
(1971) 09 CAL CK 0021

In the Calcutta High Court

Case No : A.F.O.D. No. 203 of 1969 and Suit No. 2964 of 1968

Rawatmal Bhairudan

APPELLANT

Vs

The Rajputana Trading Co. (Pvt.) Ltd.

RESPONDENT

Date of Decision : 17-09-1971

Acts Referred:

West Bengal Premises Tenancy Act, 1956 — Section 17(2)

Citation : AIR 1973 Cal 248

Hon'ble Judges : T.K. Basu, J; Ghose, J

Bench : Division Bench

Advocate : Kapoor, for the Appellant;

Final Decision : Allowed

Judgement

Ghose, J.—This appeal arises out of an order dated August 7, 1969. passed by K. L. Roy. J. in an application made by the defendant u/s 17 (2) of the West Bengal Premises Tenancy Act, 1956 (hereinafter referred to as the said Act).

2. The application was made by the defendant in the suit for ejectment filed by the plaintiff being suit No. 2964 of 1968 inter alia on grounds of default for, amongst others, determination of the amount of the rent that was payable by the defendant in respect of the premises in suit and for direction to deposit the said amount upon such determination within such time as the Court would think fit.

3. In the said application the applicant also prayed for leave to deposit the rent for the months of July and December, 1968. together with the statutory interest and the rent for the month of January, 1969. with the Registrar. Original Side of this Court. The defendant also prayed for leave to deposit rent (for months subsequent to January, 1969, in the office of the Rent Controller, Calcutta, during the pendency of the suit.

4. Under the rules of the Original Side of this Court no leave of the Court was necessary for the purpose of deposit of the rent in terms of the aforesaid prayer for the months of July and December, 1968. and January, 1969. or subsequent

rents with the Rent Controller.

5. Under the relevant rules all that the defendant was required to do was to make an application for determination of the rent for the disputed period and deposit the admitted arrears either in Court or with the Rent Controller within the time mentioned in Section 17 (1) of the said Act.

6. Be that as it may in the application made by the defendant an order was made by A. N. Sen J. on 4th February, 1969, giving leave to the defendant to deposit the rent for July and December, 1968. along with statutory interest and that for the month of January, 1969, with the Registrar. O. S. of this Court The defendant was given leave to deposit the rents for the months subsequent to January, 1969, with the Rent Controller. Directions for filing of the affidavits by the parties were given on the application to A. N. Sen. J. on that day.

7. The application was ultimately heard by K. L. Roy, J. on August 7, 1969, when His Lordship was pleased to make an order directing the defendant to deposit in Court within six weeks from the date of the said order arrears of rent for the period from April 1965 to November, 1968. with the exception of the rent for July, 1968. together with interest thereon as provided for in Section 17 (2) of the said Act. The defendant by the said order was given liberty to withdraw the amount deposited by him with the Rent Controller for the aforesaid period. The said order also directed that in default of the defendant depositing the said amount within the time mentioned above the defendant's application would stand dismissed, with costs. The entirety of the said order was made expressly "without prejudice" to the rights and contentions of the parties."

8. For the purpose of this application Sub-sections (1) and (2) of Section 17 of the said Act are material. The said subsections are set out hereunder :

"Section 17. When a tenant can get the benefit of protection against eviction--

(1) On a suit or proceeding being instituted by the landlord on any of the grounds referred to in Section 13. the tenant shall, subject to the provisions of Sub-section (2). within one month of the service of the writ of summons on him or where he appears in the suit or Proceeding without the writ of summons being served on him within one month of his appearance, deposit in Court or with the Controller or pay to the landlord an amount calculated at the rate of rent at which it was last paid, for the period for which the tenant may have made default including the period subsequent thereto upto the end of the month previous to that in which the deposit or payment is made together with interest on such amount calculated at the rate of eight and one-third per cent per annum from the date when any such amount was payable upto the date of deposit, and shall thereafter continue to deposit or pay, month by month by the 15th of each succeeding month a sum equivalent to the rent at that rate.

