

Civil Revision

PRESENT: THE HON'BLE JUSTICE MD ABDUL GHANI

Judgment on 26.4.2010

C.O. NO. 1122 OF 2007

Ramrup Jaiswal

Versus

Smt Manju Paul

Points:

Defence struck of- Whether mandatory or directory - West Bengal Premises Tenancy Act, 1956 - S.17(3)

Facts:

Opposite party filed a suit for eviction of the petitioner on the ground of reasonable requirement and default. Petitioner filed an application under section 17(2) of the West Bengal Premises Tenancy Act, 1956. Learned Trial Court disposed of the said application directing the petitioner to pay the arrears by installments. Petitioner paid all the installments but there was delay in making one installment due to laches of the clerk of the learned Advocate. The petitioner also given a notice of said payment to the learned Advocate of the opposite party who have received the same without any objection. Opposite party thereafter filed an application under section 17(3) of the Act and the learned Trial Judge allowed the same.

Held:

True it is that striking out defence of a tenant is a harsh extreme and having regard to the benign scheme of the legislation this drastic power is meant for use in grossly recalcitrant situations where a tenant is guilty of disregard in

paying rent. That is why a discretion is vested.

Para 6

Since the petitioner-tenant has subsequently made upto date payment of the rent, the particulars of which was endorsed by the learned lawyer for the O.P. with no objection and since in accordance with the principles of the rulings (reported in AIR 1987 SC 1010 as well as other rulings referred to above) “shall” may be read as “may” that is the word “shall” is not mandatory and of course directory, it would be expedient and proper to allow the petitioner-tenant an opportunity to contest the suit brought against him.

Para 7

Cases cited :

AIR 1980 Calcutta 155-- M/s. Sen and Co. V.Sm Manimala Sadhu; AIR 1980 SC 587-- Shyamacharan Sharma V. Dharamdas AIR1985 SC 964-- Ganesh Prasad Sah Keshari & Anr. V. Lakshmi Narayan Gupta; AIR 1980 SC 1664, Miss Santosh_Mehta V Om Prakash & ors; AIR 1987 SC 1010 M/S B P Khemka Pvt ltd V Birendra Kumar Bhowmick & ors.

Mr souradipta banerjee

Mr Naba Krishna Das

Mr P C Das

Advocates for petitioner

Mr A K Sadhukhan

Mr D N Mukherjee

Advocates for opposite party

The Court

.

1) The instant application under Article 227 of the Constitution of India is directed against the order no. 64 dated 29.8.2006 and the order no. 61 dated 17.6.2006, passed by the learned Judge, 6th Bench, Small Causes Court of Calcutta in ejectment suit no. 92 of 2002.

2} It would appear that the O.P. Smt. Manju Paul by filing the aforesaid suit against the present petitioner prayed for eviction of the petitioner from the suit premises comprising three rooms situated in the ground floor of premises no. 4A, Barick Lane, now known as 4B, Banik Lane, P.S. Amherst Street, Kolkata – 700 009. It transpires from the materials on record that the petitioner happens to be the tenant of the suit premises under the opposite party (in short the O.P.) at a monthly rental of Rs.150/- per month. The suit in question was filed against the present petitioner on ground of reasonable requirement and defaults as to payment of rent. In the said suit the present petitioner entered appearance and also denied the allegations including the allegation of default as to payment of rent brought against him by filing a written objection as also an application under Section 17(2) of the West Bengal Premises Tenancy Act, 1956, (hereinafter referred to as the Act, 1956). The said application under Section 17(2) of the Act, 1956 was resisted by O.P. by filing a written objection denying the contention made therein. The application under Section 17(2) of the Act was however disposed of by the learned Court below by passing an order no. 25 dated 13.6.2002 holding that the petitioner happens to be the defaulter as to payment of rent to the tune of Rs.10800, plus statutory interest to the tune of Rs.870/-. Thus the petitioner was held liable for payment of Rs.11670/- and was directed for payment of the same to the O.P. landlord by 12 installments out of which 1st to 11th installments were fixed for payment @ Rs.1000/- per month each and the rest installment was directed to be paid to the tune of Rs.970/- per month with further direction upon the present petitioner to deposit the money of the first installment by 15.6.2002. But the petitioner deposited such amount of Rs.1000/- on 15.7.2002 instead of 15.6.2002 as per authorised order no. 27 dated 9.7.2002. This way the petitioner deposited all the installments, particulars of which were received by learned advocate for the O.P. with no note of objection. But unfortunately despite such upto date payment of rent the present O.P. upon filing an application under Section 17(3) of the Act, 1956 sought for an order of striking out the defence of the present petitioner-defendant in the

