

Item No. 3
17.08.2023
Court. No. 19
GB

C.O. 1385 of 2023

Kishan Lal Bihani
Vs.
Shiv Shakti Real Estate Private Limited

*Mr. Ankit Agarwal,
Mr. Abhishek Dutt,
Ms. Rupa Singh*

... for the Petitioner.

*Mr. Anshunath Chakraborty,
Ms. Soma Mukhopadhyay,
Mr. Gourab Mukhopadhyay*

... for the Opposite Party.

The revisional application arises out of an order dated February 9, 2023, passed by the learned Chief Judge, Presidency Small Causes Court at Calcutta in Ejectment Suit No.286 of 2022.

By the order impugned, the applications under Section 7(1) and 7(2) of the West Bengal Premises Tenancy Act, 1997 (hereinafter referred to as the 'said Act') filed by the petitioner/tenant were dismissed.

The issue is whether the belated filing of application under Section 7(1) and 7(2) of the said Act could be condoned by application of the Limitation Act, 1963.

The learned counsel for the petitioner submits that the order impugned suffers from various irregularities:-

- a) The decision of the Hon'ble Apex Court in ***Bijay Kumar Singh & Ors. versus Amit Kumar Chamariya & Anr.*** reported in

(2019) 10 SCC 660, was wrongly relied upon.

- b) The learned court below misinterpreted the decision in Chamariya (supra), inter alia, holding that the Hon'ble Apex Court had held that Section 5 of the Limitation Act, 1963 would not be applicable in case of belated applications under Section 7(1) and 7(2) of the said Act.
- c) The point for decision in Chamariya (supra) was maintainability of an application under Section 7(2) of the said Act when the admitted arrear rents had not been deposited by the tenant. The Hon'ble Apex Court decided whether the learned trial judge was right in granting the tenant an option to pay the arrears by allowing an application under Section 7(2) of the said Act, without the tenant having deposited the admitted arrears. The Hon'ble Apex Court had dealt with the interpretation of Section 7(2) of the said Act and not whether Section 5 of the Limitation Act would apply when a tenant approached the trial court belatedly, praying for determination of rent and payment of the arrears.

- d) The learned court below, did not take into consideration the decision of a Three Judges Bench in ***Nasiruddin & Ors. versus Sita Ram Agarwal*** reported in ***(2003) 2 SCC 577***. The said decision, recognised the power of the court to extend the time for deposit of rent and also permitted an application under Section 5 of the Limitation Act, 1963, to condone the delay in filing an application for payment of arrear rent.
- e) The decision in ***B.P. Khemka (P) Ltd. versus Birendra Kumar Bhowmick*** reported in ***(1987) 2 SCC 407*** also held that delay could be condoned by the court in case of failure to deposit the rent as directed by the court or as provided by the statute. Such decision was still operative in the field and was ignored by the learned court below.
- f) The decision in ***Bahadur Singh Kathotia versus Purabi Basu*** passed in C.O.2575 of 2022 categorically laid down that the decision in Chamariya (supra) suffered from the doctrine of sub-silentio on the issue whether Section 5 of the Limitation Act would be applicable in case of belated filing of an application under Sections 7(1) and 7(2) of the said Act. The learned court failed to take

into consideration **Bahadur Singh Kathotia (supra)**.

- g) That Sections 39 and 40 of the said Act permitted the courts to condone the delay by application of the provisions of the Limitation Act.
- h) Each case should be decided on its peculiar facts and circumstances. There were exceptions to the general rule. Delay in filing an application under Section 7(1) and 7(2) or appearance, could be condoned in the circumstances laid down by the coordinate Bench in **Bahadur Singh Kathotia (supra)** as hereunder:-
 - i) When the date of appearance of the defendant was beyond one month from the date of receipt of the summons.
 - ii) When the defendant/tenant was unable to appear on the date fixed due to unavoidable circumstances.
 - iii) Where in the opinion of the court, refusal to condone the delay would result in miscarriage of justice.

Mr. Agarwal, learned advocate for the petitioner submits that the learned trial judge ought to have applied the principles laid down in Bahadur Singh Kathotia (supra) in order to test whether the case fell

under the exceptional circumstances which would allow the court to condone the delay in filing the application under Section 7(1) and 7(2) of the said Act.

It is submitted that the defendant was not in default. The rents were deposited with the rent controller. Only the current rent should have been allowed to be deposited upon disposal of the application under Section 7(1) of the said Act. The learned counsel further submitted that only upon the court allowing the applications under Section 7(1) and 7(2) of said Act, would the petitioner be liable to pay the current rent month by month every month, within 15th of the following month.

