

SUPREME COURT OF INDIA

Dwarika Nath Acooli

Vs.

Dulal Chandra Bayen

C.A.No.7 of 2009

(Dr. Arijit Pasayat and Dr. Mukundakam Sharma JJ.)

06.01.2009

JUDGMENT

Dr.Arijit Pasayat, J.

1. Leave granted.
2. Challenge in this appeal is to the judgment of a Division Bench of the Calcutta High Court allowing the writ petition filed by the respondents. Challenge in the writ petition was to the judgment and order passed by the West Bengal Reforms and Tenancy Tribunal (in short the 'Tribunal') whereby the earlier writ petition filed by the respondents was dismissed.
3. Background facts, as projected by appellant, in a nutshell, are as follows:

“Originally, one Durga Bala Acooli, the predecessor-in-interest of the appellant was the owner of the premises being 18/1, Ramesh Mitra Road, Kolkatta. In terms of the final decree passed in Suit No.467 of 1970 the Calcutta High Court, the appellant claimed to have become the absolute owner of the suit property. The aforesaid Durga Bala Acooli had inducted one Ratan Chandra Byen as monthly tenant in respect of premises i.e. land with structures and/or sheds. On 2.11.1981 the *Calcutta Thika Tenancy (Acquisition & Regulation) Act, 1981* (in short the 'Act') came into force. On 5.5.1982 in exercise of power conferred by Section 20 of the Act the State Government framed *Calcutta Thika Tenancy (Acquisition & Regulation) Rules, 1981* (in short the 'Rules') which became operative from that date and under Rule 3(a) of the Rules, the Thika tenants were directed to file Return under Form-A before the Thika Controller within 240 days from the date of commencement of the Act. However, the Thika Controller was given power to extend the time not exceeding six months subject to filing of an application for condonation of delay.

According to the appellant the tenant was paying rent to the owner of the said premises after the death of Durga Bala Acooli in 1969. The appellant collected rent upto the months of August and September, 1986. The last payment was made on

14.3.1987 relating to September 1986. Several writ petitions were filed before the High Court challenging the validity of the Act. By judgment dated 8.7.1987 it was held as follow:

"Within the scope and ambit of Section 5 of the impugned Act only lands comprised in Thika Tenancy within the meaning of *Calcutta Thika Tenancy Act, 1949* namely Kutchha structure and/or Pucca structure constructed for residential purpose, with the permission of the Thika Controller under the *Calcutta Thika Tenancy Act, 1949* and Khatal land held under a lease shall vest and save as aforesaid no other lands and structure vests under the impugned Act. Sub-sections (2) and (3) of section 8 of the impugned Act and rule 5 of the *Calcutta Thika Tenancy (Acquisition & Regulation) Rules, 1982* are ultra vires to the Constitution."

The appellant through his advocate sent a notice to respondent No.1 under Section 13(6) of the *West Bengal Premises Tenancy Act, 1956* (in short the `Tenancy Act') and Section 106 of the *Transfer of Property Act, 1882* (in short the `TP Act') for terminating the tenancy. Against the judgment of the High Court an appeal was preferred before this Court. In Civil Appeal Nos. 3713-3900 of 1987 an order of status quo as on the date was directed to be maintained. On 18.2.1988 the respondents replied to the notice sent by the appellant's advocate denying that the appellant was not their landlord. Since the tenant failed to hand over the vacant and peaceful possession a title suit was instituted for recovery of possession, damages and/or mesne profits and other reliefs which was numbered as Title Suit 68 of 1988. Shri Birendra Chandra Bayen, defendant No.4 in the civil suit filed an application under Section 17(2) and Section 2A and 2B of the Tenancy Act before learned Civil Judge, Junior Division 4th Court, Alipore. The appellant also filed a petition on 23.7.1988 in connection with the application under Section 17(2) of the Tenancy Act denying the allegations.

According to the appellant Shri Birendra Chandra Bayen by filing a petition not only admitted on oath that appellant was the landlord of the premises but also sought for a direction upon the appellant to repair the sheds and structures of the premises. Since the deceased after 7 years from the date of coming into force of the Act filed Return under Section Form-A of Rule 3(a) of the Rules before the Thika Controller claiming to be the Thika tenant of the property without notice to the appellant, the controversy in real sense starts from this point. On 4.10.1989 the Inspector of Regional Office of Thika Controller provisionally accepted the Return subject to the verification of tenancy and without any legal right. Such acceptance was made without notice to the appellant and also without disclosing the fact that the civil suit was pending between the parties. Such acceptance of rent was without prejudice to the right of the Government and without creating any right of the tenant. After the provisional acceptance of rent, Shri Birendra Chandra Bayen filed an application in the pending suit that in view of Section 5 of the Act, the suit is not maintainable. The High Court on revision application being C.O.2670/1990 directed that the preliminary point raised by the defendant would be decided at the final hearing of the suit. When the

