
(1972) 07 CAL CK 0025
In the Calcutta High Court

Iswar Singh Kripal Singh and Co.

APPELLANT

Vs

The Rajputana Trading Co. Ltd. and Another

RESPONDENT

Date of Decision : 04-07-1972

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 10, 2

Citation : 77 CWN 326

Hon'ble Judges : P.B. Mukharji, C.J.; B.C. Mitra, J

Bench : Division Bench

Advocate : Prabir Sen and S.K. Upadhyay, for the Appellant; S.K. Kapur and Bhaskar Sen, for the Respondent

Final Decision : Allowed

Judgement

1. This is an appeal by Messrs. Iswar Singh Kripal Singh & Co. from the judgment and order passed in suit by S.C. Ghose, J. on the 26th August, 1970.

2. The plaintiff in the suit, The Rajputana Trading Company Limited, filed a suit against Iswar Singh Kripal Singh & Co. It is a landlord and tenant action. In that suit the plaintiff made an application for striking out the defence of the defendant Iswar Singh Kripal Singh & Co. The learned Judge allowed the application and struck off the defence.

3. In short facts of the case are as follows: -

In 1959 Iswar Singh and Kripal Singh Co., hereinafter referred to as the defendant, was a tenant under the plaintiff in respect of six separate portions of premises No. 12 Armenian Street, Calcutta also known as 10/1 Portuguese Street, Calcutta. It was alleged that each portion admittedly constituted a separate and distinct tenancy. On the 14th September, 1959, joint Receivers were appointed of the entire premises in suit No. 1133 of 1959. The joint Receivers were discharged on the 3rd October 1961 and Mr. T. K. Ghose, Barrister-at-Law was appointed Receiver. It is alleged that the defendant defaulted in payment of rent in respect of all the six tenancies in December,

1961. On the 23rd March, 1962, the defendant made affidavits and also deposits on the ground of refusal in respect of all the six tenancies for the month of December, 1961 with the Rent Controller. These deposits were in favour of the Receiver. It is alleged in the affidavits that they are in respect of all the tenancies. Thereafter, chalans for certain periods from time to time were received by the plaintiff. On the 29th September, 1967, the Receiver was discharged. On the 12th January, 1968, the defendant made fresh affidavits before the Rent Controller and deposits for the month of December, 1967 to the credit of both the plaintiff and the Receiver on the ground of bonafide doubt. Tenancies were also mis-described in these affidavits. On the 8th April, 1968 the plaintiff terminated the tenancies. On the 6th March, 1969, the present suit was instituted. The writ of summons was served on the defendant on the 7th April, 1969 and on the 5th May, 1969, written statement was filed by the defendant.

The grounds on which the ejectment was sought was (1) non-payment of rent, (2) sub-letting and (3) construction and re-construction.

4. On the 6th May, 1969, deposits for the months of October and November, 1967 were made to the credit of the plaintiff. Thereafter on the 10th June, 1969, the defendant alleges that it tendered rent for the month of May, 1969 to Durga Prosad More, Director of the plaintiff and upon his refusal, the rents were remitted to the plaintiff by money orders. On the 12th June, 1969 the money orders were refused by the plaintiff and on the 17th June, 1969, the money orders were returned to the defendant. On the 20th June, 1969, deposits in respect of all the six tenancies for the month of May, 1969 were made with the Rent Controller. On the 14th November, 1969, deposits for the month of October, 1969 in respect of two tenancies were made with the Rent Controller and on the 17th November, 1969, deposits for the month of October, 1969 were made with the Rent Controller for the remaining six tenancies.

