

Item No.3
26.04.2024
Court. No. 19
GB

C.O. 858 of 2024

Smt. Malati Sarkar & Anr.
Vs.
Ashok Ghosh & Ors.

Mr. Tarak Nath Halder

...for the Petitioners.

*Mrs. Sohini Chakraborty,
Mr. Amit Chaudhury*

...for the Opposite Parties.

1. The revisional application arises out of orders dated November 17, 2023 and December 18, 2023, passed by the learned Civil Judge (Junior Division), Additional Court at Sealdah, District – 24 Parganas (South) in Ejectment Suit No.399 of 2005. This suit was being heard analogously with Title Suit No.400 of 2005 due to similarities in the status of the parties and subject matter of the suits. Composite orders on the aforementioned dates were passed in both the suits on the respective applications filed by the parties in each of the suits.
2. By the order impugned dated November 17, 2023, the learned court rejected the applications under Order 14 Rule 2 of the Code of Civil Procedure by which the petitioners (tenants) had requested the court to adjudicate the maintainability of the suit as a preliminary issue. By the order dated December 18, 2023, the learned court allowed an application under Section 7(3) of the West Bengal Premises Tenancy Act,

1997 (hereinafter referred to as the 'said Act'), inter alia, holding that the tenants were defaulters in payment of rent. In spite of an order of the learned trial court, upheld by the High Court, the provisions of Section 7(2) of the said Act had not been complied with.

3. By the order dated November 17, 2023, the court held that it appeared that Smt. Mrinalini Dasi bequeathed her ownership right in respect of the property to the plaintiff, Smt. Malati Ghosh by executing a Will dated January 20, 1986. Accordingly, the said erstwhile plaintiff acquired ownership right over the said property, upon grant of probate. Although, Mrinalini Dasi also executed a Will on July 10, 1986 in favour of the tenants, that is, one room to each set of tenants and the petitioners claimed ownership through such Will, but probate had not been granted at the time of filing of the suit. Thus, the plaintiff was found to have a justified claim to ownership in respect of the suit property. Subsequently, the executor of the second Will filed an application for probate before the learned District Delegate and probate was granted on March 14, 2023. The defendants/petitioners and others who were erstwhile tenants claimed ownership in the suit property on the basis of such probate of 2023. According to the court, the issue of ownership and maintainability of the suit at the instance of Smt.

Malati Ghosh or her heirs, could not be decided as a preliminary issue only on the grant of probate in 2023. Elaborate evidence would be required in order to decide title. There was an earlier probate in favour of Malati Ghosh, the predecessor-in-interest of the opposite parties. The learned court rightly decided that grant of probate would only prove genuineness of the Will and not the titles of the parties inter se. Thus, the court was of the view that the maintainability of the suit should not be decided as a preliminary issue, but as a main issue at the trial. I do not find any reason to interfere with the said order. A preliminary issue can be decided on a question of law and not on such issues which require elaborate evidence. Moreover, the learned court had already kept the issue of landlord tenant relationship open for final adjudication at the trial. Only a tentative finding had been arrived at for the purpose of disposal of the application under Section 7(2) of the said Act.

4. By the order dated December 18, 2023, the court held that the order passed in the application under Section 7(2) of the said Act had been upheld by the High Court. The direction of the court to deposit arrear rent with 10% statutory interest and also to deposit current rent at the rate it was last paid, month by month within 15th of each succeeding month, had also been upheld by the High Court in C.O. 3200 of 2008. Despite such orders,

deposits were not made. Thus, the defence of the tenants was liable to be struck off. The High Court had observed that the learned trial judge had not erred in directing the petitioners to deposit the rent, having found them to be defaulters. Under such circumstances, the provision of Section 7(3) of the said Act would be attracted and the plaintiffs rightly prayed for striking off the defence of the defendants on account of non-compliance of the court's order and non-compliance of the provisions of law. Admittedly, the rent from November 1, 1986 to August 1, 2008, that is, for 261 months along with 10% statutory deposit were not paid and the current rent was also not deposited pursuant to the order of the learned trial judge which was upheld by the High Court in C.O.3200 of 2008.

