

**IN THE HIGH COURT AT CALCUTTA  
CIVIL REVISIONAL JURISDICTION  
APPELLATE SIDE**

PRESENT:

**THE HON'BLE DR. JUSTICE AJOY KUMAR MUKHERJEE**

**SA 98 of 2011**

**With  
IA No. CAN 3 of 2024, CAN 4 of 2024, CAN 6 of 2024**

**Austin Distributors (p) Ltd.  
Vs.  
Sri Sri Iswar Ganesh Chandra Jiu & Ors.**

For the Appellant : Mr. Aniruddha Chatterjee, Sr. Adv.,  
Mr. Debabrata Roy  
Mr. Anil Choudhury,  
Ms. N. Jain

For the Respondents : Mr. Surajit Nath Mitra, Sr. Adv.,  
Mr. Partha Pratim Ray,  
Mr. Sankarsan Sarkar,  
Mr. Soumyadeeb Sinha,  
Ms. Surnajana Chatterjee

Heard on : 05.01.2026

Judgment on : 20.04.2026

**Dr. Ajoy Kumar Mukherjee , J.:**

1. The respondents herein as plaintiffs instituted the Ejectment Case no. 04 of 2004 for decree of eviction and recovery of possession from the appellant herein, before learned Civil Judge (Junior Division) Sealdah. The Appellant being a company was inducted as a tenant in respect of suit

premises situated at 173 AJC Bose Road, Kolkata, at a monthly rental of Rs. 790/-, payable according to the English calendar month under the respondents herein by dint of a lease agreement dated 18.10.1947. According to plaintiff case defendant was originally a lessee and after expiry of the lease period he became the premises tenant under the plaintiff. The suit property is actually a trust property by dint of an Arpan Nama executed on 10.04.1950. The respondents herein served an ejectment notice upon the appellant on 28.08.2002 for eviction and the appellant herein replied the said notice of ejectment on 04.09.2002. Thereafter the respondents herein filed the abovementioned ejectment suit no. 04 of 2004 on following grounds;

(a) The defendants/appellants have defaulted in payment of rent in respect of suit premises since July, 1990.

(b) The plaintiffs reasonably required the suit premise for building and re building purpose and /or to augment their income.

**2.** Prior to institution of present suit, the plaintiffs herein filed another eviction suit on the ground of building/rebuilding against the same defendant/tenant being T.S. No. 53 of 1967, which was decreed. The defendant preferred Title Appeal being No. 991 of 1975 and the appeal was allowed on the ground that the plaintiffs could not establish having sufficient fund to make building/re building of the suit premises

**3.** In the instant suit the defendant/appellant contested the suit by filing written statement thereby denying all materials allegations in the plaint. The defendant in the written statement denied that they have defaulted in payment of rent since 1990 and that plaintiffs have

suppressed the fact that the said rent payable by the defendant was directed to be paid to the credit of the earlier suit filed by the plaintiff/landlord being aforesaid TS no. 53 of 1967, in the court of learned 9<sup>th</sup> Sub-Judge, Alipore. The defendant deposited the rent month by month in compliance with the said order, before the court in TA 991 of 1975. When the said Appeal was allowed, the defendant was directed to deposit the rent month by month to the Nazir Khana of the court to the credit of the said suit. Accordingly the defendant deposited the rent from the month of February, 1967 to October, 1996, before the Court.

**4.** The defendant further stated in the written statement that the plaintiff as Appellant filed an appeal before this High Court who directed that 50% of the rent will be deposited towards arrear of municipal tax. In due compliance of the order of this court, the defendant deposited monthly rent from the year of 1996 to 2004 and municipal tax thereof. The defendant paid the amount in excess to the monthly rent and that the defendant is entitled to refund a sum of Rs. 7,61,271/-, which was paid towards tax and therefore he is not a defaulter. The defendant in their written statement had also denied plaintiffs requirement of suit premises on the ground of building and re building.

**5.** In the aforesaid present suit defendant also filed an application under section 7 (2) of the West Bengal Premises Tenancy Act, 1997 (in short Act of 1997). Learned Trial Court was pleased to dispose of the said application directing the defendant to pay the arrear rent for 188 months with 10% interest amounting to Rs. 1,63,372/-. The said order was carried up before this High Court through a revisional application and this High

Court while disposed of the revisional application observed that the trial court will modify the order to the extent that the amount of Rs. 85,000/- is to be adjusted against the payment of RS. 7,00,000/- by way of municipal taxes by the tenant and the tenant/petitioner shall not be considered to be a defaulter in rent till march 2005.

**6.** Thereafter the instant suit was taken up for final hearing on 05.02.2009, when the trial court decreed the suit on contest in favour of the respondents herein on the ground of default. However the ground of building and re building was decided by the trial court against the plaintiffs/respondents.

**7.** Being aggrieved by and dissatisfied with the judgment and decree passed by learned Trial Court, in aforesaid Ejectment Suit no. 4 of 2004, the appellant herein preferred an appeal before the first appellate Court being TA no. 40 of 2009. Subsequently the respondents herein also filed a cross appeal against the findings of the trial court relating to dismissal of the eviction suit on the ground of building and re building.