(2) If in any suit or proceeding referred to in Sub-section (1). there is any dispute as to the amount of rent payable by the tenant, the tenant shall, within

the time specified in Sub-section (1) deposit in Court the amount admitted by him to be due from him together with an application to the Court for determination of the rent payable. No such deposit shall be accepted unless it is accompanied by an application for determination of the rent payable. On receipt of such application, the Court shall--

(a) having regard to the rate at which rent was last paid, and the period for, which default may have been made, by the tenant, make, as soon as possible within a period not exceeding one year. a preliminary order, pending final decision of the dispute, specifying the amount, if any, due from the tenant and thereupon the tenant shall within one month of the date of such preliminary order, deposit in Court or pay to the landlord the amount so specified in the preliminary order; and

(b) having regard to the provisions of this Act. make as soon after the preliminary order as possible, a final order determining the rate of rent and the amount to be deposited in Court or paid to the landlord and either fixing the time within which the amount shall be deposited or paid or as the case may be, directing that the amount already deposited or paid be adjusted in such manner and within such time as may be specified in the order,

2A. Notwithstanding anything contained in Sub-section (1) or Sub-section (2) on the application of the tenant, the Court may, by order--

(a) extend the time specified in Sub-section (1) or Sub-section (2) for the deposit or payment of any amount referred to therein:

(b) having regard to the circumstances of the tenant as also of the landlord and the total sum inclusive of interest required to be deposited or paid under Sub-section (1) on account of default, in the payment of rent, permit the tenant to deposit or pay such sum in such instalments and by such dates as the Court may fix :

Provided that where payment is permitted by instalments, such sum shall include all amounts calculated at the rate of rent for the period of default including the period subsequent thereto upto the end of the month previous to that in which the order under this sub-section is to be made with interest on any such amount calculated at the rate specified in Sub-section (1) from the date when such amount was payable upto the date of such order.

2B. No application for extension of time for the deposit or payment of any amount under clause (a) of Sub-section (2-A) shall be entertained unless it is made before the expiry of the time specified therefore in Sub-section (1) or Sub-section (2) and no application for permission to pay in instalment under clause (b) of Sub-section (2-A) shall be entertained unless it is made before the expiry of the time specified in Sub-section (1) for the deposit or payment of the amount due on account of default in the payment of rent."

9. Usually any order made without prejudice to the rights and contentions of the parties in a proceeding leaves all legal claims and disputes which are the subject-matter of the proceedings in status quo. The Court does not in such case decide the rights and contentions of the parties (See *Peruvian Guano Co. v. Drayfus* 1892 AC 166). Thus Mr. Kapoor appearing on behalf of the respondent contended that in view of the aforesaid, no right or liability of the parties was decided by the said order.

10. Secondly Mr. Kapoor contended that the said order did not in any event decide the merits of any question involved in the said suit. Therefore, the said order was not appealable. Appeal is a creature of statute. West Bengal Premises Tenancy Act does not confer any right of appeal as against an order passed u/s 17 (2) of the Act. This order could be appealable only if the same was a judgment within the meaning of clause 15 of the Letters Patent. The said order is not a judgment for the reasons stated above according to Mr. Kapoor.

11. Mr. Kapoor contended that the said order passed u/s 17 (2) of the Act was merely a step in the suit to obtain an order striking out the defence so far as delivery of possession is concerned in subsequent application to be made u/s 17 (3) and even if the defence of the defendants so far as delivery of possession is concerned is struck out u/s 17 (3) that does not put an end to the suit. The claim in the suit of the plaintiff in aid whereof the said order may be obtained u/s 17 (3) is not finally decided by the order u/s 17 (3). Even if the defence against ejectment is struck out, the plaintiff has to prove his claim as laid in the plaint by adducing evidence at the trial inter alia on the issue of default. The position of the defendant so far as the claim for ejectment is concerned would be as if the defendant did not file any written statement; but the defendant would be entitled to defend even the claim for ejectment by cross-examining the plaintiff's witness on the ground of default. Thus the order passed u/s 17 (2) would not finally affect the rights of the parties.

12. Mr. Kapoor relied on AIR 1949 1 (Federal Court) . Mr. Kapoor relied on paragraph 6 of the judgment and submitted that a decision or an order to be final must finally dispose of the matter in dispute.

13. Mr. Kapoor then relied on the observations made by Lord Esher, Fry, L. J. and Lopes, L. J. in *Salaman v. Warner* (1891) 1 QB 734 quoted in paragraph 6 of the said report and submitted that the said order has not obviously determined any part of the rights of the parties involved in the action and so cannot be taken to be a final order.

