

M/S. B. P. Khemka Pvt. Ltd.

Vs

Birendra Kumar Bhowmick and Another

Civil Appeal No. 1262 of 1979 with Civil Miscellaneous Petitions Nos. 19671 and 32297 of 1986

(A. P. Sen, S. Natarajan JJ)

06.03.1987

JUDGMENT

S. NATARAJAN, J. -

1. This appeal by special leave is by a tenant and is directed against the judgment of the Calcutta High Court in an appeal against Appellate Decree No. 1700 of 1972. The defence of appellant in the suit filed by the first respondent for eviction was struck out and thereafter a decree for eviction was passed and the said decree was confirmed by the appellate court and the High Court and hence this appeal by special leave.
2. During the pendency of the suit the first respondent had entered into an agreement for sale of his building in which the suit property forms the ground floor to one Ramdin Singh Agarwala but subsequently executed a sale deed in favour of one Chidanand Halder. Ramdin Singh Agarwala filed a suit for specific performance in the Court of the Sub-Judge, Alipore and obtained a decree. The subsequent purchaser Chidanand Halder has filed an appeal against the judgment and decree in the said suit and the appeal is pending disposal before the High Court. Both the parties, claiming to have acquired title to the building of which the suit property forms a part have filed CMP Nos. 19671 and 32297 of 1986 seeking impleadment in this appeal.
3. The first respondent who succeeded to the suit property after the death of his father filed a suit against the appellant and its director the second respondent for ejection on the ground of default in payment of the monthly rent of Rs. 550 from March 1965 to July 1966. The appellant filed a written statement denying the default in payment or rent and also filed an application under Section 17(2) of the West Bengal Premises Tenancy Act, 1956 (for short the 'Act') to seek the orders of the court regarding the amount of rent payable to the landlord.
4. During the pendency of the proceedings the West Bengal Premises Tenancy (Amendment) Ordinance No. 6 of 1967 [later replaced by the West Bengal Premises Tenancy (Amendment) Act 30 of 1969] came to be promulgated with effect from August 26, 1967. By Section 2 of the Ordinance sub-sections (2-A) and (2-B) to Section 17 of the Act were inserted. Section 5 of the ordinance gave retrospective effect to the amendments by providing that the amendments made by Section 2 of the Ordinance shall have effect in respect of all suits including appeals which were pending at the date of commencement of the Ordinance. The amendments inter alia enabled tenants who were in default to apply to the court and pay the arrears of rent in instalments and thereby avert their eviction.
5. To avail the benefit of the amended provisions the appellant preferred an application on September 22, 1967 i.e. within one month from the date of promulgation of the Ordinance under

Section 17(2-A)(b) praying for payment of the arrears of rent in installments. By Order No. 39 the trial court fixed the amount of arrears payable at Rs. 13,602 and gave directions for the amount being paid in three installments. As an error was noticed in the calculation of the rent arrears, the appellant filed a review petition and the court re-fixed the arrears at Rs. 9752 by Order No. 72. Subsequently this order was also revised and eventually the appellant paid the entire arrears of rent in accordance with the directions of the court by July 31, 1970. It may be stated here that the payment covered the period previous to the date on which Order No. 39 was made, viz. March 16, 1968.

6. In the meanwhile the first respondent had filed an application under Section 17(3) for striking out the defence of the appellant against the delivery of possession of the demised premises for non-compliance with the terms of Section 17(1). On March 14, 1970 the court allowed the said application and struck out the defence of the appellant, on the ground that in paying the rents for the months of September 1968 and March 1969 there had been a delay of 44 days and 6 days respectively and this was in contravention of Section 17(1) of the Act. Thereafter the suit for eviction was decreed and the said decree came to be confirmed by the appellate court and the High Court.

7. The appellant filed an application on June 13, 1970 under Section 148, Civil Procedure Code for extension of Time for deposit of amount for the months of September 1968 and March 1969 so as to cover the delays that had occurred in the payment of rent for those two months. This application was dismissed by the trial court on July 30, 1970. It was thereafter the decree for eviction was passed.

