

(2001) 03 CAL CK 0005

In the Calcutta High Court

Case No : Appeal from Appellate Decree No. 35 of 1970

Sarat Chandra Biswas (Dead), by His Legal Heirs	APPELLANT
Vs	
Dilip Kumar Sarkar and Another	RESPONDENT

Date of Decision : 01-03-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 115, 151
Constitution of India, 1950 — Article 226, 227
West Bengal Premises Tenancy Act, 1956 — Section 17, 17(1), 17(2), 17(3), 17(4)

Citation : 105 CWN 834

Hon'ble Judges : Subhro Kamal Mukherjee, J

Bench : Single Bench

Advocate : Nirmal Kumar De, for the Appellant; Swadesh Bhusan Bhunia and Bidyut Kumar Banerjee Amicus Curiae, for the Respondent

Final Decision : Allowed

Judgement

Subhro Kamal Mukherjee. J.

1. This is a second appeal against the judgment and decree dated August 13, 1969 passed by Mr. S.K. Mookherjee, the learned Subordinate Judge, First Court at Alipore, District 24 Parganas in Title Appeal No. 619 of 1968 affirming the judgement and decree dated March 6, 1968 passed by Mr. D. Guha.Majumdar, learned Munsif, Second Additional Court at Alipore, District : 24 Parganas in Title Suit No. 252 of 1967. The Plaintiff/respondent instituted the present suit alleging, inter alia, that the tenant/defendant defaulted in payment of rent in respect of the suit premises with effect from the month of June 1966 and as such is liable to be evicted from the suit premises which the defendant/ tenant was holding as a premises tenant at a monthly rental of Rs. 32/ payable according to English Calender. The defendant entered appearance in the said suit and contested the same by filing a written statement.

2. Admittedly no application u/s 17(2) of the West Bengal Premiaes Tenancy Act. 1956 (hereinafter referred to as the said Act of 1956 in short) was filed and

accordingly the plaintiff/respondent filed an application u/s 17(3) of the said Act of 1956 for striata out the defence of the defendant against delivery of possession far non-compliance of the provisions of Section 17(1) and Section 17(2) of the said Act of 1956.

3. That during the pendency of the said application u/s 17(3) he said Act of 1956 filed by the plaintiff/respondent, the State Government promulgated the West Bengal Premises Tenancy (Amendment) Ordinance, 1967 (West Bengal Ordinance No. VI of 1967) on September 19, 1967. The defendant filed an application under the said Ordinance No. VI of 1967 and prayed for leave to liquidate the arrears by instalments. December 1, 1967 was fixed by the learned trial judge for hearing of the aforesaid two applications. However, by Order No. 24 dated December 1, 1967, the learned trial judge allowed the application u/s 17(3) of the said Act of 1956 filed by the plaintiff/respondent, but no order was passed on the application filed by the defendant/tenant under Ordinance No. VI of 1967. Eventually, by Order No. 26 dated December 9, 1967 the learned trial judge dismissed the defendants application under the said Ordinance No. VI of 1967 as the defendant took no step on December 1, 1967. The defendant's application for recalling of the said order dated December 9, 1967 was filed on January 12, 1968 and the learned trial judge by Order No. 31 dated January 12, 1968 allowed the said applications filed u/s 151 of the CPC subject to payment of cost of Rs. 10/- by January 18, 1968. As the said cost was not deposited by January 18, 1968, by Order No. 32 dated January 18, 1968 the defendants application u/s 151 of the CPC was rejected and the order rejecting the defendant's application under Ordinance No.VI of 1967 became final.

4. The State Government promulgated the West Bengal Premises Tenancy (Amendment) Second Ordinance, 1968 (West Bengal Ordinance No.II of 1958) on January 8, 1968 whereby and whereunder the West Bengal Premises Tenancy (Amendment) Ordinance, 1967 was repealed. By the Ordinance No. II of 1968 certain amendments were made in Section 17 of the said Act of 1956. Section 17A of the said Art of 1966 was omitted and Sections 17B, 17C and 17D were inserted.

