

(1986) 01 CAL CK 0001
In the Calcutta High Court
Case No : A.O.D. No. 208 of 1971

Chandradip Thakur and Others

APPELLANT

Vs

Dulal Lal Seal and Others

RESPONDENT

Date of Decision : 21-01-1986

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151

Transfer of Property Act, 1882 — Section 106

West Bengal Premises Tenancy Act, 1956 — Section 13, 13(1), 13(1)(h), 13(6), 17

Citation : 90 CWN 638

Hon'ble Judges : Sukumar Chakravarty, J; M.N. Roy, J

Bench : Division Bench

Advocate : H.D. Ghosh, for the Appellant; S.P. Chatterjee, Tapas Kumar Chatterjee and Birendra Kumar Bhowmick for Respondent No. 1 and Saktinath Mukherjee, Manwar Ali and Saidal Ahmed for Respondent Nos. 2 to 5, for the Respondent

Final Decision : Dismissed

Judgement

M.N. Roy, J.—This appeal is directed against the judgment and decree dated 7th August, 1978, passed in Ejectment Suit No. 132 of 1974 by Shri K.N. Mukherjee, learned Judge, 3rd Bench, City Civil Court, Calcutta and whereby, the suit for eviction of the defendant/appellants, was decreed and it was directed that the plaintiff/respondents, would be entitled to get a decree for khas possession after evicting the defendant/appellants from the premises in suit, which comprised of a portion of the first floor of premises No. 84, Rafi Ahmed Kidwai Road, Calcutta (hereinafter referred to as the said tenancy) Admittedly, the defendant/appellants were joint monthly tenants under the plaintiff/Respondents in respect of the said tenancy at a monthly rent of Rs. 250/-, payable according to English calendar month. It was claimed by the plaintiff/Respondents that the tenancy of the defendant/appellants was duly determined by service of a notice to quit and they having failed to comply with the terms of the said notice (Ext. 1), the Ejectment Suit was filed on 7th February 1974 and it was alleged that the

defendant/appellants failed and neglected to pay rent since 1973 and as such, they were not entitled to any protection against eviction under the provisions of the West Bengal Premises Tenancy Act, 1956 (hereinafter referred to as the said Act). As such and on those allegations, the plaintiff/Respondents prayed for the decree as made.

2. The defendant/appellants in their written statement denied the legality, validity and sufficiency of the ejectment notice (Ext. 1), apart from asserting that the plaintiff/respondents, with malafide intention, refused to accept the rent from them. The propriety of the schedule of the said tenancy as disclosed in the plaint, was also denied. The defendant/appellants further claimed protection from eviction under the provisions of the said Act and claimed that the suit was filed, not only on a wrong premises and facts.* but the same was intended, as mentioned thereinbefore, to harass them. They further claimed to be in due and bonafide occupation of the said tenancy. Admittedly, for determination of arrears of rent, if any, the defendant/appellants filed a separate petition u/s 17(2)(A)(b) of the said Act and prayed for payment of arrears, by instalments.

3. On the pleadings, the particulars whereof have been indicated hereinbefore, the following issues were framed for determination:

1. Is the suit maintainable in its present form?
2. Are the defendants defaulters in payment of rent as alleged?
3. Was notice served ? Is it legal, valid and sufficient?
4. Is the plaintiff entitled to a decree for ejectment?
5. To what relief, if any, is the plaintiff entitled?

4. On the basis of the evidence as available, the learned Judge of the Court below came to the conclusion that the plaintiff/Respondents had succeeded in establishing the defendants' default in payment of rents since June 1973 and so also the bonafide, validity and sufficiency of the notice of Ejectment (Ext. 1). In fact, it has been found that the said notice was duly served on two of the defendants, while the other two had refused to accept the same. It has further been observed by the learned Judge of the Court below that the defendant/appellants did not dispute the plaintiff/Respondents case that they were defaulters in respect of payment of rent, apart from, not disputing the fact of the service of the said Ejectment notice (Ext. 1) and furthermore, the legality and validity of that notice could not be disputed. In fact, it has been observed that the requirements of section 13(6) of the said Act and section 106 of the Transfer of Property Act, was satisfied. It has further been observed that the default of the defendants in payment of rent was proved.