8. Resisting the application under Section 17(3) filed by the first respondent the appellant contended that since he had paid the arrears of rent as per the orders of the court under Section 17(2-A)(b), the first respondent's suit should be dismissed under Section 17(4) of the Act. The trial court rejected the contention and held that in view of the default in depositing the rent for the months of September 1968 and March 1969 within time i.e. before the 15th of the next succeeding month, the appellant had contravened Section 17(1) of the Act and therefore, the appellant was not entitled to protection under Section 17 (4). The High Court went a step further and held that even the application under section 17(2-A)(b) was not maintainable and hence the appellant cannot raise a plea that he had paid the arrears of rent within time and as such the trial court should have dismissed the suit under Section 17(4). The High Court's reasoning is as under :

In our view, the application under Section 17(2-A)(b) was not also maintainable. It is true that Section 17(2-A)(b) was made applicable to pending suits by the Ordinance. But such applicability will be subject to the limitation imposed sub-section (2-B) of Section 17, namely, that an application under sub-section (2-A)(b) has to be made before the expiry of the time specified in sub-section (1) of Section 17 for the deposit or payment of the amount due on account of default in payment of rent. Under sub-section (1) of Section 17 the time specified is one month from the service of the writ of summons on the defendants or where he appears in the suit or proceeding without the writ of summons being served on him, within one month of his appearance. In the instant case, the summons was served on the defendants on April 6, 1967. The application under Section 17(2-A) (b) having been filed on September 22, 1967, it was barred by limitation .... In our view, after the expiry of one month of the service of summons on the defendants, they had no right to avail themselves of the provisions of Section 17(2-A). Sub-section (2-B) of Section 17 having prescribed a time limit for an application under sub-section (2-A), no other period of limitation

can be substituted for the purpose of making an application for instalments. It is true that the Act is a remedial statute, but that fact does not give the court jurisdiction to alter the period of limitation as prescribed by the statute for the purpose of giving relief to the tenant. If the legislature had intended that the tenant in a pending suit would be entitled to make an application under Section 17(2-A) within one month of the date of promulgation of the Ordinance, it would have expressly provided for the same as it has done in other cases covered by Section 17-B and 17-D.

9. Having regard to the reasons given by the trial court and the High Court for striking out the defence of the appellant and the inapplicability of Section 17(4) to the case, two questions fall for consideration, viz. (1) whether the appellant was not entitled to the benefit of Section 17(2-A)(b) of the Act since the application under the sub-section had not been filed within one month from the date of service of the writ of summons and (2) whether in any event the delayed payment of rent for the months of September 1968 and March 1969 necessarily warranted the striking out of the defence. Mr. S. T. Desai, learned counsel for the appellant, contended that the decision rendered by the trial court and the High Court are clearly unsustainable. On the contrary, the learned counsel for the first respondent argued that the trial court and the High Court had acted perfectly in accordance with law.

10. Taking up the first question for consideration we find that the High Court has committed an error in failing to notice the overriding effect of Section 17(2-A) and Section 5 of the Ordinance. Section 17(2-A) begins with the words "Notwithstanding anything contained in sub-section (1) or sub-section (2) on the application of the tenant, the court may, by order" and then sets out sub-section (a), (b) and the Proviso. Then comes the all important Section 5 of the Ordinance which is in the following terms :

5. Retrospective effect. - The amendments made by Section 2 shall have effect in respect of all suits including appeals which are pending at the date of commencement of this Ordinance.

11. Since the Ordinance came to be replaced long after by the Act, Section 5 of the Ordinance was not reproduced in the Act because it has served its purpose. What is, however, of significance is that Section 5 of the Ordinance entitled the appellant to file an application under Section 17(2-A)(b), in the suit filed by the first respondent which was pending then. Unfortunately, the High Court has looked only into the Act and not the Ordinance and that is how Section 5 of the Ordinance has escaped its notice. When Section 17(2-A) and Section 5 of the Ordinance are read conjointly it may be seen that it was the intention of the legislature to extend the benefit of sub-section (2-A) to all pending suits and appeals irrespective of the fact whether the time limit of one month prescribed under Section 17(1) had expired or not. No other construction is possible because any other construction would have the effect of rendering otiose Section 5 of the Ordinance. It is a well known rule of interpretation of law that remedial amendments have to be liberally construed so as not to deny their efficacy and it is the duty of the courts to avoid a conflict between two sections. In *Madhav Rao Scindia v. Union of India* (AIR 1971 SC 530, 576 : (1971) 1 SCC 85 : (1971) 3 SCR 9) this Court has held as follows : (SCC p. 162, para 134)