5. Onder Section 6 of the said Ordinance it was made retrospective in respect of all suits including appeals which were pending at the date of commencement of the said Ordinance. u/s 17B. as introduced u/s 4 of the said Ordinance No. II of 1968, powers were given to courts to set aside orderes striking out defence against delivery of possession. The provisions of Section 17B, as inserted by the said Ordinance No. II of 1968, run as under: Power of Court to set aside order striking out defence against delivery of possession. (1) Where in a suit pending at the date of commencement of the West Bengal Premises Tenancy (Amendment) Ordinance, 1967 (West Bengal Ordinance No. VI of 1967) the defence against delivery of possession was struck out by an order made under sub-section (3) of Section 17 before such date, the tenant may, within thirty days from such date, make an application to the court to set aside such order.

(2) On receipt of an application under sub-section 2(1), the court shall determine, after giving credit for every deposit or payment made by the tenant in accordance with the provisions of sub-section (1) or sub-section (2) of Section 17, the total amount which the tenant remained liable to deposit or pay in accordance with such provisions to the end of the month previous to that in which the order under this sub-section is to be made, and direct the tenant, by order, to deposit such amount in court within thirty days from the date of the order.

(3) If the tenant deposits such amount within such time, the court shall allow the application under sub-section (1) and set aside the order made under sub-section (3) of Section 17 striking out the defence against delivery of possession and permit the tenant to defend the claim for delivery of possession. If the tenant fails to deposit such amount within such time, his application under sub-section (1) shall be dismissed with such costs as the court may award to the landlord."

6. On the basis of the said Ordinance No. II of 1968 tenant/defendant, on February 7, 1968. filed an application under Sections 2 and 4 of the Ordinance No. II of 1968 praying for setting aside of the order striking out of defence and for grant by way of instalments. It is alleged in the said applications that in the present suit the defence of the tenant against delivery of possession was struck out on an application u/s 17(3) of the said Act of 1956 filed by the plaintiff / respondent on December 1, 1967 and as such under the present Ordinance No. II of 1968, the order striking out the defence should be set aside the appropriate relief should be granted to the defendant/petitioner.

7. By Order No. 36 dated February 15. 1968 the said application filed by one defendant/tenant raider Ordinance No. II of 1968 was rejected by the learned trial judge on the ground that a second petition under the same section was not maintainable in view of rejection of the application filed by the defendant/tenant under Ordinance No. VI of 1967. Thereafter, the learned trial judge by judgment and decree dated March 6, 1968 decreed the suit holding, inter alia, that the defendant was a defaulter in payment of rent for the period between June 1966 to October 1966 and held that the defendant was not entitled to any protection u/s 17(4) of the said Act of 1956 for his failure to comply with the provisions of Sections 17(1) and 17(2) of the said Act of 1956.

8. The defendant preferred appeal in the court of the learned District Judge at Alipore, District 24 Parganas which was registered as Title Appeal No. 619 of 1968. Eventually, the said appeal was transferred to the court of the learned Subordinate Judge, First Court at Alipore, District 24-Parganas. The learned Judge in the lower appellate court dismissed the appeal and declined to grant relief to the defendant/tenant in terms of his application dated February 7, 1968 filed by the defendant/tenant within thirty days from the date of promulgation of the said Ordinance No. II of 1968.

9. Being aggrieved the tenant /defendant has come in second appeal.

10. Mr. Nirmal Kumar De, learned Advocate for the appellant submitted before me that the courts below went wrong in construing the application filed by the tenant-defendant under Ordinance No. II of 1968 and erroneously-dismissed the said application on a misconception that as the earlier application of the tenant/defendant under Ordinance No. VI of 1967 has been rejected, the tenant/defendant is not entitled to any relief in terms of his prayer as made in his second application filed on February 7, 1968 under Ordinance II of 1968.