5. It should be noted that on their application, the defendant/appellants were permitted to deposit the arrears of rent by instalments, but they failed to deposit two of such instalments in terms of the Court's order and on such failure, the

plaintiff/Respondents filed an application u/s 17(3) of the said Act. On such, the defendant/appellants filed an application u/s 151 of the CPC and the said application was disposed of in their favour by an order dated 7th May, 1976 and by the said order, the delay in making the concerned deposit was condoned. It should also be noted that this was the first application u/s 151 of the Code of Civil Procedure. There is no doubt or any dispute that subsequently, the defendant/appellants deposited the entire arrears at the time of hearing and on such fact, it was contended on their behalf, that in the circumstances of the case and in view of the specific admission of the plaintiff (P.W. 1), that it was the first default of the defendant/appellants, they should be given relief u/s 17(4) of the said Act.

6. It was of course, contended by the plaintiff/Respondents that the defendant/appellants would not be entitled to such or any relief u/s 17(4) of the said Act, as subsequent to the order condoning the delay as mentioned above, in depositing the arrears of rent, the defendant/appellants have defaulted, in depositing the current rent within the prescribed time and thus they had signally failed to comply with the provisions of section 17(1) of the said Act. On the basis of the challans as available before the Court, the learned Judge of the Court below has observed that the defendants paid the rent for the month of November 1976 on 20th December, 1976 and so also the rent for the month of July, 1977 on 7th September, 1977 and similarly, the rents for January and February 1978 were deposited on 21st March 1978. Thus, there was admittedly four defaults committed by the defendant/appellants in the matter of payment of rent even after the earlier delay was condoned. In view of such state of the records, it has been found, that the defendant/appellants defaulted in depositing the rent for the periods as mentioned above and as such, they had clearly defaulted in complying with the requirements of section 17(1). of the said Act. It should be noted that after plaintiff/Respondents' evidence was closed, the defendant/appellants filed their second application u/s 151 of the Civil Procedure Code, praying again for condonation of the delay in depositing the current rent in Court. In the said application it was stated that due to illness of one of the defendant's Ram Narayan Thakur, the delay in deposit took place. The said application was opposed by the plaintiff/Respondents, contending inter alia that on such vague grounds as indicated, the delay in deposit of rent for the months or the periods as indicated above, should not be condoned- The learned Judge of the Court below has further observed that none of the defendant/appellants have come forward to depose in the proceedings and to explain the delay in depositing the rents for the periods as indicated hereinbefore and the ground as stated in the said application u/s 151 of the Code, was not also supported by any affidavit or any Medical certificate, apart from observing that it has not also been disclosed as to on what date or dates the said Ram Narayan Thakur fall ill and which incapacitated him to deposit the current rent for the periods as indicated. As such, the learned Judge of the Court below has observed that it can reasonably be contended that the delay in making the deposit of rent for the

period as mentioned above, was more due to latches or further ground that the ground of illness as pleaded. That being the position, it has been observed by the learned Judge of the Court below, that there was no material on record to show that due to supervening or any unavoidable circumstances or any circumstances beyond their control, the defendant/appellants could not deposit the rent in time. On such findings, it was further observed that no ground for condonation of delay in depositing rents as mentioned above, was made out by the defendant/appellants and consequently, the delay in depositing the current for those periods, could not be condoned. Such being the position, the Learned Judge of the Court below has further observed that thus the defendants in the instant case had failed to deposit the current rent within the prescribed time as required u/s 17(1) of the said Act and consequently, they would not be entitled to get the benefit of the provisions of section 17(4) of the said Act and as a result thereof, the plaintiff/Respondents would be entitled to get a decree for khas possession after evicting the defendant/appellants, for default in payment of rent as mentioned above.

7. Mr. Ghosh, appearing in support of the appeal, after placing the facts, which were not in dispute, urged that the learned Judge of the Court below was wrong in holding that the defendant/appellants defaulted in complying with the requirements, of section 17(1) of the said Act and according to him, he was also wrong in holding that defendant/appellants, had failed to deposit current rent within the prescribed time under the sections as mentioned above and that, they would not be entitled to the benefits of the provisions of section 17(4) of the said Act. In fact, it was claimed by him that the learned Judge of the Court below should have held that sufficient cause for condonation of delay and consequently, he should have held that the defendant/appellants were entitled to protection u/s 17(4) of the said Act. It was also contended by Mr. Ghosh that since there was an application u/s 17(2) of the said Act, whereupon instalments were granted and the delay in making the deposit in time was condoned on the basis of the first application u/s 151 of the CPC as made by the defendant/appellants, the learned Judge of the Court below should have held that the subsequent default for which the decree in the instant case has been passed, could not have been passed, because the subsequent default, for which the decree in the instant case has been passed, could not have been passed, because the subsequent default as alleged, would really be the second default under the said Act and without a fresh suit, the claim or the validity and propriety of the said second default, could not be determined and decided. It was also been claimed by him that inasmuch as the second application u/s 151 of the CPC was decided and disposed of by the learned Judge of the Court below during the course of hearing and without giving the defendant/appellants opportunity to produce necessary evidence in support of the same, the determination as made, was void and the same was contrary to and against the principles of natural justice.