The court will interpret a statute as far as possible, agreeably to justice and reason and that in case of two or more interpretations, one which is more reasonable and just will be adopted, for there is always a presumption against the law maker intending injustice and unreason .... The provision in a statute will not be construed to defeat its manifest purpose and general valued which animate its structure.

in *Dy. Custodian v. Off. Receiver* ((1965) 1 SCR 220, 225 : AIR 1965 SC 951, 955) it was held as follows :

If it appears that the obvious aim and object of the statutory provisions would be frustrated by accepting the literal construction suggested by the respondent, then it may be open to the court to enquire whether an alternative construction which would serve the purpose of achieving the aim and object of the Act, is reasonably possible.

12. If it was the intention of the legislature to restrict the benefits given under Section 17(2-A) to only those tenants against whom suits had been filed within one month prior to the promulgation of the ordinance, there was no necessity to give retrospectivity to sub-section (2-A) under Section 5 of the Ordinance. It has, therefore, to be held that all tenants against whom suits or appeals were pending on the date of the promulgation of the Ordinance were entitled to seek the benefit of Section 17(2-A) by filing an application within one month from the date of promulgation of the Ordinance. The High Court was, therefore, in error in holding that the application under Section 17(2-A)(b) was itself not maintainable. If the High Court's view is to be accepted it would then amount to asking the appellant to perform the impossible i.e. asking the appellant to file an application under Section 17(2-A)(b) which came into force on August 26, 1967 within one month from April 6, 1967 when the suit summons was served. Therefore the first question has to be answered in favour of the appellant. The resultant position would then be that insofar as the payment of arrears for the period ending February 29, 1968 is concerned, the appellant had complied with the orders of the court under Section 17(2-A)(b) and was therefore entitled to claim the benefit of Section 17(4).

13. The second question now remains for consideration. The trial court and the High Court have taken the view that the delayed payment of rent for the months of September 1968 and March 1969 attracted the striking out of the defence under Section 17 (3) of the Act. Sub-section (3) and (4) are worded as under :

(3) if a tenant fails to deposit, or pay any amount referred to in sub-section (1) or sub-section (2) within the time specified therein or within such extended time as may be allowed under clause (a) of sub-section (2-A), or fails to deposit or pay any instalment permitted under clause (b) of sub-section (2-A) within the time fixed therefor, the court shall order the defence against delivery of possession to be struck out and shall proceed with the hearing of the suit.

(4) If a tenant makes deposit or payment as required by sub-section (1), sub-section (2), or subsection (2-A) on decree or order for delivery of possession of the premises to the landlord on the ground of default in payment of rent by the tenant shall be made by the court but the court may allow such costs as it may deem fit to the landlord :

Provided that a tenant shall not be entitled to any relief under this sub-section if, having obtained such relief once in respect of the premises, he has again made default in the payment of rent for four months within a period of twelve months.

Perhaps on a rigid construction of sub-section (3) without reference to sub-section (4) it may be said that the failure to pay the rent for the months of September 1968 and March 1969 by the 15th of the next succeeding month may afford ground for striking out the defence of the appellant. But then

sub-section (3) has to be read and understood with reference to sub-section (4) also and in particular its Proviso. Sub-section (4) lays down that when a tenant makes payments as required by sub-section (1), (2) or (2-A) no decree or order for delivery of possession shall be made on the ground of default in payment of rent by the tenant. The Proviso sets out that a tenant who has obtained relief under sub-section (4) is not entitled to seek relief once again under the subsection if he has again made default in the payment of rent for 4 months within a period of 12 months. The Proviso, therefore, makes it clear that if the subsequent default is for a period less than 4 months within a period of 12 months the tenant can claim relief under the sub-section once again. In this case the previous arrears related, to the period ending with February 29, 1968 and those arrears had been paid in compliance of the court's order. The appellant was, therefore, entitled to ask for the dismissal of the suit. Insofar as the subsequent default is concerned, it is well within the limitations prescribed by the proviso to sub-section (4). The default is only for two months and that too in a period of 13 months. The appellant will, therefore, be entitled to the protection of the proviso. The trial court and appellate court have failed to notice this aspect of the matter.