11. Mr. Swadesh Bhusan Bhunia, learned Advocate for the plaintiff/ respondent, submitted that since the earlier application under Ordinance No. VI of 1967 has been rejected, the second application under Ordinance No. II of 1968 is barred by principles of res judicata. In support of his contention Mr. Bhunia has cited the decision in the cases of Arjun Singh Vs. Mohindra Kumar and Others, and M/s. Devidayal Rolling Mills Vs. Prakash Chiman Lal Parikh and others, and submitted on the strength thereof that the principles of res judicata applies in subsequent stages of same proceeding. Mr. Bhunia, further, argued that since the prayer of the defendant tenant is barred by principles of res judicata, no order could be passed in favour of the tenant/defendant on his second application dated February 7, 1968 as no court can pass an order contrary to the statute. In support of his contention, Mr. Bhunia cited the case of State of Maharashtra Vs. Vikas Sahebrao Roundale and others, . Mr. Bhunia has pointed out that the application dated February 7, 1968 has been filed under Sections 2 and 4 of the said Ordinance No. II of 1968 and such application, according to Mr. Bhunia, is a device to evade law and proves unclean hands as the defendant wanted to commit a legal fraud to get unfair advantage. Mr. Bhunia in this behalf cited the cases of S. P. Chengalvaraya Naidu (dead) by S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, , Bheru Singh Vs. State of Rajasthan, and T. N. Rugmani & Anr. vs. C. Achutha Menon & Ors., reported in 1991 (suppl. 1) SCC 520. Mr. Bhunia construed the provisions of Section 17B as inserted u/s 4 of the said Ordinance No. II of 1968 by submitting that the tenant/defendant was required to file the application for relief under the said section within thirty days from the date of promulgation of Ordinance No. VI of 1967 and not within thirty days from the date of promulgation of Ordinance No. II of 1968.

12. Mr. Bidyut Kumar Banerjee, learned Advocate, at my request, acted as amicus in this case and addressed me on the points involved in the second appeal. Mr. Banerjee prepared a very useful list of dates for the purpose of hearing of this appeal and submitted that the courts below misconstrued the applications filed by the defendant/tenant. Mr. Banerjee, further, submitted that the courts below erroneously proceeded on the assumption that the second application is nothing but a replica of the earlier application while the second application has been filed within thirty days from the date of promulgation of the Ordinance No. II of 1968 for the reliefs available to a tenant whose defence against delivery has been struck out. Mr. Banerjee, also, submitted that the

learned judge in the lower appellate court was wrong in commenting that the said application was barred by limitation as, according to Mr. Banerjee, the application was filed in time, that is, within thirty days from the date of promulgation of the Ordinance No. II of 1968. Mr. Banerjee submitted that there is no way, but to set aside the judgments and decrees passed by the courts below and to remit the matter back to the learned trial judge for reconsideration of the application filed by the defendant on February 7, 1968 under Ordinance No. II of 1968 afresh and in accordance with law.

13. After careful consideration of the materials on record and the submissions advanced by the said learned Advocates, my reading of Section 17B as introduced by Section 4 of the Ordinance No. II of 1968 is as follows :

14. The new Section was introduced by the Section 4 of the said Ordinance No. II of 1968 to enable a defaulting tenant to have the order striking out his defence against delivery of possession set aside by filing an application under the said Ordinance No. II of 1968 within thirty days from the date of promulgation of the said Ordinance. That after receipt of the said application, the court is to determine, after giving credit for every deposit or payment made by the tenant in accordance with the provisions of Sections 17(1) and 17(2) of the said Act of 1956, the total amount which the tenant remained liable to deposit or pay in accordance with such provision upto the end of the month previous to that in which the order is to be made, and direct the tenant to deposit such amount in court within thirty days from the date of the order. If the tenant deposits such amount within such time, the court is to set aside the order striking out the defence against delivery of possession and permit the tenant to defend landlord's claim for delivery of possession. However, if the tenant fails to deposit such amount within such time, his application under Ordinance No. II of 1968 shall be dismissed with such costs as the court may award in favour of the landlord.

15. Admittedly, in this case the defence against delivery of possession was struck out on December 1, 1967, that is, prior to the promulgation of the Ordinance No. II of 1968 and admittedly the suit was pending when the said application under Ordinance No. II of 1968 was filed by the tenant. The said application is, also, not barred by limitation as the same was filed within thirty days from the date of promulgation of the Ordinance No. II of 1968. Therefore, in my view the learned judges in the courts below went wrong in misconstruing the application filed by the tenant-defendant on February 7, 1968 under Ordinance No. II of 1968. The said application was not barred by the principles of res judicata and the courts below went against the statute in not entertaining the said application on merits.

