

Behari Lal Show Vs. Another

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Court : Kolkata

Decided On : Jul-17-1987

Reported in : 92CWN595

Judge : S.K. Mookherjee, J.

Acts : [Limitation Act, 1963](#) - Section 5

Appeal No. : C.O. 1316 of 1986

Appellant : Behari Lal Show

Respondent : Another

Advocate for Def. : T. Pal and ;M. Das Mazumdar, Adv.

Advocate for Pet/Ap. : B.K. Rej, Adv.

Disposition : Revision allowed

Judgement :

S.K. Mookherjee, J.

1. The present Revisional Application, is directed against an order being No. 71, dated 18.2.86 passed by the learned Munsif, Second Court, Alipore, in Title Suit No. 228 of 1983.

2. The landlord of the suit premises, wherein the opposite party, is a tenant, is the petitioner in the said Revisional Application. The tenant/opposite party filed a belated application under Sections 17(1), 17(2) and 17(2A) of the West Bengal Premises Tenancy Act with an application for condonation of delay, which had been allowed by the learned Munsif by the impugned order. The extent of delay, as found by the court below, is sixty-seven days.

2a. In support of the Revisional Application, Mr. Rej has strongly contended that the delay does not deserve condonation as the reasons advanced on behalf of the tenant/opposite party before the Court below clearly indicate that the delay occurred due to gross and inexcusable legal advice and not due to any bona fide mistake either on the part of the tenant/opposite party or his lawyer. Apart from the contradictions in the averments made in the application for condonation of delay, the evidence tendered on behalf of the tenant/opposite party before the court below, Mr. Rej has submitted, unequivocally shows that the lawyer or lawyers who were in-Charge of the defence did not exercise reasonable care and skill resulting in default of the tenant/opposite party in making the requisite application and such mistake of a lawyer cannot entitle the defendant/opposite party to a condonation of such default. In fine, Mr. Rej has challenged the propriety and correctness of the findings made by the court below on the basis of which the impugned order has been passed on the ground that in arriving at such findings the court below acted illegally and with material irregularity in the exercise of its jurisdiction by making out a case not made by the defendant/opposite party himself, overlooking the incongruities between evidence and pleading.

3. Mr. Rej in support of the approach he has taken, has relied on a number of decisions viz. *Indo Singh Bejwa v. Calcutta Corporation* reported in : AIR1969 Cal418 , *Rajputana Trading Co. v. Malaya Trading Co.* reported in : AIR1971 Cal313 , *Surendra v. Mahendra* reported in 36 C.W.N. 421 *Bhakti Bhuson Mandal v. K. K. Bandopadhyay* reported in AIR 1963 Calcutta 69.

4. Mr. Pal, the learned Advocate for the tenant/opposite party, has contended that the court below was justified in condoning the delay in conformity with the guidelines laid down by the Supreme Court in the case of *Rafiq and Anr. v.*

Munshilal and Anr. reported in AIR 1961 SC 1400. According to him, the basic principle which governs such cases is that no litigant should be penalised for defaults or inaction or even deliberate omission of a duly qualified lawyer. Notwithstanding unimportant contradictions, which had crept in the pleading on behalf of the tenant/ opposite party and the evidence adduced on his behalf, according to him, the position that the client took all steps what he was supposed to take is absolutely clear and uncontrovertible. The court below was, therefore, right in condoning the delay and this court in exercise of its Revisional Jurisdiction should not interfere.

5. It appears from the record that the tenant/Opposite party committed defaults in payment of rents for the month of November 1980 to April, 1983. It further appears that summons were served on him on 7th of June, 1983 and he entered appearance on 16th of June, 1983 when he was granted time to file the written statement till 16th of July, 1983. On 26th of July, 1983, again, on the prayer of the tenant/defendant, time to file written statement was extended till 5th of September, 1983. It further appears that the application under Sections 17(1)(2) and 17(2)(a)(b) of the West Bengal Premises Tenancy Act, 1956 had been filed on 13th September, 1983 with an application for condonation of delay under Section 5 of the Limitation Act read with Section 151 of the Code of Civil Procedure. In the application under Section 5 of the Limitation Act, the entire responsibility for failure of the tenant/opposite party to file the application under West Bengal Premises Tenancy Act was sought to be placed on Shri Subrata Basu, an Advocate, by alleging, on the basis of informations from reliable sources, that Shri Basu was ordinarily practising on the Criminal Side and was not conversant with the technicalities and procedure of Civil Court and as such failed to give the tenant/ opposite party proper legal advice about the steps to be taken. It is significant to note that the source has not been disclosed and Mr. Basu, the Learned Advocate concerned, has not, in his evidence, supported the same. In evidence, however, the tenant/ petitioner has tried to make out a case that he fully depended on his Advocate Mr. Arun Roychowdhury, whom he came to know in connection with a criminal case and that the said Arun Roychowdhury, did not ask him to file application as needed. The defendant/opposite party also admitted in cross-examination that Subrata Bose, Junior of Shri Arun Roychowdhury, used to act