5. Mr. Halder, learned advocate appearing on behalf of the tenants submits that as the Will in favour of the tenants had been probated in 2023, the petitioners had acquired right, title and interest in the suit property and as such the question of depositing the arrear rent and current rent would not arise. The petitioners were not tenants and they did not have any liability to comply with Sections 7(1) and 7(2) of the said Act.
6. To substantiate such claim, Mr. Halder has relied on the decision of this Court in the matter of ***Baidyanath Kundu versus Sm. Jyotshna Rani***

Karmakar reported in **1972 SCC OnLine Cal 23**. A coordinate Bench had held that in order to proceed in a suit for eviction, the court must first of all decide whether there was a relationship of landlord and tenant between the parties. If the court found that there was no relationship between the parties, the court would not have any jurisdiction to pass a decree of ejectment. Therefore, in the opinion of the High Court, it was incumbent upon the trial court to first decide the existence of relationship of landlord and tenant. The court could neither strike off the defence against delivery of possession nor decree the suit, without deciding whether a relationship of landlord and tenant existed between the parties.

7. Reliance was placed on the decision of an Hon'ble Division Bench in the matter of **Synthetic Plywood Industries (P) Ltd. versus Smt. Manjulika Bhaduri & Ors.** passed in **C.O.50 of 1995**. The Division Bench opined that the consistent view of the High Court was that if any dispute was raised by the defendant with regard to the relationship of landlord and tenant, even without filing an application under Section 17(2), before striking off the defence on the ground of non-compliance of Section 17(1), the court must decide such issue.
8. The next decision that was relied upon by Mr. Halder is the decision of **Sri Manik Lal Sett & Anr. versus**

Smt. Hira Basu @ Surali Basu & Ors. reported in **2008 (2) CLJ (Cal) 675**, in which another coordinate Bench held that the learned trial court could not dispose of an application under Sections 17(2) and 17(2)(A) of the 1956 Act, without framing an issue as to the relationship of landlord and tenant and without deciding the said issue first, upon evidence.

9. Finally, reliance was also placed on a decision of this Court in the matter of **Sk. Rafiuddin Ahmed versus Hazi Abdul Rahim & Ors.** reported in **2008 (2) CHN 48**, in which a coordinate Bench held that the High Court could set aside an order of another coordinate Bench upon exercise of power under Article 227 of the Constitution of India. This Court was thus, urged to set aside the order passed in C.O.3200 of 2008 on the ratio of the above decision.
10. Ms. Chakraborty, learned advocate appearing on behalf of the plaintiffs submits that the application under Section 7(2) was disposed of by the learned trial judge with specific finding with regard to the title of Smt. Malati Ghosh. The probate granted in favour of the erstwhile plaintiff was accepted by the court as proof of ownership. Thus, further adjudication on the issue would require evidence and the learned court reserved the issue to be decided finally at the trial. She further relied on the findings of the High Court with regard to the relationship of landlord and tenants. Both the

learned trial court and the High Court had come to a finding that the tenants were defaulters and should deposit the arrear rent with 10% interest as also current rent.

11. Heard the learned advocates for the respective parties. This court is required to decide whether in the instant case, the defence of the tenant was liable to be struck off for non-compliance of the provisions of law. Section 7(3) of the said Act provides that if the tenant fails to deposit or pay any amount referred to in Sub-Section (1) or Sub-Section (2) of the said Act within the time limit specified therein or within such extended time as may be granted, the Civil Judge shall order the defence against delivery of possession to be struck off and shall proceed with the hearing of the suit. The Hon'ble Apex Court had held in the matter of ***Bijay Kumar Singh & Ors. versus Amit Kumar Chamariya & Anr.*** reported in **(2019) 10 SCC 660**, that provisions of Section 7 were mandatory. If the tenant failed to comply with the provisions of Sections 7(1) and 7(2) of the said Act, the court did not have any other choice but to strike off the defence. The relevant paragraphs are quoted below:-

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.”