5. The non-payment of rent for the month of May, 1969 is the major point of controversy. On June 10, 1969 Govindalal Das on behalf of the tenant tendered to Durga Prosad More, Director of the landlord company at his registered office at No.97, Vivekananda Road, Calcutta, a total sum of Rs.537.29 for rent of several portions of premises No.10/1, Portuguese Street, Calcutta also known as 12 Armenian Street, Calcutta. As said previously, on the very same day, that is, 10th of June, 1969 the tender was refused by Durga Prosad More and Govindalal Das remitted Rs.537.28 with the Beadon Street Post Office. It was thereafter on 12th June, 1969 the landlord refused to receive the moneys remitted by the money orders. On the 16th and 17th June, 1969, the tenant received back the money orders with refusal endorsed upon them. On the 20th June, 1969 the tenant through Govindalal Das deposited the total sum of Rs.537.28 with the Rent Controller.

6. The learned Judge came to the following finding on the above facts. He held that it had been already said that no deposit could be treated to have been invalidated on account of any alleged false statement having been made by the

defendant in his application for depositing rent. Therefore, the learned Judge came to the specific finding - "only default that is alleged now is the default of rent for the month of May, 1969, in respect of all the tenancies and for the month of October, 1969 in respect of four tenancies.

7. Thereafter the learned Judge proceeds to say that in the instant case, writ of summons was served upon the defendant in April, 1969, and holds, "There was no arrears of rent due from the defendant at that time and the defendant thus was not called upon to deposit any arrear of rent within a month of the service of the writ of summons upon him.

The learned Judge therefore proceeded only on the basis of alleged arrears of rent due from the defendant in May, 1969.

8. Relying on a Special Bench decision of this Court, (1) Siddheswar v. Prakash, 68 C.W.N. 301 it was held that "the rent for the month of May, 1969, in respect of all the tenancies not having been deposited by the 15th of the succeeding month, provision of the second limb of section 17(1) of the West Bengal Premises Tenancy Act, 1955 have not been complied with and the defendant must be visited with the penalty prescribed under the Act. This application must therefore succeed. The defence of the defendant against delivery of possession be struck out.

9. The whole point in the case appears to be u/s 17(3) of the West Bengal Premises Tenancy Act. The crucial words of that section is "if a tenant fails to pay". It is then only that the Court shall order the defence against delivery of possession to be struck out and shall proceed with the hearing of the suit. The question, therefore, for determination is whether there has been a tenant's failure to pay.

10. This point is accentuated by the following facts. The material allegation in paragraph 13 of the petition in Appeal No. 176 is as follow: "The said Sri Govindalal Das, (an employee of the defendant), arrived at the registered office of the company at about 10.30 a.m. on the said date (that is, 10th June, 1969) and tendered the entire of amount of Rs. 537.28 p. to Durga Prosad More, a director of the company but the said Durga Prosad More refused to accept the said sum of Rs. 537.28 p. tendered in cash to him.

11. Surprisingly enough the said Durga Prosad More did not affirm any affidavit denying this allegation. There is no affidavit from the said Durga Prosad More. The affidavit-in-opposition is by Gopal Prosad More who is only a constituted attorney of the plaintiff company. He says that paragraph 12 of the affidavit-in-opposition is true to his knowledge. But he does not say how it was true to his knowledge, nor does he plead his presence at the time of the incident when the said Govindalal Das went to make the payment to Durga Prosad More.

12. In the circumstances of the case, we are bound to hold that there has been no proper affidavit or any denial by Durga Prosad More. We have therefore no

option but to accept the version of Gobindalal Das. Therefore, u/s 17(3) of the West Bengal Premises Tenancy Act, there was no failure of the tenant to pay. He did all that was to be done by him.

13. I am aware that the word "pay" means not only payment by the debtor but also acceptance by the creditor. I have also seen the meaning of the word "pay" in Stroud's Judicial Dictionary, 3rd Edn. p. 2121 and 2127, as well as Oxford Dictionary, Vol. II, p. 1452. But these definitions, I do not think, are conclusive.

14. Here the interpretation of section 17(3) of the West Bengal Premises Tenancy Act is alone in question and the word used in that section is "if a tenant fails to deposit or pay, within the time specified". Only then the penalty of the defence against delivery of possession is attracted.

