

(1970) 08 CAL CK 0020
In the Calcutta High Court
Case No : Suit No. 1466 of 1969

The Rajputana Trading Co. Pvt. Ltd.

APPELLANT

Vs

Malaya Trading Agency

RESPONDENT

Date of Decision : 27-08-1970

Acts Referred:

West Bengal Premises Tenancy Act, 1956 — Section 17(2A), 17(2B)
Limitation Act, 1963 — Section 5

Citation : AIR 1971 Cal 313 : (1973) 1 ILR (Cal) 619

Hon'ble Judges : S.C. Ghose, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

S.C. Ghose, J.—This is an application by the applicant, inter alia, for condonation of delay in making this application and for an order extending the time to deposit the rent in respect of the premises in suit at the rate of Rs. 156.25 per month from September, 1967, until date. The applicant has also prayed for liberty to continue to make deposit of the said rent month by month in future.

2. The applicant is the defendant in this suit which was filed on May 27, 1969. against the applicant, inter alia, for a decree for vacant possession of the shop room described in the plaint, decree for Rs. 9025.66 on account of rent, mesne profit at the rate of Rs. 1.25 p. per diem from the date of the institution of the suit until delivery of vacant possession of the said shop room.

3. The said suit has been filed by the plaintiff on inter alia the following grounds, to wit:

(1) The applicant has, without the previous consent in writing of the landlord, transferred and/or assigned and/or sub-let in whole or in part the said shop room to Chunilal Agarwalla and/or to Kamroop Transport Corporation and others.

(2) The applicant has failed and neglected to pay and has made default in payment of rent to the plaintiff since September, 1967.

4. Prior to October, 1967, Mr. T. K. Ghose, Barrister-at-Law. was a Receiver of the premises in suit. The Receiver was discharged and by a letter dated the 28th September, 1967, the Receiver intimated the petitioner of the fact of his discharge and directed the applicant to pay rent to the plaintiff. The applicant tendered the rent for the month of October, 1967, to the plaintiff, who wrongfully refused to accept the same. The rent for the month of November, 1967, was also tendered by money order by the defendant applicant but was refused by the plaintiff landlord. Since then the applicant has been depositing the rent with the Rent Controller. The Writ of Summons in suit was served on the applicant on or about 17th July, 1969. On 23rd September, 1969, the applicant filed its written statement in the suit. The applicant admits that the time to deposit rent u/s 17(1) of the West Bengal Premises Tenancy Act expired on 17th August, 1969.

5. This application has been made u/s 17(2A) of the West Bengal Premises Tenancy Act, 1956, hereinafter referred to as the Act read with Section 5 of the Limitation Act, 1963, because the time to make the said application had expired long ago, in accordance with the provisions of Section 17(2B) of the West Bengal Premises Tenancy Act, 1956. Thus, the applicant has relied on Section 5 of the Limitation Act, 1963 for condonation of delay in making the said application. Section 17(2B) of the Act provides as follows:--

"17(2B). No application for extension of time for the deposit or payment of any amount under Clause (a) of Sub-section (2A) 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 (2A) 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."

6. Now, the time to make payment expired as has been admitted by the applicant itself in paragraph 16 of the petition filed herein on or about 17th August, 1969. This application has been made long after the said date. Section 17(2B), therefore, lays down a special period of limitation for making applications for leave to pay or deposit rent as required by Section 17(1) of the said Act. According to the petitioner, in the instant case, Section 17 (1) (c) of the Limitation Act of 1963 applies and this application is not barred by the laws of limitation. The relevant portion of Section 17 (1) (c) of the Limitation Act of 1963 provides as follows:--

"17(1). Where, in the case of any suit or application for which a period of limitation is prescribed by this Act,--

* * * * *

(c) the suit or application is for relief from the consequences of mistake; or

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7. The period of limitation within which such an application u/s 17(1) of the West

Bengal Premises Tenancy Act has to be made although not prescribed by the Limitation Act, shall be deemed to have been prescribed under the Limitation Act by virtue of the provisions of Section 29(2) of the Limitation Act, 1963, which provides as follows:--

"29 (2). Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 (inclusive) shall apply only in so far as and to the extent to which, they are not expressly excluded by such special or local law."

8. Section 3 of the said Limitation Act which is thus attracted to the period of limitation prescribed u/s 17(2B) of the West Bengal Premises Tenancy Act is set out hereunder:--

"3. (1) Subject to the provisions in Sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence.

