

18.5.2023
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Ct. no. 652
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C.O. 793 of 2019

**Pradip Kumar Mukherjee
Vs.
Binay Chowdhury & Ors.**

Ms. Tarak Nath Halder
Mr. Raja Biswas
Mr. Abhijit Sarkar ...for the Petitioner

Mr. Prosenjit Mukherjee
Mr. Saptarshi Chakraborty
Mr. Aslam Parvez ...for the Opposite parties

Being aggrieved and dissatisfied with the order dated 14.1.2019 passed by learned Civil Judge (Junior Division), 5th Court, Alipore, South 24 parganas in Ejectment Suit no. 1 of 2015, the present application under Article 227 of the Constitution of India has been preferred.

The petitioner contended that the plaintiff duly instituted aforesaid suit against the defendant/opposite parties for recovery of Khas possession along with other reliefs. The defendant/opposite parties appeared in the said suit and filed applications under Section 7(1) & 7(2) of West Bengal Premises Tenancy Act (Act of 1997) before the trial court. The trial court after hearing the said applications under Section 7(1) & 7(2) of the Act of 1997 was pleased to dispose of the said application under Section 7(1) and 7(2) of the Act of 1997 on 4.5.2016

wherein the trial court held that the defendants are defaulter in payment of rent for total 11 months and is liable to pay arrear rent along with statutory interest for the said months, a total amount of Rs. 15,534/- and directed to deposit the said amount by 6.5.2016. positively.

Being aggrieved by the said order, the defendant/opposite parties preferred revisional application before this court being C.O. 2194 of 2016 but this court while disposing of the said application, was pleased to observe that there seems to be no ground for interference with the findings of the trial judge arrived at while passing the impugned order whereby the application under Section 7(2) of the Act of 1997 was disposed of and that the defendant/opposite parties were directed to pay arrear rent in accordance with law. It was however, observed by this court that the trial court dealt with the point urged by the petitioner in details and arrived at a conclusion that all deposits made with the controller for the period subsequent to October, 2013 were bad deposits and as such this court did not incline to interfere with the said factual findings of the trial court arrived at upon just consideration of the materials on record and as a result, the said revisional application was dismissed.

However, subsequently, the defendant/opposite parties filed an application under Section 151 of the Code

of Civil Procedure before the court below for acceptance of the deposited arrear rent on 22.12.2017 with a prayer for recalling the aforesaid order dated 04.05.2016. Before that, the plaintiff filed an application under Section 7(3) of the Act of 1997 praying for striking out the defence on 25.01.2018.

Learned court below heard both the applications i.e. defendant's application under Section 151 of the Code dated 6.3.2018 and the plaintiff's application under Section 7(3) of the Act of 1997 dated 25.1.2018 and passed the impugned order by which the court below allowed the defendant's application under Section 151 of the Code and rejected the plaintiff's application under Section 7(3) of the Act of 1997.

Being aggrieved by the said order, learned counsel for the petitioner submits that the impugned order is perverse and the court below acted illegally by allowing the said application under Section 151 of the Code. Learned court below failed to appreciate that there is no scope for condoning the delay as the direction was clear and specific and there was no stay order granted by this court and as such there was no impediment for the defendants to deposit the rent month by month. Accordingly, the petitioner has prayed for setting aside the impugned order.

In this context he relied upon judgments of ***Satyadhyan Ghosal and others vs. Smt. Deorajin***

Debi and another reported in **AIR 1960 SC 941** and another judgment of the Apex court passed in ***Bijay Kumar Singh & Others vs. Amit Kumar Chamariya and others*** being **Civil Appeal no. 7849 of 2019 with Civil Appeal no. 7850 of 2019** and another judgment of this court passed in ***Smt. Bina Devi Binani vs. Ramesh Kumar Gupta*** reported in **(2015) 3 CAL LT 384 (HC)**.

Learned counsel for the opposite parties submits that the application under Section 7(2) of the Act of 1997 was disposed of twice on 29.01.2016 and 4.5.2016 and on the first occasion i.e. on 29.01.2016, the said petition was disposed of under presumption that the same was not filed within time as prescribed by law and as such after determination of defaulting period, the same left open for another date or clarification and on the date of clarification i.e. on 4.5.2016 the order regarding application under Section 7(2) of the Act of 1997 was passed. Furthermore, granting only two days time is also to some extent seems to be not reasonable. Having regard to the circumstances of the case, the opposite parties prayed for extension of time. He further submits that law has not been enacted to cause suffering of the litigants but to aid and assist them if they are just and proper. He further submits that one should not suffer for causes of the court. Furthermore, from the facts and circumstances of the case, it is apparent that there is no intentional latches on the part of the defendants in making the

aforesaid deposit and as such the court below was justified and passed a reasoned order, which does not call for any interference. In this context, judgment of a Division Bench of this court passed in C.O. 3443 of 2010 with C.O. 3054 of 2011 has been referred and contended that the time limit for demand or deposit of admitted amount of rent as mentioned in Section 7(1) and 7(2) of the Act of 1997 is not mandatory. Relying upon said judgment he further contended that legislature sometimes uses the word “shall” that does not make the provision mandatory and sometimes it means directory and as such the present revisional application is liable to be dismissed.