15. I cannot hold on these facts of this case that there has been a tenant's failure to deposit or pay. It will be useful to recall that the only default according to the learned Judge was for May, 1969. No other default is in question. On the facts I hold that there was no failure to deposit or pay within the meaning of section 17(3) of the West Bengal Premises Tenancy Act and the learned Judge was not right in striking off the defence against delivery of possession. This is a case of first impression.

16. The point was argued that there is no appeal against this order of striking out the defence. For this purpose, the learned Counsel for the Respondent relied on a batch of three cases in the first instance. They are reported as (2) Sunil Baran Roy Choudhury Vs. Purna Chandra Chandra, , (3) Meher Singh Vs. Keshardeo Chamaria, and (4) Sm. Ashalata Mitra Vs. A.D. Viz, .

17. It was held in (2) Sunil Baran Roy Choudhury Vs. Purna Chandra Chandra, that an appeal lies against an order striking out the defence following non-compliance with an order passed u/s 14(4) of the Rent Control Act, 1950 directing the tenant to put in arrears of rent. The second case of (3) Meher Singh Vs. Keshardeo Chamaria, held that an order striking out the defence against ejectment u/s 14(4) of the Rent Control act, 1950 is not appealable, and that such an order is neither a decree nor an appealable order under O. 43, R. 1 of the Code of Civil Procedure. In a subsequent case in (4) Sm. Ashalata Mitra Vs. A.D. Viz, it was held again that an order u/s 14(4) of the West Bengal Premises Rent Control act, 1950 striking out the defence is not appealable. Mr. Justice Guha Ray who was a party to the decision of (2) Sunil Baran Roy Choudhury Vs. Purna Chandra Chandra, revised his opinion in this case of (4) Sm. Ashalata Mitra Vs. A.D. Viz, in this way.

But as I was a party to the decision in the case of (2) Sunil Baran Roy Choudhury Vs. Purna Chandra Chandra, , it is necessary that I should add a few words of my own. It appears to have been assumed in that case that such an order was appealable but there is no reference to any provision of law under which it was appealable. On a closer examination, however, it now appears that such an order cannot be appealable either as an order or as a decree because there is no

provision under which such an order is appealable and because an order striking out the defence is not really a decree within the meaning of the word in section 2(2) of the Code of Civil Procedure. In these circumstances, it has got to be said that the view taken in (2) Sunil Baran Roy Choudhury Vs. Purna Chandra Chandra, that the order striking out the defence u/s 14(4) of the West Bengal Premises Rent Control Act, 1950 is appealable, does not stand close scrutiny.

18. It is curious that one Division Bench went against another Division Bench of which the Judge was himself a party without reference to a Full Bench or a Special Bench as required by the Rules of this High Court.

Not one of those cases deals with Clause 15 of the Letters of Patent and what is the meaning of the word "judgment".

19. Then we come to the second batch of cases which include Lal Behari Prosad Chowdhury Vs. Parasmull Jain and Others, . It held that "To rank as a judgment the order must be the final pronouncement of the Court making it, the effect of which is to dispose of or terminate the suit or proceeding in its entirety or in part." This was the case where the provisions of O. 37, R. 2 were in question. The point was that in default of the defendant obtaining leave to enter appearance and to defend the suit, the allegations in the plaint shall be deemed to be admitted and it was held that it does not mean that the questions of law which the plaint raises are to be decided in favour of the plaintiff by admission. The word "allegations" in the plaint in O. 37, R. 2 can only mean allegations of fact and nothing more. They do not include questions or submissions of law.

20. The next case in this batch is (6) National Screw and Wire Products Ltd. & ors. v. Syndicate Bank Ltd., (75 C.W.N. 447). It held that an order which does not dispose of or terminate a suit or proceeding in its entirety or in part is not a judgment within the meaning of Clause 15 of the Letters Patent. So it was held that the order refusing leave to file written statement is not a judgment.