(2) For the purposes of this Act,--

(a) a suit is instituted,--

(i) in an ordinary case, when the plaint is presented to the proper officer;

(ii) in the case of a pauper, when his application for leave to sue as a pauper is made; and

(iii) in the case of a claim against a company which is being wound up by the Court, when the claimant first sends in his claim to the official liquidator;

(b) any claim by way of a set off or a counter-claim, shall be treated as a separate suit and shall be deemed to have been instituted-

(i) in the case of a set-off, on the same date as the suit in which the set-off is pleaded;

(ii) in the case of a counter-claim on the date on which the counter-claim is made in Court;

(c) an application by notice of motion in a High Court is made when the application is presented to the proper officer of the Court."

9. The Supreme Court has held in *Vidyacharan Shukla Vs. Khubchand Baghel and Others*, that Sub-section (2) of Section 29 of the Limitation Act, 1963 has made Sections 4 to 24 uniformly applicable to the period of limitation prescribed by any special or local law in the absence of express exclusion thereof by the said special or local law. Both the parts of Section 29(2) of the Limitation Act are to

be read as one whole and the words following the conjunction "and" "for the purpose of determining any period of limitation" etc. attract the conditions laid down by the opening words of the said sub-section. It appears therefore that apart from other provisions contained in the West Bengal Premises Tenancy Act, 1956. Section 5 of the Limitation Act is attracted to the present application in view of Section 29(2) of the limitation Act It is to be seen now as to whether Section 39 of the West Bengal Premises Tenancy Act which is in the following terms affect the position. The said Section 39 is set out hereunder:

"39. Subject to the provisions in this Act relating to limitation, all the provisions of the Indian Limitation Act, 1908, (IX of 1908) shall apply to suits, appeals and proceedings under this Act."

10. The words "subject to the provisions in this Act relating to limitation" occurring in Section 39 of the West Bengal Premises Tenancy Act, 1956, in my view, lay down that with regard to limitation prescribed for suits, applications or other proceedings, the provisions of Limitation Act, 1908 shall apply unless they are contrary to or repugnant to specific provisions relating to the same contained in the West Bengal Premises Tenancy Act, 1956. There is no provision contained in the West Bengal Premises Tenancy Act, 1956, which runs contrary to the provisions laid down in Section 5 of the Limitation Act 1963. In that view of the matter, in my opinion, Section 5 of the Limitation Act is applicable to the present application.

11. The provisions relating to limitation appear only in Sections 7(1), 17(1), 17(2A), 17(2B), 22, 27, 29(2) and 31. It is clear, therefore, that there is no provision similar to that contained in Section 5 of the Limitation Act, which is set out hereunder:

"5. Any appeal or any application, other than an application under any of the provisions of Order 21 of the Code of Civil Procedure, 1908, may be admitted after the prescribed period if the appellant or the applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period."

12. Mr. Kapur submitted that the words "subject to the provisions of this Act" excludes the application of the said provisions of Section 5 of the Limitation Act in the instant case inasmuch as there is a provision relating to limitation in Section 17 of the Tenancy Act and thus operation of Section 5 of the Limitation Act would be excluded. Mr. Kapur relied on the case of *Smith v. London Transport Executive*. 1951 AC 555, where the House of Lords construed the words "subject to" appearing in Section 1 of the Transport Act. 1947. Section 1(1) of the said Act commences with the words "subject to the provisions of this Act the Commission shall have power.....". The British Transport Commission was constituted by and u/s 1 of the said Act. Construing the said words Lord Simonds observed that the words were "apt in communicate that the powers thereafter given are subject to restrictions or limitations to be found elsewhere in the Act."

It was held that the said words were words of restriction.

13. I have already stated that there is no provision contained in the West Bengal Premises Tenancy Act which is contrary to the provision of Section 5. Although Section 17 prescribes a time for making the deposit as well as deals with the question of an application for extension of that time and the conditions under which the same can be granted, it does not in my opinion deal with the condonation of delay in making the said application as has been provided for by and u/s 5 of the Limitation Act. Thus the provisions "relating to limitation" contained in Section 17 of the West Bengal Premises Tenancy Act are not contrary to and/or inconsistent with the provisions of Section 5 of the Limitation Act.

14. In view however of the judgment D/- 13-8-1969 of Ramendra Mohan Datta J. in Suit No. 829 of 1966 (Cal). Jatindra Nath Samanta v. Rash Behari Dutta & Co. I am bound to hold that Section 5 of the Limitation Act is not attracted to the present application and cannot be applied to it.