Further submission is made that the decision in Chamariya (supra) was passed by the Hon'ble Apex Court on an appeal from the decision of this Court in the matter of **Amit Kumar Chamariya & Anr. versus Bijay Kumar Singh & Ors.** passed in C.O. 1943 of 2013 and C.O.1942 of 2013. Relying on the aforementioned decisions of the High Court, Mr. Agarwal submits that the facts stated in the said decisions would reveal that what fell for decision before the High Court was whether the application under Section 7(2) of the said Act could be filed directly, without the defendant having complied with the provisions of Section 7(1)(a) of the said Act.

According to Mr. Agarwal, in the cases before the High Court, the tenant did not come up with any prayer to make payment of arrears rent under Section 7(1)(a) of the said Act. An application was filed under Section 7(2) of the said Act to allow delayed deposits. The learned trial court allowed the application by the order impugned in the civil orders, mentioned above. The question before the High Court was whether the impugned order could be sustained in view of the legal position. The High Court held that without compliance of Section 7(1)(a), 7(2) would not be maintainable and had set aside the order of the learned trial judge. The said order went up in challenge before the Hon'ble Apex Court and the decision was passed in *Chamariya (supra)*. *Nasiruddin (supra)* would squarely apply. Relying on the decision of ***Career Institute Educational Society versus Om Shree Thakurji Educational Society***. Mr. Agarwal contends that what was ultimately decided in ***Chamariya (supra)*** would be the binding precedent and the other discussions on Section 7 of the Act, were obiter dicta.

The trial court, in this case should have directed the petitioner to file an application for condonation of delay and thereafter allowed the applications, upon condonation of the delay of three months.

Mr. Chakraborty, learned advocate appearing on behalf of the opposite party submits that the issue for

decision in Chamariya (supra) was not only interpretation of Section 7(2) of the said Act. Referring to paragraph 5 of the said decision Mr. Chakraborty urged that the Hon'ble Apex Court proposed to bring a certainty to the scope of Section 7 of the said Act. According to Mr. Chakraborty, the Hon'ble Apex Court decided the scope and ambit of Section 7 of the said Act which included Sections 7(1), 7(2), 7(3) and 7(4). Learned advocate referred to paragraph 5 of the said judgment is quoted below:-

“5. In this background, the argument of the learned counsel appearing for the appellant is that the High Court has not maintained judicial decorum and should have referred the matter to the larger Bench to decide the scope and ambit of Section 7(2) of the Act. We find that since a short question of law arises for consideration, therefore, without going into the question as to whether learned Single Judge should have referred the matter to the larger Bench or not, the question to be decided by this Court is to bring certainty in respect of scope of Section 7 of the Act.”

Mr. Chakraborty further submitted that while deciding the issue, the Hon'ble Apex Court took note of the decisions rendered in **B.P. Khemka (supra), Shibu Chandra Dhar versus Pasupati Nath Auddya reported in (2002) 3 SCC 617 and Nasiruddin (supra)** and arrived at the conclusion that filing an application under Section 7(1) and 7(2) within the statutory period and fulfilment of the other ingredients of Section 7(1) and 7(2) of the said Act, were mandatory. Relying on **Nasiruddin (supra)**, it was

submitted that when the Act required performance of a duty by a private person within a specified time, the same would ordinarily be mandatory, but when a public functionary was required to perform a public function within a time frame, the same would be held to be directory, unless the consequences thereof were specified.

Further Mr. Chakraborty submitted that the decision in **Bahadur Singh Kathotia** (supra) was per incuriam, as the decision of the Division Bench of this Court in **Calcutta Gujarati Education Society versus Sri Ajit Naraya Kapoor** passed in C.O.175 of 2017, had not considered.

According to Mr. Chakraborty, Sections 7(1) and 7(2) were not independent of each other. The petitioner ought to have come within one month from receipt of summons, and deposited the admitted arrears with statutory interest, if the petitioner wished to take the benefit of protection against eviction. In this case, the petitioner admittedly came after three months from service of summons. Summons were received on September 6, 2022. The petitioner filed two applications one under Section 7(1) and the other under Section 7(2), both on December 17, 2022, without payment of admitted arrears and without payment of current rent.