Court below on ground of non-compliance of the order dated 13.6.2002. In this context, it may be pertinent to point out that the present petitioner submitted an account before the learned Court below by forwarding a copy of the same to the learned lawyer for plaintiff-O.P. showing receipt of the same with no objection as to upto date payment of rent. It may further be pointed out that inadvertently the concerned law clerk took the date of filing of the challan showing payment of rent as 6.7.2006, instead of 17.6.2006, as a result of which no step could be taken from the end of the petitioner on 17.6.2006 and thus the petition under Section 17(3) of the Act was allowed ex-parte holding the petitioner as defaulter as to payment of rent and accordingly the petitioner was directed for handing over delivery of possession of suit premises upon striking out his defence taken in the suit.

3) Thereafter, the petitioner by filing an application under Section 151 of the Code of Civil Procedure prayed for recalling of the order dated 17.6.2006, passed by the learned Court below. The said application was however heard and rejected on contest.

4) Being aggrieved by and dissatisfied with the aforesaid orders the present petitioner has come up before this Court praying for setting aside the same. The only point for consideration is whether the Court below was justified in passing the impugned orders or whether the same need any interference by this Court.

5) The learned advocate appearing for the petitioner at the very outset of his argument drew this Court's attention to the materials on record including the copy of the challans containing particulars in regard to payment of rent as per direction of the learned Court below and strongly submitted that learned Court below while passing the impugned orders dated 17.6.2006 and 29.8.2006 committed mistake causing injustice to his client. In support of

his contention he further submitted that due to mistake on the part of the concerned clerk the relevant challans showing deposit of rent could not be filed on the specified date i.e. on 17.6.2006 and instead the same was filed on 6.7.2006 as a result of which the petition under Section 17(3) of the Act, 1956 stood disposed of ex-parte directing striking out the defence of the petitioner-defendant as contemplated in Section 17(3) of the said Act. Referring to the contents of the statement of account furnished on behalf of his client learned lawyer appearing for the petitioner urged that copy of the challan/statement of accounts while shown to the learned lawyer for the other side, no objection was raised. Further in support of his contention learned lawyer for the petitioner relied upon the rulings reported in AIR 1980 Calcutta 155 (M/s. Sen and Co. V. Sm. Mani MalaSadhu), AIR 1980 S.C. 587 (Shyamcharan Sharma V. Dharamdas), AIR 1985S.C. 964 (Ganesh Prasad Sah Kesari & Anr. V. Lakshmi Narayan Gupta) AIR 1980 Calcutta 155 and AIR 1987 S.C. 1010 (M/s. B.P. Khemka Pvt. Ltd. V. Birendra Kumar Bhowmick & Anr.) and strongly contended that in a case like the present one, the Court is vested with discretionary power to condone the delay in depositing the rent beyond the period specified by the Court. He also urged that for non-payment of rent within the time fixed by the Court, the defence of the tenant like the present petitioner should not be struck out inasmuch the words "shall order the defence against delivery of possession to be struck out" occurring in Section 17(3) of the Act, have to be construed as a directory provision and not a mandatory provision as the word "shall" has to be read as "may". Further in support of his contention he drew this Court's attention to the endorsement of the learned lawyer for the O.P. made in the body of the statement of account and contended that in the present case the landlord- O.P. could be said to have waived her right of raising objection against late payment of rent. In fine, it has been strongly submitted that in the existing circumstances of the case the present petitioner's contention may be said to be tenable and warrantable in the eye and estimation of law and accordingly the orders impugned deserve to be set aside for rendering effective justice to the parties concerned.