according to the instructions of Arunbabu. He also denied any knowledge as to whether Arunbabu was engaged in Civil Court also. He stated that Arunbabu would depose in the suit though Arunbabu never appeared as a witness to support the case made out by the tenant/opposite party for condonation of delay in filing the requisite application under the West Bengal Premises Tenancy Act. The only other witness of the tenant/defendant was Shri Subrata Bose, Advocate, Junior to Mr. Arun Roychowdhury. He confirmed the position that he acted according to the instructions of his senior and also asserted that Arunbabu, his senior, was engaged in both civil and criminal cases. It is a settled position in law that a party who wants the discretion vested in a court of law under Section 5 of the Limitation Act to be exercised in his favour must prove the case for exercise of such discretion. A party asking for such exercise of discretion in his favour must not keep facts within his sleeves but must make a full and complete disclosure of related facts. After the decision of the Supreme Court in the case of Rafiq and Anr. v. Munshilal and Anr. reported in : [1981]3SCR509 , a default on the part of lawyer is not allowed to result in prejudicing the rights of his client and where the court accepts a plea to that effect the client, almost as a routine, becomes entitled 'to relief. It does not, however, mean that mere setting up of a plea based on default on the part of a member of the legal profession is sufficient and the court has no option but to accept the same. The Court has full jurisdiction to weigh the veracity and truth of such a plea and it has full authority to reject one which it finds to be incredible or unworthy of any credence. Court has to be very much cautious and circumspect in considering pleas of the nature referred to above as after expiration of the statutory period of limitation, the party, in whose favour the order, intended to be assailed or impugned, has been passed acquires a very valuable right and a strong case is needed to divest such party of such a right. The court is not a mere Post Office but must apply its judicial mind to convince its conscience about the trust worthiness and acceptability of a plea, set up by a litigant. In the instant case, it is found that the entire case for condonation of delay has a two fold foundation, namely, absence of knowledge about Sections 17(1)(2) and (2A) of the West Bengal Premises Tenancy Act on the part of the junior Advocate Mr. Subrata Basu and absence of any instruction from the side of the senior Advocate Shri Arun Roy-chowdhury. On a proper reading of the evidence of Shri Subrata Basu, it

appears that he was not instructed by Arun Babu to file 'Section 17 Applications'.

6. On the Opposite party's own evidence the case was entrusted by him to Arun Babu to whom Subrata Babu acted as Junior and who gave necessary instructions to Subrata Babu. His evidence further is that for the delay in question Arun Babu is responsible. There is, however, no material on record to indicate why Arun Babu did not file the 'Section 17 Applications' in time or give instructions for the filing of the same. According to Subrata Babu, Arun Babu is engaged in both civil and criminal cases and Subrata Babu acted, in the instant case, under Arun Babu's instructions. There is no material before the court that Arun Babu had no knowledge of the requirements of Section 17. Arun Babu would have been the best person to explain why in the instant case, 'Section 17 Application' was not filed in time. But Arun Babu has not been examined and in absence of his evidence, the defendant's case that he (Arun Babu) was responsible for the delay in question cannot be accepted.

7. On consideration of the materials on record I am of the view that the opposite party, for some reasons or other, failed to ask for appropriate advice from Arun Babu. I have no hesitation to record my strong reluctance to affix the seal of judicial approval on the attitude of a tenant in withholding circumstances justifying such unusual conduct. The omission, in the context of the aforesaid state of affairs, therefore, must not be given a premium particularly when its effect is to divest a landlord of a very valuable right accruing to him due to failure of the tenant to avail of the statutory relief within the time granted by legislature. If discretion under Section 5 of the Limitation Act is not intended to be illusory or merely academic, a line is needed to be drawn to prevent undeserving tenants from reaping more benefits than the legislature, in spite of its intention to confer benefits on tenants in general, permits him to do. The principle laid down in the Supreme Court Case of Rafiq and Anr. v. Munshilal and Anr. (Supra) is distinguishable first because it is not; a case dealing with the exercise of powers for condonation of delay under Section 5 of the Limitation Act which has its own modalities and forms of application, and secondly, because, in the said reported case, by no stretch of imagination, could a part of the default be attributed to the litigant.

8. The Learned Trial Judge has misdirected himself by not advertng to the above aspect of the matter and relying upon Subrata Babu's lack of knowledge of the requirements of Section 17 which in the above context has hardly any material bearing on the point at issue between two parties for giving relief to the defendants and by so doing he has exercised his jurisdiction illegally and with material irregularity to make his order amendable correction under Section 115 of the Code of Civil Procedure.

9. In the result, I allow the Revisional Application and set aside the order of the Learned Munsif, Second Court, Alipore and direct that the defendant's application under Section 5 of the Limitation Act would stand dismissed.

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