15. It was submitted before me by Mr. Das that the unreported case of Pannalal Ramnarain v. Bengal Nagpur Cotton Mills Ltd. the judgment of a Division Bench of this Court consisting of G. K. Mitter, J. as his Lordship then was and Masud J. delivered on 25-7-1966 in A. F. O. O. No. 9 of 1956 (Cal) was not cited before Ramendra Mohan Dutta J. The case in Vidyacharan Shukla Vs. Khubchand Baghel and Others, and Division Bench decision in Sati Prosad Garga and Others Vs. Gobinda Chandra Shee, were not cited before his Lordship. Thus the said judgment is "per incuriam" and as such is not binding on me. It is also said that the provision of Section 39 of the West Bengal Premises was not placed before his Lordship, The said section as we have seen expressly makes all the provisions of the Limitation Act applicable inter alia to all applications under the said Act subject to the special provisions contained in the said Act with regard to the said applications.

16. It was contended that a judgment which had omitted to take note of a statutory provision applicable to the matter under consideration would be "per incuriam" and would not be binding on any other learned Judge. (See The Young v. Bristol Aeroplane Co. Ltd. per Lord Green M. R. (1944) 2 All ER 293). The said conclusion of Ramendra Mohan Datta, J. it is contended, is directly contrary to the ratio decidendi of the Supreme Court in the case of Vidyacharan Shukla Vs. Khubchand Baghel and Others, . It was contended that ordinarily a decision of a single Judge should be followed by another single Judge unless the earlier decision was not given per incuriam---see Suresh v. Bank of Calcutta Ltd 54 CWN 832; Virjibandas Mulji v. Bisseswarlal Hargobind 24 CWN 1032 : (AIR 1921 Cal 169). See also in this connection the following passage from Halsbury's Laws of England, Vol. 22, 3rd Edn. pp. 799-800 which was also placed before me. The said passage is as follows:

"The Court is not bound to follow a decision of its own if given per incuriam. A

decision is given per incuriam when the Court has acted in ignorance of a previous decision of its own or of a Court of coordinate jurisdiction which covered the case before it or when it has acted in ignorance of a decision of the House of Lords."

17. It is suggested that in view of the two Division Bench decisions of this Court, viz., Sati Prosad Garga and Others Vs. Gobinda Chandra Shee, and the unreported decision in Bengal Nagpur Cotton Mills Ltd. case, A. F. O. O. No. 9 of 1956, D/- 25-7-1966 (Cal) as well as the Supreme Court decision in Vidyacharan Shukla Vs. Khubchand Baghel and Others, which were not considered in the said judgment, the said judgment is not binding. In support of this contention a Division Bench decision in Jagannath Gupta and Co. Private Ltd. Vs. Mulchand Gupta, has been cited which did not follow a previous Division Bench decision of this Court in John Herbert and Co. Pvt. Ltd. Vs. Pranay Kumar Dutta, , which had decided that order made in a company matter refusing to stay the advertisement of a winding up petition was not appealable. The latter judgment in Jagannath Gupta and Co. Private Ltd. Vs. Mulchand Gupta, held that the said earlier decision did not take into consideration the statutory provision contained in Section 483 of the Companies Act, 1956 and was inconsistent with the case reported in Shankarlal Aggarwal and Others Vs. Shankarlal Poddar and Others, .

18. For the aforesaid two reasons the latter Division Bench differed with the earlier view and held that such an order was appealable. It was contended that if the said judgment of R. M. Datta J. stands in the way of my deciding that Section 5 of the Limitation Act, 1963 was applicable to the present application, for the reasons stated hereinbefore the entire matter should be placed before my Lord the Chief Justice for being referred to a larger Bench under the provisions of Chap. 5, Rule 2 and the Rules of the Original Side of this Court and the following cases were relied on in support of the said contention, viz., Jaisri Sahu Vs. Rajdewan Dubey and Others, , Tribhuvandas Purshottamdas Thakur Vs. Ratilal Motilal Patel, . But in view of the observations of the Supreme Court in Smt. Somavanti and Others Vs. The State of Punjab and Others, to the following effect, viz.,

"The binding effect of a decision does not depend upon whether a particular argument was considered therein or not provided that the point with reference to which an argument was subsequently, advanced was actually decided."