**8.** Finally on 20.01.2011, said Title Appeal was taken up for consideration and after hearing both the parties, learned First Appellate Court by the impugned judgment dated 31.01.2011 had dismissed the appeal on contest, affirming the decree passed by trial court on the ground of default and at the same time allowed the cross appeal filed by the respondents against the order of dismissal of the suit, on the ground of building and re building. Being aggrieved by the aforesaid judgment passed by the First Appellate Court the defendant/appellant herein have preferred the instant second Appeal being SA 98 of 2011.

**9.** A Division Bench of this Court while admitted the second Appeal has framed the following three substantial questions of law by an order dated 29<sup>th</sup> April, 2011.

- I.** *Whether the learned Judge in the courts below, substantially, erred in law in passing the decree for eviction on the ground of default, when the appellant has complied with all the requirements of Sub-section (1) of Section 7 of the West Bengal Premises Tenancy Act, 1997?*
- II.** *Whether the learned judges in the lower appellate court, substantially, erred in law in granting the decree for eviction on the ground of building and re-building, when it has been proved that the owners had no means but they had decided to engage a promoter for development of the property in suit for augmentation of their income?*
- III.** *In the absence of any provisions in the decree for giving back possession, after the building and re-building is complete within a specified period of time, whether the decree passed by the learned judge in the lower appellate court would be sustainable in law?*

**10.** During pendency of the second appeal the appellant herein on 12.04.2012 filed a stay application and this High Court directed the appellant to deposit current occupational charges at the rate of Rs. 4,00,000/- per month till disposal of the appeal. Both the appellant and respondent herein challenged the said order dated 12.04.2012 before the Supreme Court and both the special Leave Petition were taken up together and the court by an order dated October, 15, 2012 modified the said order dated 12.04.2012 and directed appellant herein to deposit Rs. 2,00,000/- per month before the executing court and furnish a bank guarantee of Rs. 200,000/- per month before the Registrar General of the High Court.

**11.** Learned Counsel for the appellant claimed that the appellant is depositing the said amount month by month. It is further submitted that the appellant herein as plaintiff had instituted a suit against the respondent herein for recovery of the aforesaid Municipal Tax amounting to

Rs. 7,61,272/-, which the appellant herein has already paid to the Municipality. Said suit being T.S. no. 7 of 2010 has already been decreed ex parte against the defendant/land lord/respondent herein and thereby passed a direction for recovery of money of Rs. 7,61,272/- from the defendant/respondent herein along with interest.

**12.** Being aggrieved by the judgment of affirmation passed in connection with the instant Ejectment suit for eviction on the ground of default, learned Counsel for the appellant Mr. Chatterjee argued that while the decree for eviction on the ground of default was passed, the courts below completely ignored the fact that the appellant has complied with all the requirements of subsection (1) of section 7 of the Act of 1997. The appellant as defendant paid amount excess to the rent and the said tenant had deposited the rent from February, 1967 to October, 1996. The plaintiffs infact suppressed the fact that the said rent payable by the defendant/tenant was directed to be paid to the credit of the earlier suit being T.S. 53 of 1967 in the Court of 9<sup>th</sup> Sub Judge, Alipore and the appellant duly complied the said order and the appeal preferred therefrom has been dismissed. Therefore the defendant has duly deposited the rent from the month of February, 1967 to October, 1996. Thereafter in due compliance of the High Court's order passed in Civil Revisional Application the appellant herein deposited monthly rent from the year of 1996 to 2004 along with municipal tax and thereby the defendant has made excess payment and they have also obtained ex parte decree in respect of the sum of Rs. 7,61,271/- paid for an on account of the petitioner/land lord. The defendant appellant never defaulted in payment of Rent.

**13.** Mr. Chatterjee strenuously argued that once this High Court has held that the appellants are not be considered as defaulter in payment of rent till March 2005, in absence of any finding to the contrary the trial court could not have come to a finding that the defendant/tenant was in default. The courts below completely overlooked the fact that there was decree for recovery of money in T.S. 7 of 2010, whereby and whereunder the plaintiffs were directed to pay money to defendant in lieu of municipal tax, which are paid by the tenant. Till March 2005, every payment liable to be made by the appellant/tenant were paid off and the records of Courts below show that since March 2005 the tenants have been making payment regularly without any default.

**14.** Per contra learned counsel for the respondent Mr. Mitra argued that the defendant/appellant infact continued to occupy the suit property under its erstwhile owners even after expiry of its lease, upon payment of Rs. 790/- per month as monthly rent and in addition to the monthly rent, the appellant was under an obligation to pay property tax payable to the Kolkata Municipal Corporation in terms of the Tenancy Agreement and to maintain regular payment of such dues as part of its obligations as tenant. The appellant had paid rent upto June, 1990 but thereafter defaulted in payment of Rent and statutory dues continued for years together despite repeated oral and written demand from the respondents.