On the other hand, learned lawyer appearing for the O.P. having drawn this Court's attention to the provisions laid down in Section 17(3) of the said Act argued and submitted that the learned Court below while passing the impugned orders committed no mistake or illegality inasmuch as the orders impugned could be said to have been passed in accordance with the provisions laid down in

Sections 17(1), 17(2) and 17(3) of the Act. He has further submitted that in the instant case the principles of the rulings relied upon on behalf of the petitioners are not applicable and accordingly the application under Article 227 of the Constitution of India is having no merit and thus the same is liable to be dismissed. There is no dispute that the present petitioner happens to be the tenant in respect of the suit premises under the O.P. at a monthly rental of Rs.150/- payable according to the English calendar month. It would be seen from the record that upon receiving Court's summons the present petitioner entered appearance in the said suit and filed a written statement as also an application under Section 17(2) of the Act seeking relief as embodied in the said section. Subsequently, the learned Court below upon hearing the learned advocates for the parties concerned and also giving due consideration to the materials on record was pleased to dispose of the said petition under Section 17(2) of the Act, 1956 marking the petitioner as a defaulter as to payment of rent and allowed an opportunity to him for payment of arrear rent of Rs.10800/- plus accrued interest for Rs.870/-, i.e. totalling Rs.11670/- with direction for making payment of the same by 12 installments of which the installment nos. 1 to 11 was to be paid @ Rs.1000/- each and the 12th installment of Rs.670/- was directed to be paid subsequently. The date of first installment for payment was fixed on 15th of June, 2002. But the first installment was paid on 15.7.2002 as per authorized order passed by the Court below. on scrutiny it could be detected that the subsequent deposits were also made, but not in accordance with the direction of the Court; though, the learned lawyer appearing for the O.P. raised no note of objection in the body of the statement of accounts submitted showing payment of the arrear rent.

6) True it is that striking out defence of a tenant is a harsh extreme and having regard to the benign scheme of the legislation this drastic power is meant for use in grossly recalcitrant situations where a tenant is guilty of disregard in paying rent. That is why a discretion is vested. Further it has been highlighted in the ruling reported in AIR 1980 S.C. 1664 (Miss Santosh Mehta V. Om Parkash & Ors.) that striking out a party's defence is an exceptional step, not a routine visitation of a punitive extreme following upon a mere failure to pay rent.

7) In my considered view, since the petitioner-tenant has subsequently made upto date payment of the rent, the particulars of which was endorsed

by the learned lawyer for the O.P. with no objection and since in accordance with the principles of the rulings (reported in AIR 1987 SC 1010 as well as other rulings referred to above) "shall" may be read as "may" that is the word "shall" is not mandatory and of course directory, I think it would be expedient and proper to allow the petitioner-tenant an opportunity to contest the suit brought against him. But considering the laches made out against the petitioner-tenant I am of the view that the petitioner's application should be allowed subject to payment of reasonable cost.

8) Therefore, having considered the submissions advanced by the learned lawyers for the parties concerned and also regard being had to the principles of the ruling relied upon on behalf of the petitioner-tenant I find reasons to understand and believe that it would be justifiable and warrantable if the petitioner's application be allowed subject to payment of a reasonable cost, like Rs.2000/-. In the result, the application under Section under Article 227 of the Constitution of India succeeds subject to payment of cost of Rs.2000/- (rupees two thousand only) to be paid by the petitioner to the contesting O.P.-landlord within a period of 15 days from the date of communication of this order in the Court below and consequently the impugned orders dated 29.8.2006 and 17.6.2006 will be recalled. In default of payment of cost as directed, the application in question shall stand dismissed.

Urgent xerox certified copy be given to the parties expeditiously, if applied for.

(Md. Abdul Ghani, J.)