12. Coming to the facts of this case, it appears that the suit for eviction was filed under Section 6(1) of the said Act, on the ground of default and reasonable requirement. The petitioner also filed an application under Section 7(2) of the said Act by raising a dispute with regard to the relationship of landlord and tenant. The learned trial judge allowed the parties to adduce evidence in the matter and decided the application. In the application under Section 7(2) of the said Act, the petitioners raised a question with regard to the genuineness of the Will executed by Mrinalini Dasi in favour of Smt. Malati

Ghosh erstwhile plaintiff, and also claimed that the erstwhile plaintiff could not have become the owner of the property in question, thereby claiming the eviction of the petitioners. The petitioners were not tenants, as a subsequent Will had been executed and the petitioners were beneficiaries of the suit property under such Will.

13. The plaintiff contested the application and relied on the probate certificate of the Will dated January 25, 1986, death certificate of Mrinalini Dasi, the corporation taxes, ration card, burning ghat certificate, notice of attornment, notice of termination of tenancy, etc. Upon considering the evidence, the learned court came to the following findings:-

“From the evidence of PW-1, I find that in his cross-examination, he has made clear and explicit admission in respect of the following facts:-

- (a) he is not claiming ownership right
- (b) they (tenants) are staying in the case property since there is no landlord.
- (c) the statement that he became owner by adverse possession was not explain (sic explained) to him by his advocate.
- (d) he claims to be a tenant in respect of the case property, and not the owner.
- (e) he would accept the petitioner as his landlord if she can establish herself as the owner of the case premises and if she is declared to be the owner of the premises by a competent court.
- (f) he has paid rent in favour of Mrinalini Dasi up to Jaisthya 1393 B.S.”

14. From the explicit admission of PW-1 in the deposition, it became amply clear to the trial court that he had demolished his own plea of ownership which he had built up in his application under Section 7(2) of the Act. The witness had expressly admitted that he was a tenant

and he had expressed that he had no reservation in accepting the petitioner as the landlady if she was so declared by a competent court. There were specific findings of fact, by the learned trial court.

15. The learned trial court then considered the probate certificate granted in favour of the plaintiff in respect of the Will dated January 25, 1986. The court found that the Will continued to remain in force until the same was either revoked or annulled. The court held that the relationship of landlord and tenant could not be said to have persisted in the practical sense of the term, as no payment and acceptance of rent had taken place between the parties, but the claim of the petitioners in the capacity of owners could not be conclusively decided. The evidence on behalf of the plaintiff and the probate certificate established that the plaintiff was the landlord and owner of the property in question. Accordingly, directions were passed to pay the arrear rent with 10% statutory interest as also the current rent. The said order was challenged before this Court in C.O.3200 of 2008. Although a composite order was passed in both the suits, C.O.3200 of 2008 was filed only in respect of Ejectment Suit No.399 of 2005. A coordinate Bench held that the plaintiff/opposite party was claiming title in respect of the suit property on the basis of the Will dated January 25, 1986 by which Mrinalini Dasi bequeathed the suit property in favour of the plaintiff. The Will was duly

probated in 2004. Thereafter, notice of attornment was served upon the defendant, that is, petitioner's predecessor and rent was demanded. The defendants replied to the said notice, but refused to pay the rent to the plaintiff. The defendants also claimed right to the property on the basis of an unprobated Will, executed by Mrinalini Dasi on July 10, 1986. The defendants made an alternative claim of acquisition of title by adverse possession, though they did not deny their occupation as tenant in the suit premises under Mrinalini Dasi.

16. His Lordship held that the learned trial judge had rightly decided that as the relationship of landlord and tenant between Mrinalini Dasi (original owner) and the petitioner was not disputed and further, as the petitioners had failed to prove their title in respect of the suit property, no other conclusion could be arrived at excepting that there existed a relationship of landlord and tenant between the parties. The petitioners/defendants had failed to prove their title in the suit property on the basis of an unprobated Will.
17. His Lordship held that the issue regarding the existence of the relationship of landlord and tenant, was decided tentatively and was not conclusive. The issue would be decided finally and conclusively at the time of hearing of the suit, after taking evidence of the parties.
18. His Lordship held that as the plaintiff had already proved the title by virtue of the Will, His Lordship had

no other alternative, but to agree with the finding of the learned trial judge regarding the dispute relating to existence of the relationship of landlord and tenant between the parties.