14. Even if the Proviso is viewed in a limited sense as being attracted only to those cases where there has been full and complete compliance with the provisions of sub-section (1) or (2) or (2-A) of Section 17 and will not apply to a case as the one on hand, the appellant cannot be denied relief because the words "shall order the defence against delivery of possession to be struck out" occurring in Section 17(3) have to be construed as a directory provision and not a mandatory provision as the word "shall" has to be read as "may". Such a canon of construction is warranted because otherwise the intendment of the legislature will be defeated and the class of tenants for whom the beneficial provisions were made by the Ordinance and the amending Act will stand deprived of them. We may only refer to two decisions of this Court on this aspect of the matter. In *Govindlal Chhaganlal Patel v. Agricultural Produce Market Committee, Godhra* ((1976) 1 SCR 451 : (1975) 2 SCC 482), Chandrachud, C.J. speaking for the court approved the following passage in Crawford on "Statutory Construction" (1940 edn., Art. 261, p. 516) : (quoted at SCC p. 487, para 13)

The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which could follow from construing it the one way or the other.

In *Ganesh Prasad Sah Kesari v. Lakshmi Narayan Gupta* ((1985) 3 SCC 53), this Court, dealing with a similar provision for striking out of defence in Section 11-A of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 referred to *Govindlal Chhaganlal Patel* case ((1976) 1 SCR 451 : (1975) 2 SCC 482), and held as follows : (SCC p. 60, para 9)

Applying this well recognised canon of construction the conclusion is inescapable that the word "shall" used in the provision is directory and not mandatory and must be read as "may".

15. Once the word "shall" used in Section 17(3) is read as "may" and consequently the provision for striking out of the defence is to be read as directory and not mandatory then it follows that the court is vested with discretion to order either striking out of the defence or not depending upon the circumstances of the case and the interests of justice. This Court has consistently taken the view that if the court has the discretion not to strike out the defence of the tenant committing default in payment or deposit of rent as required by a provision in any Rent Restriction Act, then the court surely has the further discretion to condone the default and extend the time for payment or deposit

and such a discretion is a necessary implication of the discretion not to strike out the defence. We may only refer, in this connection, to three earlier decisions of this Court. *Shyamcharan Sharma v. Dharamdas* ((1980) 2 SCR 334 : (1980) 2 SCC 151 : AIR 1980 SC 587) is a case which arose under the Madhya Pradesh Accommodation Control Act, 1961. *Santosh Mehta v. Om Prakash* ((1980) 3 SCR 325 : (1980) 3 SCC 610 : AIR 1980 SC 1664) and *Ram Murti v. Bhola Nath* ((1984) 3 SCC 111) were cases which arose under the Delhi Rent Control Act, 1958. The Rent Control Act of Madhya Pradesh as well as the Rent Control Act of Delhi provided that if a tenant failed to make payment or deposit as required by the section the Controller may order the defence against eviction to be struck out and proceed with the hearing of the application. In all these cases it has been uniformly held that the powers of discretion vested in the Rent Controller give him further right to condone the delay in deposit or payment of rent for the subsequent months.

16. In this case the default was not one of non-payment of the arrears or the rent for the subsequent period. The default pertained to belated payments of rent for two months and was, therefore, a default in the technical sense than in the real sense and hence of an inconsequential nature. Having regard to the intendment of the Act and the nature of the provisions it can never be said that the defaults were of such a serious nature as to warrant the court refusing to exercise its discretion and to feel constrained to strike out the defence. Such being the case the answer to the second question has also to be in favour of the appellant. The subordinate courts and the High Court were in error in holding that the delayed payment of rent for the months of September 1968 and March 1969 constituted such defaults as necessarily warranted the striking out of the defence under Section 17.

17. In the light of our conclusions the appeal succeeds and will accordingly stand allowed. The suit filed by the first respondent will stand dismissed.

18. Insofar as the petitions for impleadment are concerned, though we heard the arguments of the counsel for the parties, we do not think their presence is necessary in the appeal and hence both the petitions are dismissed.

19. The parties will pay and bear the respective costs.

</html