Considered the submissions. The law provides a complete mechanism to be availed of by a tenant in order to protect himself from eviction. Such mechanism was provided under Section 7 of the said Act. On institution of a suit by the landlord for eviction on any of the grounds referred to in Section 6 of the said Act, the tenant, subject to the provisions of sub-section (2) of the Section 7, was liable to pay to the landlord or deposit with the civil judge all arrears of rent calculated at the rate at which it was last paid and upto the end of the month previous to that in which the payment was made, together with interest at the rate of 10% per annum. Such payment or deposit was to be made within one month from the service of summons on the tenant or when the tenant appeared in the suit without summons being served, within one month from his appearance. Thereafter, the tenant was enjoined by law, to continue to pay to the landlord or deposit with the civil judge a sum equivalent to the rent at that rate, month by month within 15th of each succeeding month.

In case of any dispute as to the amount of rent payable by the tenant, within the time specified in the sub-section, the tenant was liable to deposit with the civil judge, the amount admitted by him to be due from him together with an application for determination of the rent payable. No such deposit could be accepted

unless it was accompanied by an application for determination of the rent payable. On receipt of the application, the civil judge, having regard to the rate at which the rent was last paid and the period for which default may have been made by the tenant, determine the dispute, and pass an order within a period not exceeding one year, specifying the amount, if any, due from the tenant and thereupon the tenant was liable to pay to the landlord within one month from the date of such order, the amount so specified in the order along with the monthly rent at the rate so determined.

Coming to the facts of this case, there is no dispute with regard to the admitted position that the suit was one for eviction under the provision of Section 6 of the said Act. Ground of default was also one of the grounds for eviction. The summons were served on September 6, 2022. The petitioner appeared on November 1, 2022. The application under Section 7(1) and 7(2) of the said Act were filed on December 17, 2022, that is, after more than three months from receipt of the summons.

In the application under Section 7(1) of the said Act, the petitioner stated that the monthly rents were paid to the landlord upto September 2020. Suddenly, the landlord refused to accept the rent from October 2020. The petitioner tried to pay the rent through money order from October 2020 to August 2021, but

the same was refused. The petitioner was regularly paying rent in favour of the landlord since the month of May 2022 and they had refused to accept the rents. The petitioner, upon compliance of all formalities, was compelled to deposit monthly rents in the office of the rent controller. The petitioner prayed for leave to produce the rent deposit challans at the time of hearing. The prayer was that the petitioner be permitted to deposit rents from the month of October 2020 and for all subsequent months before the learned court under the provisions of Section 7(1) of the said Act. No application for condonation of delay was filed.

The ingredients of Section 7(1) were not met. Not only was there delay in filing the application, but the other requirements of the provisions were also not complied with:-

- a) The admitted arrears rent were not deposited within the statutory period of one month from receipt of summons with statutory interest.
- b) The application did not indicate till which month the rent was deposited with the rent controller and at what rate. Neither any documents nor challans were filed to indicate there no arrear.
- c) The rate of rent admitted by the petitioner was not mentioned. No dispute with regard to the rate of rent was raised.

- d) On the one hand, the petitioner has stated that the rent from October 2020 to August 2021 was not accepted by the landlord. The same was sent by money order, but was refused. On the other hand, it has also been stated that the petitioner had regularly paid rent in favour of the landlord since May 2022. The rent was deposited with the office of the rent controller at Kolkata. Neither the period for which such rent was deposited before the rent controller nor the period of default or arrears have been mentioned.
- e) If the petitioner was depositing rents with the rent controller since October 2020, there was no reason why a prayer was made before the learned court below in the application under Section 7(1) of the said Act to allow the petitioner to deposit rent from October 2020. There is stark contradiction in the contentions of the petitioner.

The ingredients of Section 7 of the said Act are as follows:-

- 1) Within a month from the date of receipt of summons, the petitioner ought to have deposited the admitted arrears with statutory interest of 10% and approached the court by filing an application for determination of the rate of rent, in case of dispute.

- 2) Without deposit of the admitted arrears within a month with interest and without payment of the current rent month by month within 15th of every succeeding month, there could be no adjudication under Section 7(2) of the said Act.
- 3) In the application under Section 7(2), the petitioner did not raise any dispute with regard to the rate of rent but reiterated the statements which was made in the application under Section 7(1).
- 4) The prayer was to permit the petitioner to file the said application for adjudication of the issue of default.

The law is well-settled that without compliance of Section 7(1), Section 7(2) would not come into operation. The tenant was required to deposit the admitted arrear rent within a month from receipt of summons calculated at the rate at which it was last paid and upto the end of the month previous to that in which the payment was made, together with the interest at the rate of 10% per annum. Thereafter, the tenant was required to continue to pay to the landlord or deposit with the civil judge month by month within 15th of every succeeding month, a sum equivalent to the rent at that rate. In case of any dispute, the petitioner was required to deposit the amount as per

sub-section (1) with the admitted arrears with interest within the statutory period of one month and file an application asking the court to determine the dispute with regard to the rate of rent and arrears payable.