19. Thus, the High Court agreed with the tentative finding of the learned trial judge about the existence of a relationship of landlord and tenant between the parties and upheld the directions. It is also important to mention here that the trial court had rightly framed the issue of relationship of landlord and tenants to be decided at the trial, as the tenants had been claiming ownership on the basis of the Will executed later, which has not been probated at the relevant point of time. Since 2008, the arrear rents and current rents were not paid on the basis of an unprobated Will which was probated only in 2023. Thus, the default and non-compliance of Sections 7(1) and 7(2) of the said Act was proved.
20. Thus, there is no hesitation in my mind to hold that both the learned trial judge and the High Court at the relevant point of time had decided that there existed a relationship of landlord and tenant although, tentatively and had directed compliance of Section 7(2) of the said Act, which the petitioners admittedly failed. The order of the learned trial judge to deposit the arrear rent and the current rent was passed on August 21, 2008 and the order of the High Court upholding such order with

reasons and with specific finding with regard to the relationship was passed on June 23, 2009. Extension of time up to August 31, 2009 had been granted by the High Court for depositing the arrear rent with interest and the current rent. From 2009 to 2024 the petitioner did not comply with the order of either the learned trial judge or the High Court. The petitioner also did not challenge the order of the High Court passed in C.O.3200 of 2008. Thus, the court rightly applied the provisions of Section 7(3) and struck off the defence of the petitioner.

21. In the decision of Baidyanath Kundu (supra), the facts are distinguishable. In the said case, no application under Section 17(2) of the 1956 Act had been filed, but the trial court proceeded to strike off the defence without deciding the relationship of landlord and tenant, although a specific defence had been taken in the written statement that the relationship did not exist. Here, there is a tentative finding at the stage of Section 7(2) with regard to the relationship and a specific direction upon tenant was passed to pay the arrear rent and current rent in compliance of Sections 7(1) and 7(2) of the said Act.
22. In the decision of Synthetic Plywood (supra), the Hon'ble Division Bench had answered a reference framed by a learned single judge in the following manner:-

“a) Whether in deciding a matter under section 17(2) of the West Bengal Premises

Tenancy Act touching the question of relationship or existence of landlord and tenant and an issue pertaining thereto can be decided as a preliminary issue under Order 14 Rule 2 of the Code of Civil Procedure while disposing of the application under Section 17(2) of the West Bengal Premises Tenancy Act?

b) Whether West Bengal Premises Tenancy Act, being a special statute, and particularly section 17(2) of the Act, being a special provision in that statute will override and get precedent over the general provision under Order 14 Rule 2 of the Code of Civil Procedure?

c) Whether the law laid down in decisions of *Aloka Ghose vs. Inspector General* reported in 66 CWN 302, *Union of India vs. N. K. Chowdhury* reported in 78 CWN 371, *Parul Banerjee vs. Anand Kumar Agarwalla* reported in 1979 (2) CLJ 297, *Biswa Bhusan Bose vs. Kusum Agarwalla* reported in 1981 (1) CLJ 1 and *Nanda Gopal Das vs. Rabindranath De* reported in 1987 (I) CHN 362 are no longer good laws and are judgment *per incuriam*?”

23. The reference was answered in following manner:-

“a) Yes, but suit must not be decided on the basis of decision on such issue if decided in negative without pronouncing judgment on all other issues.

b) In view of answer of question No.(a), no answer is necessary, inasmuch as section 17(2) is in no way conflict with Order 14 Rule 2 of the Code.

c) The decisions referred to therein are still good laws and are not judgments *per incuriam*.”

24. The issue whether the relationship of landlord and tenant could be decided as a preliminary issue, was answered in the affirmative. The decision in *Sri Manik Lal Sett* (supra) also does not help the petitioner. There was a tentative finding of the trial court. The High Court held that was not proper and remanded the matter, directing the court to dispose of the application under Section 7(2) by allowing the parties to

adduce evidence, inter alia, holding that an application under Section 7(2) where the dispute was with regard to the relationship, the parties should be allowed to lead evidence. In the present case evidence was adduced by the parties.

