

Ram Prasad Bajaj and ors. Vs. Development and Builders (P) Ltd. and ors.

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SooperKanoon Citation : sooperkanoon.com/876900

Court : Kolkata

Decided On : Jul-23-1990

Reported in : (1990)2CALLT447(HC),95CWN531

Judge : Amulya Kumar Nandi, J.

Acts : [West Bengal Premises Tenancy Act, 1956](#) - Section 17(2), 17(2A) and 17(3)

Appellant : Ram Prasad Bajaj and ors.

Respondent : Development and Builders (P) Ltd. and ors.

Advocate for Def. : S.P. Roychowdhury and ;Bhagwan Das, Advs.

Advocate for Pet/Ap. : Utpal Bhattacharyya, Adv.

Disposition : Application dismissed

Judgement :

Amulya Kumar Nandi, J.

1. In a suit for ejectment the tenants petitioners filed an application (Annexure A to the affidavit-in-opposition) for hearing all the issues touching the dispute as to the existence of relationship of landlord and tenant along with their application under Sections 17(2), 17(2A)(b) of the West Bengal Premises Tenancy Act hereinafter

called the Act,

2. By virtue of a petition under Section 151 C.P.C. the tenants amended their application under Sections 17(2), 17(2A)(b) of the Act to challenge the relationship. They have annexed copy of the said application as Annexure 'B' to their revisipnal application.

3. The fifth Bench of the City Civil Court by order No. 70 dated 8.12.80 passed in Ejectment Suit No. 770 of 1983 has rejected the application. The said order is under impeachment in this revisional application.

4. Mr. Bhattacharyya appearing for the petitioners-tenants contends that in order to dispose of an application under Section 17(2) of the Act the Court must decide the dispute as to the existence of relationship of landlord and tenant. Reliance is placed upon an observation of the Division Bench in Biswanath Roy v. Annapurna Roy (65 Cal C.W.N. 149). P. N. Mookerjee, J speaking for the Bench held that an appropriate order under Section 17(2) of the Act cannot be passed without determination of the dispute as to the existence of relationship of landlord and tenant. In this case plea was taken by the defendant that not he but his grandsons and the tenants in respect of the disputed premises. Court took up the issue as to defect of parties along with the application under Section 17(3) of the Act.

5. His Lordship speaking for another Division Bench decision in Aloka Ghosh v. Inspector General (66 C.W.N. 302) held that the Court may take up a material issue along with the application under Section 17(3) of the Act and decide the two together fully so that decision on that issue will be final for the purposes of that suit also. This finding has been quoted with approved in Nanda Gopal Das v. Rabindra Nath De, (1987(1) C.H.N. 362).

6. His Lordship M. M. Dutt speaking for the Division Bench in Union of India v. N. K. Chowdhury (1978 CHN 371) also opined that the court has to decide an issue as to relationship of landlord and tenant before it passes another under Section 17(2) or Section 17(3) of the Act. In a latter decision His Lordship presiding over a Division Bench in Parul Banerjee v. Anand Kumar Agarwalla (1979(2) C.L.J. 997) reiterated the same view. It was opined that the issue as to relationship might be

decided as on issue in the suit along with an application of the tenant under Section 17(2) of the Act.

7. Their Lordships Anil Kumar Sen and Bhabesh Chandra Chakravarti held in *Biswa Bkusan Bose v. Kusum Agarwalla* (1961(1) CLJ 1c) that an order adjudicating a dispute under Section 17(2) or Section 17(3) of the Act is not always tentative in nature. It may involve adjudication of an issue overlapping one of the issues involved in the suit itself when the statute contemplates that such a dispute has to be finally adjudicated and when the statute further provides consequences that are to follow such adjudication.

8. His Lordship A. M. Bhattacharya while presiding over the Division Bench in *Nanda Gapal Das v. Rabindra Noth De* (1987) (1) C.H.N. 362) approved of the procedure of disposal of the issue and the application under Section 17(2) of the Act together.