In this case, not only the applications under Section 7(1) and 7(2) were delayed, but also misconceived. In the application under Section 7(1) of the said Act, the petitioner had stated that the petitioner be allowed to deposit rent from October 2020. Such prayer was made in December 2022 and the petitioner stated that the arrears were deposited with the rent controller. There appears to be total discrepancy in the facts and the submissions. It appears that in a casual manner, the applications were filed without any attention having been paid either to the requirements of the section or to the actual facts.

If, according to the petitioner, all the past rents were deposited with the rent controller since October 2020, the question of the court allowing the petitioner to deposit rent on and from October 2020, would not arise.

The prayer also indicates that there were admitted arrears, but the said admitted arrears were not deposited as per law. No application was also filed raising a dispute, but application under Section 7(2) was filed again asking the court to determine the

default, although according to the petitioner, all arrears were deposited with the rent controller.

Under such circumstances, the learned trial judge rightly rejected the application. Although the learned trial judge did not point out the anomalies in the statements made by the petitioner in the applications, but decided the matter on the basis of the decision in *Chamariya (supra)*, this Court finds that each of the applications filed by the tenant was wholly misconceived, lacking in material particulars, filed in total disregard to the provisions of law and was also belated.

Section 7(2) cannot be read in isolation from Section 7(1). The Section 7 was interpreted in **Chamariya (supra)** and the entire mechanism by which a tenant could seek benefit from eviction on the ground of default, was considered to be mandatory and inter-related. The provisions of the said section were discussed in detail in the following paragraphs of the said judgment:-

19. Sub section (1) of Section 7 of the Act relieves the tenant from the ejectment on the ground of non-payment of arrears of rent if he pays to the landlord or deposits it with the Civil Judge all arrears of rent, calculated at the rate at which it was last paid and up to the end of the month previous to that in which the payment is made together with interest at the rate of ten per cent per annum. Such payment or deposit shall be made within one month of the service of summons on the tenant or, where he appears in the suit without the summons being served upon him, within one month of his appearance.

20. Therefore, sub section (1) deals with the payment of arrears of rent when there is no dispute about the rate of rent or the period of arrears of rent. Sub section (2) of the Act comes into play if there is dispute as to the amount of rent including the period of arrears payable by the tenant. In that situation, the tenant is obliged to apply within time as specified in sub section (1) that is within one month of the receipt of summons or within one month of appearance before the court to deposit with the Civil Judge the amount admitted by him to be due. The tenant is also required to file an application for determination of the rent payable. Such deposit is not to be accepted, unless it is accompanied by an application for determination of rent payable. Therefore, sub section (2) of the Act requires two things, deposit of arrears of rent at the rate admitted to be due by the tenant along with an application for determination of the rent payable. If the two conditions are satisfied then only the Court having regard to the rate at which rent was last paid and for which tenant is in default, may make an order specifying the amount due. After such a determination the tenant is granted one month's time to pay to the landlord the amount which was specified. The proviso of the Act, limits the discretion of the court to extend the time for deposit of arrears of rent. The extension can be provided once and not exceeding two months.

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 (2A) and (2B) which was being examined by this Court in B.P. Khemka. Sub sections (2A) and (2B) of Section 17 of 1956 Act confer unfettered power on the court to extend the period of deposit of rent, which is circumscribed by the proviso of sub sections (2) and (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 pre-condition 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.”

Moreover, the decision in **Bahadur Singh Kathotia (supra)** would not come to the aid of the petitioner as the said judgment was rendered without considering the decision of the Division Bench in the **Calcutta Gujarati Education Society (supra)**, which answered the reference in view of conflicting the decisions. The question formulated by the then Acting Chief Justice is quoted below:-

“Does the view of the Division Bench of this court that section 5 of the Limitation Act can be applied to condone delay in making applications under sub-sections (1) and (2) of section 7 of the West Bengal Premises Tenancy Act, 1997, as held in the Subrata Mukherjee case (supra), survive in view of the decisions of the Hon’ble Supreme Court in the Nasiruddin case (supra), the Ashoke Kumar Mishra case (supra), Manjushree Chakraborty case (supra).”