14. In *Union of India (UOI) Vs. Khetra Mohan Banerjee*, . a Division Bench of this Court considered the observations of the Supreme Court in the case of *Asrumati Debi Vs. Kumar Rupendra Deb Raikot and Others*, . The said observations were to the following effect to wit :

"It cannot be said, therefore that according to Sir Richard Couch, every judicial pronouncement on a right or liability between the parties is to be regarded as a

judgment. For in that case there would be any number of Judgments in the course of a suit or proceedings each one of which could be challenged by way of appeal. The judgment must be the final pronouncement which puts an end to the proceedings so far as the Court dealing with it is concerned. It certainly involves the determination of some right or liability though it may not be necessary that there must be a decision on the merits."

14-A. The said observation of the Supreme Court was indeed based upon the observation of Sir Richard Couch in the Justices for Peace for Calcutta v. Oriental Gas Co. Ltd (1872) 8 Bens LR 433 The said observation of Sir Richard Couch has become classical and reads as follows:

"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 case or suit and the preliminary or interlocutory judgment determines only a part of it leaving other matters to be determined."

15. Notwithstanding various attempts to define the expression judgment as used in clause 15 of the Letters Patent in recent years it does not appear that there has been any departure, so far as this Court is concerned, in any event, from the aforesaid classical definition of the said expression given by Sir Richard Couch in the aforesaid case.

16. The definition enunciated in the aforesaid case was certainly not exhaustive and the Court has to make up its mind every time the question arises as to whether a particular order is a judgment within the meaning of Clause 15 of the Letters Patent regard being had to the nature of the order. An order cannot be a judgment if it leaves the merits of the question undecided. To be a judgment it must affect the merits of the dispute between the parties deciding some right or liability.

17. In the case of Narendra Nath Dutt Vs. Jitendra Nath Dutt and Others, . Chakravarti. C. J. delivering judgment of the Division Bench observed that judgment would certainly mean a decision of a question touching the merits of the controversy regarding rights of the parties to the subject-matter of the suit. If an order does not affect the substantive rights of the parties that are in controversy in the suit the order cannot amount to a judgment and cannot be appealable.

18. In the case of Gopiram Agarwalla Vs. First Additional Income Tax Officer and Others, . the question of the right of the I. T. O. to re-open a proceeding for fresh assessment was finally determined and thus held to be an appealable order.

19. Mr. Bhabra relied on the case of J. K. Sons v. Metal Press Works Ltd. (1966) 70 Cal WN 324. a decision of this Court deciding that the rate of rent or the amount of rent in arrears decided in an application u/s 17 (2) finally decided in the suit the said issue. The paid issue in regard to the rate of rent or the

quantum or arrears of rent cannot be agitated by either of the parties at the trial again.

20. As we have noted earlier Section 17 (2) of the Act requires the Court to decide the aforesaid question as to the rate of rent or amount of rent in arrear first by a preliminary order pending final decision of the application and then by & final order finally determining the said dispute. Sub-section (3) comes into play if and when the tenant does not deposit the admitted arrears of rent in terms of Sub-section (1) or the arrears of rent found to be in arrears by the Court on an application made by the tenant under Sub-section (2) of the said section. But if the tenant complies with the provisions of Sub-section (1) and/or Sub-section (2) as the case may be, there cannot be a decree for ejectment on the ground of default in payment of rent by the tenant; but the proviso to Sub-section (4) of the said section again deprives the tenant of the relief conferred upon him by Sub-section (4) in case of default in payment of rent for 4 months within a period of 12 months.

21. In an unreported Judgment of a Division Bench of this Court. Biharilal Barooah v. Sova Rani Bardhan, P. N. Mookherjee. J. in F. A. No. 240 of 1960 disposed of on 5-5-1961 (Cal) held inter-alia that--

(1) Plaintiff even after the defence against ejectment is struck down u/s 17 (3) of the Act has to prove his case as laid in the plaint. Fresh evidence on default has to be adduced at the trial.

(2) Evidence adduced at the hearing of Section 17 (3) application will have no bearing in the case.

21-A. Thus, according to the said decision it appears that an order striking out the defence of the defendant so far as the delivery of possession was concerned on the ground of default in payment of rent will not have any bearing at the trial. An order u/s 17 (2) if not complied with by the tenant may be availed of by the Landlord in an application u/s 17 (3). But the decision as to the default in payment of rent by the tenant arrived at in an application u/s 17 (3) cannot be availed of at the trial as held by P. N. Mookherjee J. in the unreported decision mentioned above.

22. In the case of D.R. Gellatly Vs. J.R.W. Cannon, a Division Bench of this Court decided that even after the defence of the defendant so far as the delivery of possession is struck out u/s 14 (4) of the Act of 1950. the defendant shall be entitled to appear at the trial, cross-examine the witnesses of the plaintiff and make his submissions.

