona fide dispute while in the present case even in the additional written statement the tenant made a statement that he tendered rent every month prior to deposit with the Rent Controller. This case of tender was found by the courts below to be a myth and there was really no bona fide dispute in this respect. Reliance was placed in the decision of *Tarak Nath v. Lt. Col. Karuna Kumar Chatterjee* (1958) 62 C WN 830, where it was held that only bona fide dispute come u/s 17 (2) and mere raising a dispute will not attract the provisions of the section. Reliance was also placed in *G. P. Press v. Naraindas* (1960) 64 CWN 161 in support. Mr. Chakraborty further contended that issue now raised would be a mixed question of law and fact, and not taken in the courts below, and cannot be taken for the first time in this court and he referred me to the decision in *Krishnapasuba v. Dattatraya Krishnaji* AIR 1966 SC 1024 which supported the above contention.

11. In view of the change of law which has taken effect after the decision of the lower appellate Court and has been given retrospective effect, an issue when it does not involve any question of fact, may in any event be taken even for the first time in this Court. The point for my consideration is whether the application filed on December 9, 1968 could be taken as an application u/s 17 (2). Mr. Chakraborty contended that there was no dispute involved or raised in the application and such dispute, as I have already stated even if it was there, was not according to the plaintiff, bona fide. As to the bona fides of the dispute, it appears from written statement that the defendant claimed that he was not a defaulter as alleged in the plaint in view of the deposits of rent made by him with the Rent Controller which according to the plaintiff were illegal deposits. There can thus be no doubt that the defendant by his denial in the said application that he was not a defaulter raised a dispute on the question of default. It appears also that such dispute was bona fide as in view of the deposits made with the Rent Controller of which there is no dispute, the defendant's case was that he was not a defaulter while according to the plaintiff such deposits were invalid in law. The defendant tried to validate the deposits by a story of prior tender which was disbelieved by the Courts. But that story related to the question of validity of

deposit and not to the deposits themselves which according to the defendant would disprove the plaintiff's case of default and would also require consideration in determining the amount to be deposited in court or paid to the plaintiff by the defendant.

12. As to the point whether the petition should be treated as one u/s 17 (2), it is necessary to refer to some rulings of this Court.

13. In *Smt. Parameswari Debi v. Nandalal*, C. R. 3340 of 1966, D/-20-2-67 (Cal), it was held that though the petition in the said proceedings was stated to be one u/s 17 (1) asking for permission to deposit at the rate of rent paid, it was in substance one u/s 17 (2). Further even though in the petition it was not stated that there was any dispute, as a matter of fact there was a dispute, as according to the defendant the deposits were to be made at the rate of Rupees 250/- per month, while according to the plaintiff the rate was Rs. 550/- per month. Further there was the omnibus prayer of the nature referred to in the case of *Gunwantrai* (1971) 75 CWN 372. The Court held that the application was intended to be one u/s 17 (2) and the petition contained prayer for a direction from court regarding the amount payable and the trial court should have treated it as such. In *Gunwantrai's* case, the court did not accept the application as being in substance one u/s 17 (2), as the said application was merely one for deposit and there was no omnibus prayer to the court for passing such other or further orders as would be deemed fit and proper. In the present case against the background of the plaintiff's 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 ground of default and the appellate court also erred in confirming the said decree which thus cannot be sustained.

14. In the result, this appeal succeeds and is allowed without any order as to costs in this Court. The judgments and decrees of the courts below are set aside. The case is now sent back to the trial court for disposal of the suit in accordance with law, taking into consideration the ground of default now available to the plaintiff, in view of my decision that on the other ground relating to nuisance and annoyance the plaintiff is entitled to no relief. The trial court will first take up the application filed by the defendant on Dec. 9, 1968 treating it as one under Subsection (2) of Section 17 of the Act and will dispose of the said application as also the suit in accordance with the provisions of Sub-sections (3) and (4) of Section 17 of the Act.

15. Let the matter be disposed of as expeditiously as possible and let the records be sent down at once.