The reference was specific as to whether Section 5 of the Limitation Act could be applied to condone a delay in making application under Section 7(1) and 7(2) of the said Act. The Hon'ble Division Bench held that the Limitation Act, 1963 had no manner of application in respect of an application by a tenant under Section 7 for determination of arrear rents and disputed rents. Paragraphs 46 and 47 of Nasiruddin case (supra), were considered by the Hon'ble Division Bench and it was held that in Nasiruddin (supra) the court could condone default only when the Statute conferred such a power on the court or not otherwise. The Hon'ble Division Bench held as follows:-

“West Bengal Premises Tenancy Act, 1997 is an Act of the State legislature providing for period of limitation in respect of deposit and determination of rent. Section 6 in the Act has the non-obstante clause on application of other laws, regarding eviction. Section 40 makes applicable Limitation Act, 1963 subject to provisions in the Act relating to limitation.

The application for determination of rent not having prescribed period of limitation anywhere else in the third division, article 137, if applied, will provide for it to be made within three years from when the right to apply accrues. In case of such an application it is not the right of the tenant that would accrue, to make such an application. The Act of 1997 mandates that deposit of rent or where there is dispute regarding quantum of rent, deposit of admitted rent alongwith application for determination of rent, must be made by the tenant within time specified and as extendable under said Act. This is in relation to the suit filed for eviction, where compliance with the deposit mandate will enable the tenant to seek the protection provided. This enabling provision cannot be seen as an assertive right of a tenant, to be enforced. Here, provision in article 137

cannot be made applicable. Furthermore, where it is a requirement of compliance by the tenant to seek protection, mandated by the statute as competently legislated by the State legislature and specifically limiting application of the 1963 Act, there cannot be occasion for application of the period of three years, overriding the period and extension specified by the local law and thereafter condonation of delay as under section 5.

We answer the question referred to say that Limitation Act, 1963 has no application in respect of an application by a tenant, made under section 7 for determination of arrears of disputed rent. We are aware our answer to the question referred gives rise to conflicting views of two Division Benches of this Court. However, we have answered the question pursuant to direction made in said administrative order.

The files be sent back on the reference answered and disposed of.”

The Division Bench held that the Act of 1997 mandated deposit of rent or in case of dispute with regard to quantum, deposit of admitted rent along with an application for determination, to be filed by the tenant, within the time specified under the Act. Such deposit was in relation to a suit for eviction, in which compliance with the deposit mandate within the specified time would enable the tenant to seek the protection provided under Section 7. Such enabling provision could not be seen as an assertive right of a tenant to enforce. Article 137 of the Limitation Act would not be applicable. Furthermore, when it was a statutory requirement, compliance by the tenant would entitle the tenant to seek protection. The provision was competently legislated by the State legislature by specifically limiting the application of the Limitation

Act of 1963. There could not be any occasion for application of the period of limitation of three years by overriding the period prescribed under Section 7(1). Grant of extension of time specified by the local law, by seeking condonation of delay under Section 5 of the Limitation Act was not permissible. The question on reference was thus answered. The Limitation Act had no applicability in respect of the tenant's application under Section 7(1) and Section 7(2) of the said Act.

The Hon'ble Division Bench considered Nasiruddin (supra) and held that paragraphs 46 and 47 of the said judgment had qualified the situations in which an application for condonation of delay in filing an application under Section 7(1) would be allowed. The facts of the said case would not be covered by the situation laid down in **Nasiruddin (supra)**.

The decision of a coordinate Bench in **C.O.3138 of 2019 in Abhishek Singh versus Bholanath Kundu** was also relied upon by Mr. Chakraborty, where the learned single Judge clearly held that the provision of Section 7(1) was mandatory and should be scrupulously followed by the tenant in order to avoid eviction on account of non-payment of arrears of rent under Section 6 of the Said Act.

In **Chamariya (supra)** the Hon'ble Apex Court finally interpreted **Nasiruddin (supra)**, in paragraph 16 thereof. B.P. **Khemka (supra)** was also considered and

the Hon'ble Apex Court arrived at the conclusion that Section 5 of the Limitation Act would not apply in case the benefit of protection from eviction was sought by the tenant under Section 7 of the said Act. A conjoint reading of the paragraphs 19, 20 and 21 of Chamariya (supra) would categorically reflect such finding.

Thus, Mr. Agarwal's submission that the decision in Chamariya (supra) was restricted to Section 7(2) and not Section 7(1), is not accepted. The ratio of Chamariya (supra) applies to the entire provision of Section 7 of the said Act.

On the facts pleaded in the application, which were not only devoid of merits on account of non-compliance with each and every ingredient of Section 7(1) and 7(2) but also on the ground of delay, the applications were rightly rejected.

It has been told that the defence has also been struck off. However, the said decision is not before this Court and not taken into consideration.

Accordingly, the revisional application is dismissed.

Urgent photostat certified copy of this order, if applied for, be given to the parties on priority basis.

(Shampa Sarkar, J.)