8. Mr. Chatterjee, appearing for plaintiff/Respondent No. 1.; referred to section 13(1) of the said Act, which postulates that notwithstanding anything to the

contrary in any other law, no order or decree for the recovery of possession of any premises shall be made by any Court in favour of the landlord against a tenant except on one or more of the grounds as mentioned therein and he specifically referred to clause (i) of section 13(1), which speaks of a case where the tenant has made a default in the payment of rent for two months within a period of 12 months or for two succeeding periods in cases where rent is not payable monthly. On the basis of above, Mr. Chatterjee claimed that the defendant/appellants in the instant case were duly found to be in default. Thereafter, he referred to sections 17(1), (2A) and (4) of the said Act and on construing them, he claimed that the default in the instant case continued even under the order of condonation as made on the basis of the first application u/s 151 of the CPC and as such, the defendant/appellants were not entitled to the protection of section 17(4) of the said Act and more particularly when such protection would extend only to tenants who have complied with section 17(1) or section 17(2) of the said Act. While on the point and in support of his contentions, Mr. Chatterjee referred to the case of *Satya Chorone Roquittee Vs. Suresh Chandra Pal and Others*, which has laid down that sub-section (4) of section 17 of the West Bengal Premises Tenancy Act, 1956, would extend its protection only to tenants who have complied with section 17(1) or section 17(2) of the Act. The tenant defendant, in the instant case, would not come within this class. Therefore, he would not be entitled to any protection u/s 17(4), irrespective of the proviso which requires four months' default for disentitling the tenant from the benefit of the main part of the said sub-section, where the said main part is otherwise available to him.

9. Mr. Mukherjee, appearing for Respondent Nos. 2-5, i.e. the Respondents, pointed out that the fact of default of the defendant/appellants since June 1973, which was a pre-suit default, is admitted fact in the instant case and since, as pointed out by Mr. Chatterjee, there has really been no due compliance of section 17(1) and section 17(2) of the said Act, the defendant/appellants would not be entitled to the protection u/s 17(4). In fact, he claimed that the provisions of section 17(4) of the said Act, in a case like this, would not be complied with for not taking steps duly by the defendant/appellants, in terms of the requirements of sections 17(1) and 17(2) of the said Act. According to Mr. Mukherjee, although the defendant/appellants were permitted to deposit the arrears of rent by instalments, but they have failed to deposit two of the necessary instalments in terms of the Court's order and such being the position, they would not be entitled to the benefit or protection of sub-section (4) of section 17 of the said Act.

10. In support of his submissions as above, Mr. Mukherjee referred to the case of *M/s. Bhuban Mohan Shaw Estate (P) Ltd. v. Sm. Asha Gupta & Ors.*, 1978(1) C.L.J. 41, which was an appeal arising out of an Ejectment Suit, wherein the allegation was that the defendant was defaulter in payment of the rent, apart from alleging that the premises in question, was originally let out for residential purposes and that the defendant had subsequently used the premises for

