

**IN THE HIGH COURT AT CALCUTTA
CIRCUIT BENCH AT JALPAIGURI
(CIVIL REVISIONAL JURISDICTION)**

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

C.O.32 of 2024

Tarak Chakraborty

Versus

Naryana Chandra Dutta

For the petitioner :

Dr. Pabitra Paul Chowdhury
Mr. Ratan Banik
Mr. Saptarshi Banik
Mr. Debangshu Modak

For the opposite party :

Mrs. Kakali Bose
Mr. Akhil Biswas
Ms. Neha Sahani
Mr. Koushik Ghosh

Heard on : 22.08.2024

Judgment on : 03.09.2024

Ajoy Kumar Mukherjee , J.:

1. This Application under Article 227 of the Constitution of India has been directed against order no. 34 dated 15th January 2024 passed by learned Civil Judge (Senior Division), Siliguri in Title Suit. no. 93 of 2018. By the impugned order learned court below rejected petitioners application

under section 7 of the West Bengal Premises Tenancy Act, 1997 (in short Act of 1997).

2. The petitioner's contention is that opposite party/plaintiff filed aforesaid Title Suit no. 93 of 2018 praying for decree of recovery of khas possession of the suit premises after evicting the petitioner herein/defendant. The petitioner further submits that he is a chronic myloid leukemia patient and he reposed entire faith on his erstwhile learned counsel one Mr. Dutta Joardar and entered appearance in the suit to defend himself on 27.11.2019. Thereafter, on 02.12.2021, due to non appearance of the said advocate of the petitioner, the case was posted for ex-parte hearing. Subsequently on the basis of a prayer made by the petitioner said order got vacated and suit was again posted for contested hearing.

3. On 16.10.2023 during examination of the petitioner/defendant as DW-1, petitioner herein for the first time, on enquiry by the learned court, came to learn that he was supposed to deposit arrear rent and current rent month by month but he could not reveal anything to the court as he all along acted in good faith on the advice of his said advocate.

4. Thereafter, on 08.01.2024 the petitioner defendant was represented through his newly engaged advocate and under his advice the petitioner defendant on 15.01.2024 filed three applications under section 7 (1) (a) and 7 (2) and section 7 (1) (c) along with prayer under section 40 of the Act of 1997 read with section 5 of the Limitation Act for condonation of delay. In support of condonation of delay he also filed all medical certificates.

However, learned court below by the order impugned rejected all the aforesaid applications upon hearing both the parties.

5. Learned counsel appearing on behalf of the petitioner posed the following questions before this court for adjudication

- (a)** Whether non filing of the application under section 7(1) (a) in time was a mistake of fact on the part of the petitioner /defendant, as the petitioner always acted as per the advice of his erstwhile counsel ?
- (b)** Whether the petitioner should suffer due to the acts and conduct of the petitioner's erstwhile counsel in a civil proceeding or not?
- (c)** Whether an advocate is an officer of the court and if so whether the maxim "***actus curiae neminem gravabit***" should apply in the present context or not?
- (d)** Whether the learned Civil Judge (Senior Division), Siliguri erred substantially both in law and fact in failing to appreciate that the petitioner acted in good faith under the advice of his erstwhile counsel, hence, there was no laches or lacuna on the part of petitioner in defending the suit.
- (e)** Whether invocation of section 7 of the premises Tenancy Act, 1997 is a proceeding within the meaning of section 40 of premises Tenancy Act, 1997 or not?
- (f)** And if so, whether the Doctrine of sub-silencio is applicable while interpreting the ratio laid down in ***Bijoy Kumar***

Singh & others Vs. Amit Kumar Chamaria reported in
2020 (1) ICC 664 (SC) or not?

Decision

6. Before going to further details let me refer list of dates which are important for the adjudication for the present dispute.

20.12.2018:-- The opposite party herein plaintiff filed aforesaid suit for eviction against petitioner/defendant

27.11.2019:-- The petitioner defendant entered appearance through his advocate and prays for time to file written statement.

02.12.2021:-- Due to non appearance of the petitioner /defendant, the case was posted for ex-parte hearing.

08.09.2022:-- The case was again posted for contested disposal after allowing petitioner/defendant's application under Order IX Rule 7 of the Code of Civil Procedure.

01.12.2023:-- The case was referred to Lok Adalat on consent of the parties.

14.12.2023:-- Lok Adalat conciliation failed.

21.12.2023:-- After examination of plaintiff's witness, the petitioner was examined as DW-1 and the case was fixed for further DW-1, in default for hearing of argument.

08.01.2024:-- The petitioner defendant was represented by his newly engaged counsel by filing fresh vakalatnama.

15.01.2024:-- Petitioner filed three applications under section 7 (1) (a) and 7 (2) and section 7 (1) (c) and under section 40 of the Act of 1997 read with section 5 of the Limitation Act for condonation of delay.

7. Having due regard to the submission made on behalf of both the parties and also in view of list of dates as referred above, it is very much clear that there is an inordinate delay of more than 4 years in filing the application under section 7 of the Act of 1997. Section 7 (1) (b) of the Act of 1997 lays down the time limit within which the arrears of rent along with interest determined by the court are to be paid or deposited in the court and the maximum time limit of extension, that the court may grant is two months from the date of the order. In view of the settled principle of law, the word 'shall' appearing in the second part of sub section (2) of section 7 of the Act of 1997 is imperative. It is true that under the old Act of 1956 (West Bengal Premise Tenancy Act, 1956) relating to deposit of arrear rent, current rent, as well as dispute between the land lord and tenant, a liberal approach could have been taken in favour of the tenant. In fact clause (a) of Sub-section 2(A) of section 17 of the Act of 1956 conferred the power on the court to extend the time limit for deposit of rent under sub section (2) of section 17 but while enacting the Act of 1997 the legislature has consciously omitted to incorporate any such provisions in section 7 of the Act, similar to sub section 2(A) or 2(B) of section 17 of the Act of 1956.