23. Under Rule 3 of Chapter 14 of the Original Side Rules, a defendant who does not file written statement, may with the leave of the Court cross-examine witnesses of the plaintiff.

24. In the case of Basudeo Ganeriwala (1969) 73 Cal WN 365 it was held that when a defendant tenant's defence against delivery of possession is struck out u/

s 17 (31 of the Act of 1956. what is struck out is his special defence u/s 13 (1) of the Act, but still he has the right to contest the suit and as part of this right he has the right of not only cross-examining plaintiff's witnesses but also to examine his own witnesses on points outside the scope of Section 13 (1) of the Act.

25. Similar was the decision of P. N. Mookherjee J. in Subhas Chandra Singh v. Santosh Srimani. (1964) 68 Cal WN 184 and Deo Chand Singh Vs. Shah Mohammad, . P. B. Mukharji. J. also held that after a defence against delivery of possession is struck out. the tenant defendant is entitled to cross-examine and break the plaintiff's witnesses.

26. In Mohammed Felumeah Vs. S. Mondal and Others, P. N. Mookherjee, J. delivering judgment of the Division Bench held following Chairman, Budge Budge Municipality Vs. Mongru Mia and Others, that an ad interim order of injunction passed in a writ petition by a single Judge of the High Court modified by an order of another single Judge, even pending disposal of the application amounted to judgment.

27. In (1966) 69 Cal WN 199 Dr. D. N. Mukherjee v. J. N. Bhaduri. P. B. Mukharji. J. held that it is incumbent upon the Court to first pass a preliminary order for deposit in Court or with the Rent Controller or for payment to the landlord the amount decided provisionally to be due and owing by the tenant to the Landlord and thereafter to make a final order determining the rate of rent and amount to be deposited in Court or with the Rent Controller or to be paid to the landlord. This mandatory provision, it appears, has not been followed by K. L. Roy. J. His Lordship in fact did not exercise the jurisdiction which was incumbent upon him to exercise u/s 17 (2) of the Act. His Lordship did not decide finally the amount of rent that was in arrear. In fact his Lordship did not decide any dispute that the Court was called upon to decide in the said application. The order made by his Lordship was not warranted by Section 17 (2) of the Act and was clearly beyond his jurisdiction to give liberty to the defendant to withdraw all monies deposited with the Rent Controller for the period April, 1965 to November 1969, except for the month of July, 1968.

28. Dispute under Sub-section (2) may be any dispute which touches the controversy in regard to the rate or amount of rent in arrear. In the instant case the rate of rent was not disputed. The amount of rent in arrear was disputed.

29. Mr. Kapoor contended that the validity of deposit of rent for the aforesaid period, from April, 1965 to November, 1969. save and except July and December, 1968. is not a dispute within the meaning of Section 17 (2). Mr. Kapoor cited a judgment delivered by me on March 18, 1969, in such an application in suit No. 765 of 1968 (Cal). That was a case of first impression. In fact no authority had been cited before me at that time. But Mr. Bhabra now has cited (1964) 68 Cal WN 179 which clearly shows that any dispute including the question of validity of deposits would be a dispute within the meaning of Section 17 (2) of the Act. The

reasoning in the said judgment stands to reason. If deposits of rent for certain periods with the Rent Controller are valid deposits, the amount of rent in arrear would be less by the total sum validly deposited. If the said deposits are invalid, the amount of rent in arrear would increase by sum invalidly deposited. Therefore, we have no doubt that the question of validity of deposits would be a dispute within the meaning of the said sub-section. It is clear that barred debts are not payable u/s 17 (2). (See (1961) 65 Cal WN 693 (1093 ?) and also (1961) 65 Cal WN 149 at P. 152).

30. We do not express any opinion as to whether all the orders passed u/s 17 (2) are appealable as judgment within the meaning of Clause 15 of the Letters Patent. In the instant case the order or in any event clearly a part of the order as made was beyond the jurisdiction of the learned Judge. The Learned Judge did not exercise his jurisdiction u/s 17 (2) and the order under appeal involves a jurisdictional question and thus is appealable within the meaning of clause 15.

31. We, accordingly, allow this appeal, set aside the order passed by the Court of the first instance and direct that the application be heard and disposed of in accordance with law in the light of the observations made in this judgment by the Court of the first instance. We, therefore, remand this case back to the Court of the first instance to be decided on merits as stated above.

32. The costs of the appeal will abide by the result of the suit.

T.K. Basu, J.

33. I agree.