appellant came to know about the filing of the Return in Form-A under Rule 3(a) without application for condonation of delay during the pendency of the civil suit, he raised an objection by filing an application before the Thika Controller against the preliminary acceptance of rent and prayed for determination under Section 5 of the Act inasmuch as there was no provision in the Act to prefer an appeal under Section 13 of the Act against the provisional acceptance of the Return. Since the objection was not considered for a long time, appellant filed a writ petition before the Calcutta High Court for a direction to the Thika Controller to decide whether the said property has been vested to the State. The High Court disposed of the writ petition directing the Thika Controller to dispose of the representation after giving hearing to the parties. In terms of the aforesaid order of the Thika Controller he concluded that the property had not been vested to the State under Section 5 and Shri Birendra Chandra Bayen was not the Thikha tenant. The learned Munsif disposed of the application of late Birendra Chandra Bayen under Section 17(2) and 2A and 2B of the Tenancy Act determining the relationship between the parties of the suit as landlord and tenant under the Tenancy Act. Thus, this application had become final. Against the order dated 8.12.1993 of the Thika Controller, legal heirs of Shri Birendra Chandra Bayen preferred a statutory appeal under Section 13 of the Act before learned District Judge who dismissed the same holding that the defendants could not produce any document that they were Thika tenants and the Controller had jurisdiction to pass an order under Section 5 of the Act. Respondent No.1 filed an application under Article 227 of the *Constitution of India, 1950* (in short the 'Constitution') challenging the aforesaid order of the District Judge which was transferred to the Tribunal. The Tribunal dismissed the appeal holding as follows:

(i) After the statutory period of limitation as provided under Rule 3(a) no Return could be filed.

(ii) Further the tenants paid rent to the landlord upto 1986 accepting the appellant as landlord when the Act of 1981 came into force on 18.1.1982 and the liability of 'Thika Tenant to pay rent ceased from that date.

(iii) Therefore, acceptance of Return under Form-A was without jurisdiction and dismissed the application holding that the Thika Controller has got jurisdiction to decide whether the person is a Thika Tenant or not.

(iv) The applicant is a tenant in respect of structures, he does not own structures therefore he is a premises tenant.

On 1.3.2003 a Notification under Section 1(3) of the West Bengal Thika Tenancy (Acquisition and Regulation) Act, 2001 (in short the '2001 Act') was published and under Section 27, the earlier Act of 1981 was replaced but pending proceedings were saved. By the 2001 Act, sub-section (3) of Section 5 was amended to provide that if any question arises as to whether the person is a Thika tenant or not the matter shall be decided by the Controller. Respondent No.1 challenged the said order passed by

the Tribunal dated 19.9.2002 by filing a writ petition under Article 226 of the Constitution on the ground inter-alia that the Thika Controller has no jurisdiction to decide the question whether the respondent was a Thika tenant or not and only the Civil Court had jurisdiction. On 19.8.2003 the State of West Bengal withdrew the appeal before this Court. On 23.2.2004 a Division Bench of the High Court by an impugned order allowed the writ application and set aside the order of Thika Controller, Appellate Tribunal and the Tribunal holding that the predecessor-in-interest of respondent No.1 was accepted as Thika tenant. Against the adjudication under Section 5(3) of the Act, no appeal was preferred and as such the application of the appellant for cancelling the recording of Thika tenancy is not maintainable and there is no provision in the Act empowering the Thika Controller to entertain such application after declaration of the Thika tenant.”

4. Stand of learned counsel for the appellant essentially is that there was no question of condonation of delay of an application which was filed after about 7 years. The eviction suit was filed on 14.3.1988 and rent was paid till 1986 under the Tenancy Act and thereafter it was stopped. It is pointed out that under Section 17 of the Tenancy Act if the application is on the ground of default, an application can be made to make the deposit. The application dated 25.4.1988 is still pending. On 4.10.1989 the only endorsement was of provisional acceptance subject to verification. It was clearly noted as follows:

"By whom paid	Payment made On behalf of the Person	Amount	Head of Account Account Officer
Biren Bayen	Ch. Biren Ch.Bayen 40/1 Ramen Mitra Road, Cal-25	Adhoc Rent 165/- 3869.5/- Ist Instalment	.029 Land Revenue Land Revenue/Tgax Collection of Tax Under the Calcutta Thika Tenancy Acquisition and RegulationAct,1951

Calcutta Collectorate Treasury Department Counter No. Cash received	Acceptance provisionally subject to 1) Verification of tenancy and 2) recovery adjustment with the revenue to the finally determined under the W.B. Act XXXVII Of 1981. Such acceptance of rent shall not treat or established and right or interest without Which otherwise not legally in existence."
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5. The representation made by the appellant was on 16.11.1992. It was however unnecessary as there was no order. The High Court inter-alia had disposed of earlier writ petition by

directing the Controller to consider and dispose of the representation. The High Court by the impugned judgment seems to have over-looked the fact that there was in fact no cancellation.

6. Learned counsel for the respondent on the other hand supported the order.

7. In the impugned order the High Court seems to have proceeded on the basis that there was cancellation. It noted as if the Thika Controller was moved for cancelling the order recording the tenancy. As a matter of fact there was no cancellation and there was a provisional order. There was no question of preferring an appeal unless the final order is passed. So far as the onus is concerned, it is on the appellant to establish the tenancy. It needs to be noted that on the Return no order was passed. The Thika Controller, Appellate Authority and the Tribunal came to positive finding that respondent No.1 was not a Thika tenant. They took decision on the basis of the High Court's order to deal with a representation of the appellant.

8. In view of the aforesaid we are satisfied that the order of the High Court is indefensible. We set aside the impugned order and direct that the revenue authority shall decide the relevance of the Return and pendency of the eviction suit. As the Return is in terms of Rule 3, the revenue authority has to decide the matter.

9. The appeal is accordingly disposed of with no order as to costs.