I have considered the submissions made by both the parties. On perusal of the order dated 4.5.2016, it appears that the trial court duly considered the defendant’s application under Section 7(1) and 7(2) of the Act of 1997 and found that the landlord-tenant relationship herein is not in dispute. After considering the contention and the documents including money order receipt and rent control challans, the court below came to a conclusion that since November, 2013, the defendant is a defaulter for the payment of rent in respect of suit property. Accordingly, the court below directed to deposit the arrear rent for 17 months which is amounting to Rs. 15,534/- and by that order, a specific direction was also

made that the defendants must deposit the current rent regularly before the court till the disposal of the same.

However, the defendants/opposite parties without complying said order regarding deposit of rent challenged the said order and preferred the aforesaid revisional application before this court being C.O. 2194 of 2016. It appears that in the said revisional application vide order dated 24.7.2019, this court had clearly held that the pendency of the application will not stand in the way of the trial court expeditiously disposing of the matter before it. Accordingly, this court has not granted any stay in respect of the proceeding pending before the court below. However, the defendant/opposite parties choose not to make deposit before the court below in terms of that specific order dated 4.5.2016 and waited till the disposal of their revisional application.

However, ultimately the said revisional application was dismissed with the observation as stated above, and the order dated 4.5.2016, passed by the court below, was affirmed by this court. Accordingly the court below did not have any scope to recall or review the said order dated 04.05.2016 which was affirmed by this court in the said revisional application.

Law in this context is well settled *in **Bijay Kumar Singh & others Vs. Amit Kumar Chamariya and another*** reported in **(2019) 10 SCC 660** and paragraph 21 of said judgment runs as follows:-

21. Sub-section (3) provides for consequences of non-payment of rent i.e. striking off the defence against the delivery of the possession and to proceed with the hearing of the suit. Such provision is materially different from sub-sections (2-A) and (2-B) which was being examined by this Court in *B.P. Khemka [B.P. Khemka (P) Ltd. v. Birendra Kumar Bhowmick, (1987) 2 SCC 407]*. Sub-sections (2-A) and (2-B) of Section 17 of the 1956 Act confer unfettered power on the court to extend the period of deposit of rent, which is circumscribed by the proviso to Section 7(2) and sub-section (3) of Section 7 of the Act. Therefore, the provisions of sub-section (2) are mandatory and required to be scrupulously followed by the tenant, if the tenant has to avoid the eviction on account of non-payment of arrears of rent under Section 6 of the Act. There is an outer limit for extension of time to deposit of arrears of rent in terms of the proviso to sub-section (2) of Section 7 of the Act. The consequences flowing from non-deposit of rent are contemplated under sub-section (3) of Section 7 of the Act. Therefore, if the tenant fails to deposit admitted arrears of rent within one month of receipt of summons or within one month of appearance without summons and also fails to make an application for determination of the disputed amount of rate of rent and the period of arrears and the subsequent non-payment on determining of the arrears of rent, will entail the eviction of the tenant. Section 7 of the Act provides for a complete mechanism for avoiding eviction on the ground of arrears of rent, provided that the tenant takes steps as contemplated under sub-section (2) of Section 7 of the Act and deposits the arrears of rent on determination of the disputed amount. The deposit of rent along with an application for determination of dispute is a precondition to avoid eviction on the ground of non-payment of arrears of rent. In view thereof, tenant will not be able to take recourse to Section 5 of the Limitation Act as it is not an application alone which is required to be filed by the tenant but the tenant has to deposit admitted arrears of rent as well.

In this context, it is also to be mentioned that Section 7(2) of the Act of 1997 is specific and mandatory. It provides that if in any suit, there is any dispute as to the amount of rent payable by the tenant, the tenant shall within the time specified, shall deposit the amount admitted by him to be due together with an application for determination of the rent payable. It is further provided in the said section that having regard to the circumstances of the case an extension of time may be

granted by the court only once and the period of such extension shall not exceed two months.

Though learned counsel for the opposite parties referred Section 40 of the Act of 1997 and contended that the provision of the Limitation Act shall apply to all proceedings under the said Act including the proceeding is laid down under the provision of Section 7 of the Act of 1997, but I find no substance in the said contention made by opposite parties in view of observation made by Apex Court in Bijay Kumar Singh's case (supra).

In view of aforesaid discussion, it is quite clear that once this court has affirmed the order passed by the court below dated 4.5.2016, the subsequent order i.e. the impugned order is clearly barred by res judicata and the court below exceeded its jurisdiction in making review of the order which has been affirmed by this court. Furthermore, even though there was no order of stay, granted by the High Court, the defendant has defaulted in payment of rent more than once violating the mandatory proviso to Section 7(2) of the Act of 1997 and as such the order impugned is perverse and is liable to be set aside.

It is also to be mentioned, when the defendant has defaulted in making payment of rent in violation of the provision of Section 7(1) and 7(2) of the Act of 1997, and has failed to make deposit before the court within the time specified and not entitled to be protected by proviso to section 7(2) and not even complied section 7(1) through

there was no impediment to deposit in terms of order, the provision under Section 7(3) of the Act of 1997 attracts automatically even in the absence of any formal application made by the plaintiff. However, in the present case, the plaintiff made application under Section 7(3) of the Act of 1997 before filing of the defendant's application under Section 151 of the Code.

In view of above, C.O. 793 of 2019 is allowed. The order impugned dated 14.1.2019 is hereby set aside. The plaintiff/petitioner's application under Section 7(3) of the Act of 1997 is allowed and the defendants defence against delivery of possession is struck out. The court below is directed to proceed with the hearing of the suit and shall make every endeavour for expeditious disposal of the suit and to conclude the entire proceeding of the suit preferably within a period of ten months from the date of communication of the order.

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

(Ajoy Kumar Mukherjee, J.)