21. The case reported as (7) Basudeo Ganeriwala & Ors. v. M/s. Canton Carpentry Works Pvt. Ltd. & Ors., (73 C.W.N. 365) did not actually deal with this point, but re-affirms with explanation the views I had expressed in Deo Chand Singh Vs. Shah Mohammad, . It was held in Basudeo Ganeriwala's case that the tenant whose defence is struck out still has a right to contest the suit and as part of this right he has the right not only to cross-examine the plaintiff's witnesses but also to examine his own witnesses on points outside the scope of section 13(1) of the Act.

22. In further exploration in the field of case law, the decision of (8) Muralidhar Chamaria v. M. R. Dalmia, (A.I.R. 1919 Cal. 97) was cited. There it was held by Sanderson C.J. and Woodroffe, J. that an order refusing to allow written statement after giving time is not judgment within the meaning of Clause 15 of the Letters Patent and no appeal lies.

23. In Supreme Court decision in (9) Keshardeo Chamria Vs. Radha Kissen

Chamria and Others, it was held that where a decree-holder applied for adjournment to take necessary steps and the Court refused to adjourn and dismissed the execution by the same order and subsequently an order u/s 151 restoring the execution took place, the order was neither appealable nor revisable. It was held there that an order u/s 151 simpliciter is not appealable.

24. In (10) Mrs. H. Taylor and Others Vs. Hiralall Roy Chowdhury, , a case under West Bengal Premises Rent Control Act of 1950, it was held that the effect of the order u/s 14(5) of the Act could not necessarily be the dismissal of the appeal.

25. In (11) Shri Radhey Shyam Vs. Shyam Behari Singh, , there is a discussion of what is and what is not a judgment within the meaning of the Letters Patent. There it was held that an application under O. 21, R. 90 to set aside an auction sale concerns the rights of a person declared to be the purchaser. If the application is allowed, the sale is set aside and the purchaser is deprived of his right to have the sale confirmed by the Court. The Supreme Court held that Order in a proceeding under O. 21, R. 91 is a judgment. Therefore, an appeal lay against the order of the learned single Judge of the High Court within the meaning of the Letters Patent.

26. In the (12) Union of India (UOI) Vs. Mohindra Supply Company, it was held by the Supreme Court that under the Code, as amended, the view has consistently been taken that interlocutory judgments (that is, decisions though not amounting to decrees which affect the merits of the questions between the parties by determining some right or liability) passed by single Judge of Chartered High Courts were appealable under the Letters Patent.

27. In (13) Shorab Merwanji Modi and Another Vs. Mansata Film Distributors and Another, , a Division Bench of the Calcutta High Court decided that "the term "judgment" has been defined in the Civil Procedure Code, but that definition does not apply to the word as occurring in the Letters Patent. The language of the Letters Patent which were issued in 1865 is not language of the Indian Legislature, but the language of the English lawyers as it was in use amongst them before the words "judgment", "decree" and "order" came to be clearly differentiated after the passing of the Judicature Acts. It was held there that an order refusing to stay a suit is judgment. An order refusing to stay a suit u/s 10 of the CPC involves assumption of jurisdiction and in so far as it negatives the defendant's contention that the suit cannot be proceeded with and upholds the plaintiffs claim that the suit must proceed, it affects the merits of a part of the controversy between the parties." Similarly, it was held that an order refusing to rescind a leave granted under clause 12 of the Letters Patent (Cal.) is appealable.

28. In (14) Gopiram Agarwalla Vs. First Additional Income Tax Officer and Others, , a Division Bench of this High Court held that the question whether the decision given by a judge sitting in the Original Side of the High Court affects the merits of the question by determining some right or liability, is the real index of a judgment in clause 15. In other words, to be a judgment under clause 15, it is

not sufficient that the decision will affect some question between the parties, but it must, while so affecting determine some right or liability as between the parties.

That is a broad Survey of the case law existing on the subject.

29. Section 17 of the West Bengal Premises Tenancy Act being a penal provision, landlord must bring himself clearly within its language before he can have the right of defence of his tenant against delivery of possession struck out.