9. Mr. Roychowdhury contends that Order 14 Rule 2 of the Code of Civil Procedure operates as a bar to a decision of an issue in the suit together with the application under Section 17(2) of the Act. He refers to a relevant observation of the Law Commission of India in the Fifty Fourth Report. The Commission observes in Chapter 14 of the report 'It is considered that this delay would be eliminated, by providing that a Court must give judgment on all issues, excepting, of course, when the Court finds that it has no jurisdiction or where the suit is barred by any law for the time being in force'.

10. On the recommendation of the Law Commission the Code was amended by Amending Act of 1976. The amendment came in force on 1.2.77. Order 14 Rule 2 of the Code now reads as follows :- Order 14 Rule 2-

(1) Notwithstanding that a case may be disposed of on a, preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.

(2) Where issues both of law and fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law

only it may try that issue first if that issue relates to-

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force.

11. So, trial of all issues is the rule. Trial of a particular issue is an exception to the rule. That exception can be invoked only if the issue is an issue of law only and that too must be confined within Clauses (a) and (b).

12. The relationship of landlord and tenant is essentially an issue of fact. Mr. Roychowdhury rightly contends that this issue cannot be disposed of otherwise than with other issues in the suit. In support of his contention he relies upon two Single Bench decisions of Karnataka High Court in K. Santharam v. A. Rama Amin : AIR1987 Kant1 and Mahammed Iqbal Dastagirsab v. Mahammed Gous Lalamiya Sangalli : AIR1982 Kant35 .

13. The decisions of this Court in this behalf to the contrary given prior to the amendment of the Code in 1976 are no longer good law. Mr. Roychowdhury contends that the decision to the contrary after the amendment of the Code in 1976 is a judgment per incurium since order 14 Rule 2 of the Code was not considered. Judgment per incurium, it is rightly urged, is not binding upon this Court.

14. It is further urged that having regard to the scheme of Section 17 of the Act we will find a working difficulty if the Court is disposed to try the issue in the suit together with the application under Section 17(2). Under Section 17(2) (a) of the Act Court has to make a preliminary order which shall be followed by a final order as contemplated under Clause (b) of Section 17(2). Issue cannot be framed far less can be decided until written statement is filed. The decision under Clauses (a) or (b) of Section 17 cannot be made contingent upon filing of the written statement. The tenant may not choose to file written statement at all or postpone the same indefinitely. Object and purpose of Section 17(2) get defeated.

15. Naturally the Court has to lay down the course that has to be followed in such circumstances. I respectfully agree with the observation of P. N. Mookerjee, J in

Biswanath's case (supra). His Lordship found that any kind of dispute which affects the amount of rent payable by the tenant including a dispute as to the existence of relationship of landlord and tenant between the parties will be a dispute under or within the contemplation of Section 17(2) of the Act. An appropriate order under Section 17(2) cannot be passed without determination of the dispute as to the existence of relationship of landlord and tenant.

16. So the Court has to decide the dispute involved in the proceeding under Section 17(2) or Section 17(3) of the Act independent of determination of the issue in the suit. Such a decision is only tentative as is done in the interlocutory proceeding, viz., injunction. The observation of P. N. Mookerjee, J in Aloka's case (supra) is very pertinent. His Lordship observed that it may be that the Court at that stage of Section 17(3) application will decide the above question which forms a material issue in the suit itself, only prima facie and for the purposes of the said proceedings, leaving it open for a final decision at the time of hearing of the suit. This finding was quoted with approval by my Lords A. M. Bhattacharya and Ajit Kumar Nayak in Nandagopal Das's case (supra). It was found that such a finding itself would not form the basis of final decision in the suit. These decisions indicate the course to be followed in dealing with an application under Section 17(2) or Section 17(3) of the Act. In short, the Court has to resolve all disputes necessary for disposal of an application under Section 17(2) or Section 17(3) of the Act. Such a decision is for the purpose of disposal of these applications only and they alone cannot form the foundation of the final decision in the suit.

17. The Court below rightly refused to entertain the application of the tenants. There is no ground for interference with the impugned order. The revisional application consequently fails. Let a copy of this order go down to the Court below forthwith. The trial court will now proceed according to law to dispose of the tenant's application under Section 17(2) and 17(2A)(p) of the West Bengal Premises Tenancy Act.