8. In **Nasiruddin case (2003) 2 SCC 577** while dealing with Rajasthan Act on a similar provision the court held that the word 'shall' which is ordinarily imperative in nature, has been used in sub-section (4) of section

13 of the said Act. The power of the court has also been limited to the extent that it can extend time for such deposit not exceeding three months and so far as the deposit of monthly rent is concerned, by 15th day, the courts power therefore, is restricted. In case the tenant deposits the provisional rent as determined by the court within the stipulated period, the tenant is relieved by the eviction decree. It was further held in **Nasiruddin judgment (supra)** that whenever the special act provides for extension of time or condonation of default, the court possesses the power therefor, but where the statute does not provide either for extension of time or to condone the default in depositing the rent within the stipulated period, the court does not have the power to do so. If an act is required to be performed by a private person, within a specified time, the same would ordinarily be mandatory.

9. In Bijoy Kumar Singh & others Vs. Amit Kumar Chamaria reported in **(2019) 10 SCC 660** supreme Court clearly held that the provisions of sub section (2) of section 7 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. It was further held that the consequence flowing from non deposit of rent are contemplated under sub section (3) of section 7 of the Act and if the tenant fails to deposit admitted arrears of rent within one month of receipt of summon or within one month of appearance without summon and also fails to make an application for determination of disputed amount of rate of rent and the period of arrears and subsequent non-payment on

determining of the arrears of rent, will entail the eviction of the tenant. Section 7 of the Act provides for complete mechanism for avoiding eviction on the grounds of arrears of rent and it was further observed that the deposit of rent along with an application for determination of dispute is pre condition to avoid eviction on the ground of non-payment of arrears of rents and it has been specifically observed that the 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.

10. A Division Bench of this court in the **Calcutta Gujrati Education Society Vs. Shri Ajit Narayn Kapur , 2022 (1) ICC (Cal)** held that 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-obstane clause, on application of other laws regarding eviction and section 40 of the limitation Act 1963 makes applicable subject to the provisions in the Act relating to Limitation. It was specifically observed in the said judgment that provision in Article 137 cannot be made applicable and 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. Accordingly the Division Bench concluded 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.

11. Therefore the question which boils down in the present context is whether petitioner should suffer due to the alleged acts and conducts of his erstwhile counsel in this proceeding and whether the *Maxim Actus Curiae Neminem Gravabit* should apply in present case.

12. As I have already stated above that the application under section 7 has been filed by the tenant petitioner after more than 4 years of his appearance in the suit and the only reason for such inordinate delay is that there was lack of proper advice from his erstwhile advocate and for which he sought for protection under section 5 of the Limitation Act read with section 40 of the Act of 1997.

13. At the very outset it needs to be mentioned that even if for the sake of argument if it is presumed that the petitioner herein was misguided due to ill-advice of his erstwhile Advocate, but it is very hard to digest that it was so ill that petitioner as a tenant even forgotten his liability to pay or to deposit monthly admitted rent for a continuous period of about 48 months.

14. In almost on a similar context, Apex court in ***Debasish Paul and another Vs. Amal Boral*** reported in **2023 LiveLaw (SC) 919** has held that the mere allegation of absence of correct legal advice cannot come to the aid of the respondent as if such a plea was to be accepted it would give a complete licence to a tenant to occupy premises without payment of rent and then claim that he was not correctly advised. If tenant engages an

Advocate and abides by his advice, then the legal consequences of not doing what is required to be done, must flow. In the said judgment it was further held in connection with applicability of section 40 of the Act of 1997 in such context is that though Limitation Act is applicable to the provision of the Act of 1997 in view of section 40 of the said act, but if there is a lesser time period specified as limitation in the said Act, then the provisions of the Limitation Act cannot be used to expand the same. In this context Court also referred **Nasiruddin case (supra)** where it was observed that the real intention of the legislature must be gathered from the language used.

15. The question of sub silentio also does not arise in the present context in view of reasoning given in **Bijoy Kumar Sing (supra)** case and such reasoning cannot be doubted as the requirement is for a tenant not only to file a mere application but he has to deposit the admitted arrears of rent as well, which has certainly not been done.

16. The Maxim Actus Curiae Neminem Gravabit has got no application in the present context in view of the fact that the said Maxim means for an act of the court which should not prejudice anyone. In other words by a delay on the part of the court neither party should suffer. There is no quarrel with proposition of law that lawyers are the officers of the court but the Maxim does not relate to officer of the court and it only refers to Court which means the presiding judge of the court. By taking recourse to the said Maxim one cannot not indulge, when the time has slept, to wake up

and to take shelter under the Maxim “***Actus Curiae Neminem Gravabit***” and as such it is totally unacceptable.

17. The ratio laid down in **AIR 1970 SC 1953, *Ashok Kumar Vs. New India Assurance Co. Ltd*** and **(1979) 4 SCC 365** are on completely different context and factuality distinguishable. The observation made by a co-ordinate Bench of this court in **Bahadur Singh Kathoria Vs. Purabi Basu, 2024 (1) ICC 388 (cal)** appears to be per incuriam in view of aforesaid discussions.

18. In such view of the matter as discussed above I do not find that the court below as overstepped his jurisdiction in passing the order or that the order impugned calls for interference by this court for any other cogent ground, invoking jurisdiction under Article 227 of the constitution of India.

19. C.O 32 of 2024 thus stands dismissed.

Urgent Xerox certified photocopies of this Judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(AJAY KUMAR MUKHERJEE, J.)