30. This view was approved by a Division Bench of this Court to which I was a party, in (15) Gopal Banerjee Vs. Manindranath Dey, where it was held that section 17(3) is a penal section in the sense that because of the tenant's failure to deposit or pay the amount mentioned in sub-section (1) or sub-section (2), the Court shall order the defence against delivery of possession to be struck out. Therefore, the right to defend the suit by filing defence therein is taken away by sub-section (3).

31. A case on payment and tender was cited, being (16) Jagat Tarini Dasi v. Nabagopal Chaki & anr. (5 CLJ 270) where it was held that a tender is not vitiated because a receipt was asked for. But here the question is a question of "tenant's failure to pay" and it does not speak of any acceptance by the landlord. When the tenant fails to pay, then the defence shall be struck out but here on the facts, we find that the tenant did not fail to pay.

32. The Special Bench decision on which reliance was placed was Siddheswar Paul Vs. Prakash Chandra Dutta, . There on the facts of the case it was held that it was neither payment nor deposit within the meaning of those expressions as used in section 17(i) of the Act.

33. It was held again in (17) Uday Chand Pannalal v. Khetsidas Tilokchand (28 C.W.N. 916) that an order dismissing a suit for want of prosecution under r. 36 Chapter X of the High Court Original Side Rules is a judgment within the meaning of clause 15 of the Letters Patent and is appealable.

34. The cause celebre which was the foundation of law on the subject of judgment is (18) "The Justice of the Peace for Calcutta v. The Oriental Gas Company Ltd." (8 BLR 433). There a preliminary objection was taken to the hearing of the appeal on the ground that the order for the issuing of the Mandamus was not a judgment within the meaning of Clause 15 of the Letters Patent and was, therefore, not open to appeal. Sir Richard Couch C.J. found the objection well-founded. The learned Chief Justice observed at p. 452 - "We think that "judgment" in clause 15 means a decision which affects the merits of the question between the parties by determining some right or liability. It may be either final, or preliminary, or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined.

35. The above is a classic statement on the point. The claim of a defendant to have his case tried on the merits against possession in a suit for recovery of rent is a substantial right. It determines at least in part a substantial point in the controversy in suit. The point in controversy in the suit in this case is (1) non-payment of rent (2) sub-letting (3) construction and re-construction. It is true that the plaintiff does not get a judgment straight way even after the defence of the defendant is struck out. It is true that the plaintiff has still to prove his case. But then it is all one-sided. The plaintiff can lead his evidence and get away with it. The defendant whose defence against delivery of possession has been struck out is debarred u/s 17(3) from calling any witness because his defence against delivery of possession has been struck off and the Court shall proceed with the hearing of the suit. It is probably not an outright determination of the suit itself giving him a decree for possession, the moment the defendant tenant's defence is struck off, but nevertheless, it is a part determination of a part of the substantial rights of the defendant and I believe, comes within the definition of judgment of Couch C.J. where he says that "a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined." This is considered to be such a judgment. Therefore, I hold that an appeal lies.

36. Incidentally it may be said that the whole judgment of "The Justices of the Peace for Calcutta v. The Oriental Gas Company" is a wrong judgment because it held that no appeal lay from an order issuing Mandamus. That is not a tenable proposition and it never was even during the time of Couch C.J. But even then, the aforesaid observation of the learned Chief Justice as a part of the argument is sound.

37. Here I hold that the defence was wrongly struck out. Section 17(3) of the West Bengal Premises Tenancy Act on its strict interpretation did not apply. There was in fact no default in the payment of rent for the month of May, 1969. I emphasize the words of section 17(3) of the Act namely, "if a tenant fails to deposit or pay". It is only then that the penal consequence of the defence against delivery of possession can be struck out, otherwise not. There has been no failure on the part of the tenant to pay. It should be clearly remembered in this case that the default alleged by the landlord was a post suit default.

For the reasons above mentioned, I allow the appeal with costs and set aside the judgment and order of the learned Judge.

R.C. Mitra, J.

38. I agree.