25. In the decision of Sk. Rafiuddin Ahmed (supra), a coordinate Bench held that an order of a learned single judge if palpably contrary to law, could be corrected by a revisional court, later. In the said case, a single judge had directed a preliminary issue to be framed on a point before the defence was disclosed, as no written statement was filed. The said direction was palpably erroneous and contrary to the provisions of Order 14 Rule 2 of the Code. Such mistake was sought to be corrected for the ends of justice. Thus, none of the decisions relied upon by Mr. Halder are applicable to the facts of this case.
26. A judgment is an authority for what it decides. A simple difference of fact would make a world of difference. Reliance is placed on the decision of ***Uttaranchal Road Transport Corpn. v. Mansaram Nainwal***, reported in **(2006) 6 SCC 366**, the Hon'ble Apex Court held as follows:-

“13. The High Court unfortunately did not discuss the factual aspects and by merely placing reliance on an earlier decision of the Court held that reinstatement was mandated. Reliance on the decision without looking into the factual background of the case before it is clearly impermissible. A decision is a precedent

on its own facts. Each case presents its own features. It is not everything said by a judge while giving judgment that constitutes a precedent. The only thing in a judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well-settled theory of precedents, every decision contains three basic postulates : (i) findings of material facts, direct and inferential. An inferential finding of fact is the inference which the judge draws from the direct, or perceptible facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment. The enunciation of the reason or principle on which a question before a court has been decided is alone binding as a precedent. (See *State of Orissa v. Sudhansu Sekhar Misra* [(1968) 2 SCR 154 : AIR 1968 SC 647] and *Union of India v. Dhanwanti Devi* [(1996) 6 SCC 44] .) A case is a precedent and binding for what it explicitly decides and no more. The words used by judges in their judgments are not to be read as if they are words in an Act of Parliament. In *Quinn v. Leatham* [1901 AC 495 : (1900-03) All ER Rep 1 : 85 LT 289 (HL)] , Earl of Halsbury, L.C. observed that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which are found there are not intended to be exposition of the whole law but governed and qualified by the particular facts of the case in which such expressions are found and a case is only an authority for what it actually decides.”

27. In the instant case, both the courts have dealt with the provisions of law, the provisions of the Thika Tenancy Act and arrived at a conclusion that the right of the plaintiff/landlord as the owner of the property had been sufficiently proved for the trial court to arrive at a

tentative finding that there existed a relationship of landlord and tenant and thereby directed compliance of the provisions of Section 7 of the said Act. The petitioners did not comply with the provisions of Sections 7(1) and (2) and the defence was rightly struck off. Subsequent grant of probate in 2023 would not absolve the petitioners from compliance of the earlier orders passed in 2008. The orders impugned are not interfered with. The petitioners would only have the right of cross-examination.

28. In the decision of the Hon'ble Apex Court in the matter of ***Modula India versus Kamakshya Singh Deo*** reported in ***(1988) 4 Supreme Court Cases 619***, the Hon'ble Apex Court had held that in a suit which was appearing undefended, the defendant may enter appearance by exercising a limited right to cross-examine the plaintiff's witnesses and to advance arguments to demolish the plaint case. Relevant paragraph is quoted below:-

“For the above reasons, we agree with the view of Ramendra Mohan Dutta, ACJ that, even in a case where the defence against delivery of possession of a tenant is struck off under section 17(4) of the Act, the defendant, subject to the exercise of an appropriate discretion by the court on the facts of a particular case, would generally be entitled:

(a) to cross-examine the plaintiff's witnesses; and

(b) to address argument on the basis of the plaintiff's case.

We would like to make it clear that the defendant would not be entitled to lead any

evidence of his own nor can his cross-examination be permitted to travel beyond the very limited objective of pointing out the falsity or weaknesses of the plaintiff's case. In no circumstances should the cross-examination be permitted to travel beyond this legitimate scope and to convert itself virtually into a presentation of the defendant's case either directly or in the form of suggestions put to the plaintiff's witnesses."

29. Accordingly, the revisional application is dismissed.
30. However, there will be no order as to costs.
31. All the parties are directed to act on the basis of the server copy of this order.

(Shampa Sarkar, J.)