business purposes without the consent of the plaintiff landlord. It would appear that during the pendency of the suit, the defendant in that case died and his heir and legal representative was substituted in his place. The said suit was dismissed and on appeal it was contended on behalf of the appellant that the application u/s 151 of the CPC is not maintainable for condonation of the delay in disposing rent for the month of July 1971 and that the dominant purpose of the tenancy was for residence but it was used by the defendant for business purposes. It appears that during the pendency of the suit the defendant respondent defaulted in depositing the rent for the month of July 1971. The rent for July 1971 was deposited on 23.8.71, that is, beyond the prescribed time. The defendant filed an application u/s 151 of the Code for condonation of the delay in making the deposit of rent for the said month giving certain explanations. It appears that the application u/s 151 was made after the arguments had been closed in the suit and having made the application after the arguments had been concluded, the Court below is not competent to condone the delay in making the deposit u/s 17(1) of the W.B. Premises Tenancy Act. In the facts and circumstances of the case, the application u/s 151 of the Code should not have been allowed. In not making the deposit in time for the month of July 1971, the penal consequences of section 17(3) of the Act must be fastened on the defendant and the defence against the delivery of possession must be struck out and the plaintiff would be entitled to a decree on that score alone and on such facts it has been observed that a professional man may carry on his profession from the residential house itself and if he is a doctor he must have a chamber. A residential house is a dwelling house in contradiction to a house for a commercial or business purpose but where it appears that the professional man, a doctor, in fact, resides in a part of the premises and has a chamber in some of the rooms, it cannot be said that the said professional man used the premises for purposes other than residential in the instant case, the defendant, a doctor, used a part of the residential premises as his chamber which does not at all convert the residential purpose into a non-residential purpose. But when it is found that a part of the premises is being used for business purpose it is to be held that the premises are being used for business purpose. So far as the instant case concerned, it is the admitted case of the parties that the premises in question was let out for residential purpose. It is also admitted that some portion of the premises has been used by the defendant for the business purpose, namely, the business of furniture and that cannot come under the cover of residence. The landlord let out the premises to the doctor, who had his professional chamber all through in the said premises, when the doctor shifted to his own house the chamber was still there but when the doctor transformed the chamber into a business office he was clearly using the same for nonresidential purpose and therefore he is liable to be evicted u/s 13(1)(h) of the West Bengal Premises Tenancy Act, 1956. Mr. Mukherjee, then referred to the case of Haripada Kanungo Vs. N.N. Shah and Others, where a point arose as to whether the power of Court to extend time prescribed u/s 17(2) of the said Act can be exercised arbitrarily or as a matter of grace, may be exercised on satisfactory ground being shown or delay and it has been observed

that the authority conferred b\\ section 17(2A) of the West Bengal Premises Tenancy Act, 1956 to extend the time for depositing the arrears of rent prescribed u/s 17(2) is not to be exercised in an arbitrary manner or as a matter of grace, but can be exercised only on proof of sufficient cause for the delay being shown to the satisfaction of the Court.

11. On the basis of the facts as indicated hereinbefore or as disclosed in the proceedings, there is no doubt that there has admittedly been default in making due payment of rents in terms of the requirements of the said Act and because of their inability to pay the instalments duly, the defendant/appellants would be faced with the risk of their defence being struck out and in fact, in the facts of the case, their defence was appropriately directed to be struck off, more particularly when under and in terms of section 17 of the said Act or the cumulative effect of the same is, that a tenant defendant has been fastened with the liability and obligation in a suit for ejectment, instituted on any ground u/s 13 of said Act, not only to deposit in Court or with the controller or pay to the plaintiff landlord, within one month from the service of the writ of summons, all arrears of rent calculated upto the month previous to that in which the deposit or payment is made, together with necessary interest, but also to continue to deposit or pay month by month and by the 15th of the following month, a sum equivalent to rent. In the facts of this case, it cannot be doubted or disputed that there has been failure to comply with the subsequent obligation by the defendant/appellants and that being the position, we cannot uphold the contentions of Mr. Ghose, but hold that the learned Judge of the Court below, was right and justified in passing the judgment and decree as impeached and to hold that the defendant/appellants were and are not entitled to get the benefit of section 17(4) of the said Act. There is also no doubt that in the absence of the due compliance with the provisions of section 17(1) of the said Act, the tenant/defendant would forfeit the right to contest a suit for ejectment, and in such a case u/s 17(3) of the said Act, the Court would be authorised to order the defence against delivery of possession to be struck out.

12. Section 17(1) is really a special procedure prescribing the way and the manner in which a tenant defendant may get protection during the currency of the suit, in the matter of payment or deposit of rent. In the absence of an application u/s 17(2) of the said Act, the Court is not required to adjudicate or determine as to the correctness of the amount as deposited or to pass any direction for such deposit. After the institution of the suit, irrespective of section 21 and 22 of the said Act, deposit must be made within 15th of each succeeding months. The power of the Court to extend time after a default in making deposit, is not absolute and uncontrolled and such restricted power of extension of time should be seeded sparingly and in appropriate cases and on due formation of opinion that such delayed deposit by a tenant defendant was beyond his power and control. Here in this case, the learned Judge of the Court below was satisfied about the validity of the claim for delayed deposit so far the first default after the initial order u/s 17(1) of the said Act and as such duly allowed the first

application u/s 151 of the CPC and we feel that for the reasons as disclosed in the impugned judgment and decree, the said Court-was justified in refusing to entertain the second application under the said section 151. In fact, there has been no illegality or any irregularity in such determination. Thus, on our findings as above, this appeal, should fail and we order accordingly. The Appeal is thus dismissed. There will be no order as to costs in this appeal. Let the records be sent down at once. The prayer for leave is refused since there is no point involved which is required to be decided by the Supreme Court.

Sukumar Chakravarty, J.

I agree.