16. I am of the opinion that the application filed under Ordinance No. II of 1968 is different in nature from the application under Ordinance No. II of 1967 and as such rejection of the said application under Ordinance No. II of 1967 cannot operate as res judicata. Mr. Bhunia's submissions that since the application under Ordinance No. II of 1968 has been filed mentioning two sections of the

said Ordinance, the same is liable to be rejected. I am of the opinion, such submissions cannot stand for a moments scrutiny. The Apex Court in the case of Municipal Corporation of Delhi vs. R.P. Khaitan and Anr., reported in 79 DLT 555 (SC) held that "It is true that the extra-ordinary remedies provided under Articles 226 and 227 of the Constitution are dependant upon the High Court willing to interfere in a matter for which a large measure of discretion rests with that. Its power is so wide so as to envelop not only all aspects of the matter, but orders can be passed of such nature as the High Court thinks fit. The jurisdiction as such is not curtailed to meet questions of parameters. On the other hand, the regular remedy u/s 115 of the CPC is hedged by the language of the provision. Only errors of jurisdiction and jurisdiction bring about a cause within the ambit of the provision. All the same it is worthy of notice that the forum for the aforementioned three remedies ordinary as well as extraordinary is with the High Court itself. We see no reason then as to why the frame of the cause be determinative. It is for the litigant to choose the remedy and it is for the High Court to grant or deny relief thereon having regard to the facts and circumstances of each case. We may, however, add that the existence of an alternative remedy can by itself be a ground for the High Court refusing to exercise jurisdiction, but it is not if the jurisdiction of the High Court is ousted by such existence. The High Court's dependence on Vishes Kumar vs. Shanti Prasad, MR 1980 SC 892 in refusing to convert a petition u/s 115 of the CPC to be one under Article 227 of the Constitution may have been justified on the facts of the case, but the same cannot be treated as a precedence to ? oust jurisdiction of the High Court vested in it under the law. The High Court certainly is entitled to convert any proceeding instituted before it in one manner to be that of another provided a proper cause has been made out and in the interest of justice."

17. In view of the aforesaid decisions of the Apex Court, I am of the view that the tenant/defendant might have applied under two. sections of the Ordinance No. II of 1968, but it was for the court to grant or deny relief thereon having regard to the facts and circumstances of the case and it is not open to the court to reject the application as not maintainable. Mentioning of two sections cannot be termed as malafide as we are to bear in mind that the application was filed within thirty days from the promulgation of an ordinance and the law was not settled at that point of time. Possibly the learned Advocates appearing for the defendant/ petitioner were not sure as to the applicability of the section and took no risk. The contention of Mr. Bhunia that the application was to be filed within thirty days from the date of promulgation of the Ordinance No. VI of 1967 cannot be accepted; the promulgation of the Ordinance No. II of 1968 becomes meaningless and redundant.

18. Before I part, I must record that this appeal has been presented before this court on November 21, 1969, that is, before the amendment of the CPC by the C.P.C. (Amendment) Act, 1976. Prior to amendment of Section 100 of the Code of Civil Procedure, the unamended Section 100 was as under : "Second Appeal :

(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any court subordinate to a High Court, on any of the following grounds, namely,

(a) the decision being contrary to law or to some usage having the force of law;

(b) the decision having failed to determine some material issue of law or usage having the force of law;

(c) a substantial error or defect in the procedure by this Code or by any other law for the time being in force, which may have produced error or defect in the decision of the case upon the merits.

19. In view of the aforesaid provisions, no substantial question of law is required to be framed in this appeal and in my view the decision of the courts below are contrary to law as they have failed to determine the application dated February 7, 1968 in accordance with law thereby a substantial error and defect has crept in the judgments passed by the courts below having bearing on the merits of the case.

20. I, accordingly, set aside the judgments and decrees of the courts below and remit the application dated February 7, 1968 filed by the defendant/tenant under Ordinance No. II of 1968 for determination by the learned trial judge in accordance with law within a period of six weeks from the date of communication of this order to him. Since this is a suit pending for a considerable period of time, I direct the learned trial judge to give utmost precedence in this behalf. The records of this case must go down immediately.

21. The appeal is thus, allowed.

There will be no order as to costs.

Mr. Bidyut Kumar Banerjee, learned Advocate, acted as amicus curiae in this case and I am most grateful to him for the help rendered by him.

If applied for, let xerox-certified copy of this judgment and the decree be given to the parties expeditiously.