19. In the said case of Jatindra Nath Samanta, Datta J. decided that Section 5 of the Limitation Act does not apply to the applications made u/s 17 of the West Bengal Premises Tenancy Act. In my opinion in view of the ratio in Smt. Somavanti and Others Vs. The State of Punjab and Others, , I have to follow the said judgment of Ramendra Mohan Datta, J.

20. However, I must state here that the grounds made by the defendants for condonation of delay, viz., (1) Thus Rent Court lawyer made a bona fide mistake in thinking that all deposits with the Rent Controller were valid and therefore had

advised the defendant that it was not necessary to make an application u/s 17(1) of the Act and (2) the said mistake was discovered at a conference held by the defendant with its High Court lawyer on 18th December, 1969 are not sufficient reasons within the contemplation of Section 5 of the Limitation Act, 1963 for condonation of delay in making the present application. Not every mistake or even bona fide mistake of a lawyer would attract the provisions of Section 5 of the Limitation Act.

21. In *Inder Singh Bejwa Vs. Corporation of Calcutta*, the mistake of the lawyer was with regard to the date fixed for hearing of the matter which was a fact, i.e., it was a mistake as to a fact. In the instant case the mistake is as to the provision of law. The mistaken advice of a lawyer in this connection cannot be a sufficient ground for condonation of delay in making the present application. It is settled now that every mistake of a lawyer does not entitle the litigant client to relief. In the case of *Bhakti Bh. Mondal Vs. Khagendra K. Bandopadhyaya and Others*, . S. P. Mitra J. reviewed the earlier decisions on this point and was pleased to hold that, (see at pp. 73 and 74 of the report) only in the cases of (1) the advice was given by a skilled or competent person, (2) the lawyer who gave the opinion exercised reasonable care, (3) the view taken by the lawyer was such as could have been entertained by a competent person exercising reasonable skill, (4) there was no negligence or want of reasonable skill on the part of the lawyer concerned who gave the advice. -- would a litigant be entitled to get benefit of Section 5 of the Limitation Act.

22. In the instant case, the alleged mistake is stated to have been occasioned by the ignorance of the lawyer that the Receiver was discharged but there was no reason for this ignorance. The applicant himself was aware of the fact of the discharge of the Receiver. The lawyer also should have noticed that two of the deposits made by the applicant were made within the prescribed time. Thus if the lawyer was not negligent and exercised reasonable diligence he could not have been guilty of the aforesaid mistakes and could not have advised the applicant as he is stated to have done. It is significant that the name of the lawyer is not disclosed in any of the affidavits. No affidavit of such lawyer has been filed in support of this application. The question of mistake was not even mentioned in the petition verified by an affidavit affirmed on 23rd December, 1969. On the contrary it was stated in paragraph 19 of the petition that the application was being made by way of abundant caution on the advice of the lawyer. If that was true then there was no mistake or mistaken belief at any point of time.

23. The case of mistake is sought to be made for the first time in paragraph 3 of the supplementary affidavit affirmed on 27th February 1970. This affidavit was filed after the application was opened and was heard in part on a previous occasion. The alleged mistake is verified to be true to the knowledge of the deponent of the said affidavit, viz., a partner of the defendant firm in view of the information received from the lawyer. The aforesaid allegation in my opinion

cannot be relied upon for the purpose of the present application u/s 5 of the Limitation Act. In any event in view of the Special Bench decision reported in Siddheswar Paul Vs. Prakash Chandra Dutta, wherein it was decided that after the institution of the suit rents had to be deposited in Court under the provisions of the Rent Act the alleged advice given by the alleged lawyer seems to be given negligently and without due care.

24. The ground of invalidity of the deposits made is taken out by the plaintiff in the affidavit filed in the application under Chapt. XIII A in August. 1969 and the said affidavit was read and replied to by the defendant but even then the defendant was careless enough not to enquire into the question as to why the plaintiff was alleging that the deposits which had been made by him were in-valid.

25. For all the aforesaid reasons, I am of opinion that even if it were held that Section 5 of the Limitation Act was applicable to the present application no sufficient cause has been shown in the present application by the applicant to enable the Court to condone the delay in making the present application.

26. For the reasons stated above, I am of the view that the applicant was not prevented from making this application by any mistake within the meaning of Section 17(1)(c) of Limitation Act 1963.

27. For the reasons aforesaid this application must fail and is dismissed with costs. There shall be a stay of operation, of this order until 25th September. 1970.