

S/L 3-4
19.12.2022
Court No.652
SD

CO 509 of 2017
With
CO 511 of 2017

Sri Shyamal Karmakar
Vs.
Sri Debasish Bose

Mrs. Shohini Chakrabarty
Mr. Arijit Sarkar

...for the Petitioner.

Mr. Surojit Chakraborty
Mr. Sourabh Sen
Mr. Subhojoy Sen
Ms. Adrisnata Chakraborty

...for the Opposite Party.

Since issues involved in both the revisional applications are connected with each other arising in the same suit between the parties, the same are disposed of by this common order.

Being aggrieved by the order dated May 26, 2016 passed by the learned Civil Judge (Junior Division), 5th Court, Alipore, South 24-Parganas in Ejectment Suit No.10 of 2007, the revisional application being CO 511 of 2017 has been preferred.

By the impugned order, the learned court below was pleased to reject the defendant's application under Section 151 of the Code of Civil Procedure praying for recalling of the order dated 18.7.2010 by which the Court below disposed of defendant's application under Section 7(2) of the West Bengal Premises Tenancy Act, 1997 (hereinafter called as 'the Act of 1997') with the direction to deposit arrear rent of Rs.25,960/- by 19.8.2010.

The revisional application being CO 509 of 2017 relates to allowing plaintiff's prayer for striking out defence under Section 7(3) of the Act of 1997 in view of the fact that in terms of the aforesaid order dated 18.7.2010 the defendant/petitioner has not deposited Rs.25,960/- by 19.8.2010.

The petitioner has contended that the opposite party herein filed the Ejectment Suit No.10 of 2007 against the petitioner herein for recovery of Khas possession on the ground of reasonable requirement and defaulter in payment of rent. The petitioner being the defendant contesting the said suit by filing written statement and also filed two applications under Section 7(1) and 7(2) of the Act of 1997.

The petitioner/defendant submits that he filed all old rent receipts, challans of rent controller and civil deposit challan before the learned trial court. The opposite party did not file any written objection against the defendant's application under Section 7(1) and 7(2) of the Act of 1997.

Petitioner further submits that in spite of payment of rent for each and ever month, the learned trial court by order dated July 18, 2010 was pleased to ascertain that the petitioner is defaulter in payment of rents since October 1999 to July 2009 and directed the petitioner to deposit a sum of Rs.25,960/- including interest thereon without giving any opportunity to the petitioner to clarify his stand in respect of the documents he filed showing payments of all the rents, for aforesaid 118 months.

On September 2010 the opposite party filed one application under Section 7(3) of the Act of 1997 for non-payment of aforesaid amount which was allowed by court below against which the revisional application being CO 509 of 2017 has been preferred.

Finding no other alternative, the petitioner herein/defendant/tenant initiated a proceeding under Order 47 Rule 1 of the Code of Civil Procedure for review of the order dated July 18, 2010 passed by the learned Civil Judge (Junior Division), 5th Court, Alipore. The opposite party contested the said proceeding by filing written objection and after contested hearing, on April 30, 2011 the court below rejected the application under Order 47 Rule 1 of the Code of Civil Procedure on the ground that the said application has not been filed in compliance to Rule 3 of Order 47 and also on the ground that the said order dated 18.7.2010 was passed with sufficient reasons and there is no apparent mistake or error apparent on the face of the order and no new evidence in favour of the defendant/petitioner has come before the court which can justify the prayer for review.

Being aggrieved by that order, the defendant/petitioner preferred miscellaneous appeal before the learned Additional District Judge, 6th Court at Alipore but the said miscellaneous appeal was also dismissed upon hearing on February 26, 2013. Being aggrieved by the said order of dismissal by the first appellate court, the defendant/petitioner preferred application under Article 227 of the Constitution of India before this Court being CO 1853

of 2013 and this Court without going into the merits of the case dismissed the said revisional application.

After the aforesaid dismissal order by this Court, the petitioner/defendant filed an application under Section 151 of the CPC for recalling of the order dated 18.7.2010 and come to a conclusion after considering all the papers lying with the record that the defendant is not a defaulter in payment of rent. Learned court below had taken up the said application under Section 151 and by the impugned order dated 26.5.2016 the application under Section 151 for recalling the order dated 18.7.2010 was rejected on contest.

Mrs. Shohini Chakrabarty, learned counsel appearing on behalf of the petitioner, submits that the court below ought to have liberally considered the petitioner's application considering the facts and circumstances of the case and he has committed a gross miscarriage of justice in adopting a hyper technical approach in passing the impugned order and rejected the defendant/petitioner's petition without entering in its merits. The trial court has committed a jurisdictional error in not recalling the same on the ground of an error apparent on the face of the record. The court below has also committed gross miscarriage of justice in rejecting petitioner's application holding that a court cannot sit over its own order without considering the well-settled principle of law that in appropriate cases the court can exercise its inherent power to recall its own previous order.

Mr. Sourabh Sen, learned counsel appearing on behalf of the opposite party, submits that the issue involved in the present case has already been disposed of by the trial court and also by the First Appellate Court as well as by this Hon'ble High Court and accordingly, it is barred by constructive res judicata and the same issue cannot be raised in the same proceeding which has been disposed of finally, with the observation that there is no apparent mistake or error on the face of the order.

In this context, he relied upon two Supreme Court judgments in the case of *Satyadhyan Ghosal and Ors. vs. Deorajin Debi and Ors.* reported in *AIR 1960 SC 941* and in the case of *Indu Bhusan Jana vs. The Union of India (UOI) and Ors.* reported in *2009 (1) CHN 27*.

Having considered the submissions made on behalf of the learned counsel appearing on behalf of the parties and the materials available in the record, it appears to me that the defendant/petitioner's specific case is that he is not a defaulter for a single month during the period October 1999 to July 2009 and he has deposited all his documents in support of the payment of rent for the said period. The court below ignoring and overlooking all those documents in support of payment has wrongly calculated the arrear rent and directed the defendant/petitioner to pay a sum of Rs.25,960/- as arrear rent though in fact there is no such arrear of rent which is to be paid by the defendant/petitioner and as a corollary wrongly allowed plaintiff's application under Section 7(3) of the Act of 1997..

Learned counsel appearing on behalf of the opposite party has also not raised question about such payment of rent by the petitioner/defendant but his contention is that once court has disposed of the issue regarding arrear of rent with the observation that Rs.25,960/- is lying due, the defendant/petitioner cannot raise this point again as it is barred by res judicata.

Considering the facts and circumstances of the case, both the impugned order dated 26.5.2016 and 15.12.2016 are set aside. The trial court is directed to reconsider the defendant/petitioner's recalling application under Section 151 of the Code dated 26.5.2016 afresh, in the light of the documents allegedly submitted by the petitioner in support of payments of rent for 118 months, i.e., from October 1999 to July 2009 within a period of three months from the date of communication of the order.

If the learned trial court finds that the deposit of rent has been correctly made by the defendant/petitioner for the aforesaid 118 months, he will accordingly dispose of Section 7(2) application afresh and will proceed with the suit, but if it is found that there is any outstanding amount in connection with payment of arrear of rent, for the said period which the petitioner has not deposited in accordance with law then the order impugned in both the cases that is order dated December 15, 2016 and May 26, 2016 shall revive.

With these observations, CO 509 of 2017 and CO 511 of 2017 are disposed of.

There will be no order as to costs.

Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of all necessary formalities.

(Ajoy Kumar Mukherjee, J.)