**15.** In the meantime demand notice for property tax were issued by KMC in respect of the suit property and the corporation by its letter dated 12<sup>th</sup> April, 2002 called upon the respondents to pay an outstanding amount of

Rs. 4,86,838.74/- by April, 30,2002, failing which there would be disconnection of services.

**16.** Mr. Mitra further argued that appellants made payment of the property tax to KMC in respect of the suit property being aggregate amount of Rs. 7,61,272/- from April, 20, 1998 to April, 30 2002. However appellant filed aforesaid T.S. No. 86 of 2002/T.S. No. 7 of 2010, where they have obtained ex-parte decree against the respondents. He further submits that the appellant/defendant failed to deposit last paid rent within statutory timeline before the controller. He further submits that during examination-in-chief the defense witness no.1 admitted that there was non payment of rent on and from 1996 since the disposal of TA 991 of 1975. It has been further deposed that the appellants had paid Rs. 7,61,271/- towards municipal tax and has also sought for its adjustment in TS no. 86 of 2002 filed by the Appellant against respondents.

**17.** Mr. Mitra further argued on behalf of the respondents that the Trial Court while disposed of section 7(2) of the Act of 1997 was pleased to held that the defendant is a defaulter in paying monthly rent since July 1990 for a period of 188 months and directed the appellant herein to pay of arrears of rent amounting to Rs. 1,63,372/- together with interest at the rate of 10% per annum, which was subsequently modified by this High Court in CO no. 967 of 2006, wherein the Respondents herein agreed to have sum of Rs. 85,000/- to be adjusted against total amount of property Tax allegedly paid by the appellant to KMC being a Sum of Rs. 7,00,000/- and thereby appellant would not be considered as defaulter in payment of rent till March, 2005 and it was further held that the said order was passed

without prejudice to the rights and interest of the parties, wherefrom it is clear that said order was not final but tentative upon final adjudication of the suit. Therefore, aforesaid order passed in CO 967 of 2006 passed by this High Court was subject to fulfilment of the adjustment of the amount and therefore the benefit under such orders are conditional upon compliance of the same. Delay or failure to perform the obligation within the specified period gives rise to the forfeiture of the benefit and subsequent deposit or performance after the passing of the decree is not permissible. It is clear from the facts and circumstances of the case that even after adjustment of RS. 85,000/- with the consent of the respondents, the appellant did not pay the remaining arrears of Rs. 78,372/- (1,63,372/- - 85,000/- ) along with interest within time as directed by the Court and therefore the appellant remained statutory defaulter under section 7(2) and therefore liable to be evicted under section 6(1) (b). Both the courts below after due consideration of the aforesaid facts and circumstances of the case, have granted decree of eviction on the ground of default.

**18.** Mr. Mitra further argued that once the appellant chooses to sue for refund of the alleged municipal payment and succeeded in obtaining an exparte decree for Rs. 7,61,272/-, which has also been put in execution, the appellant herein cannot treat any part thereof as adjustment towards rent. The appellant itself gave a go by to the order dated July 5, 2006 passed in CO no. 967 of 2006 by this High Court, which was obtained with the consent of the respondents regarding adjustment of Rs. 85,000/-and furthermore the appellant did not make any attempt to deposit the aforesaid Rs. 78,372/- at any point of time.

## Decision

### Substantial Question No. 1:-

19. Before going to further details let me cut the long story short in connection with factual background of the respondents allegation, pertaining to default in payment of Rent. In the ejectment suit the respondents as plaintiffs had claimed that the appellant herein is a defaulter in payment of rent since July 1990. After entering appearance the appellant herein filed application under section 7(2) of the Act of 1997 praying for determination of the arrears of the rent due and payable by him. On 08.02.2006 the said petition was disposed of by the trial court observing that the tenant/appellant is a defaulter in payment of monthly rent since July 1990 and the arrears of rent for Rs. 188/- along with interest at the rate of 10% amounting to Rs. 1,63,272/- which was directed to be paid within 30 days. This High Court modified the said order while disposing the CO 967 of 2006 on 05.07.2006 with the following observation.

*“..in the interest of early disposal of the suit and as instructed by his client, the opposite parties agree to have the amount of Rs 85,000/- adjusted against the total amount of Rs. 7,00000/- paid by the petitioner by way of tax, without prejudice to its rights. The revisional application is thus disposed of with the observations that the orders of the learned Civil Judge (Junior Division), Sealdah passed in connection with the Civil Suit No. 4 of 2004 are , modified to the extent that the amount of Rs 85,000/- is to be adjusted against the payment of RS. 700000/- paid by way of municipal tax and since adjustment of rent against the payment of tax is being allowed, the petitioner/tenant shall not be considered to be a defaulter in payment of rent till March, 2005. This order is passed without prejudice to the rights and interest of either of the parties...”*

Learned Counsel for the defendant strenuously argued before the trial court that in view of the observation made by the High Court the appellant /defendant cannot be held to be defaulter till March, 2005 by

any means. Learned Trial court while granted decree in favour of plaintiff on the ground of default made following observation.

*“upon careful perusal of the order of the Hon’ble High Court dated 5/7/06, it appears that the expression” without prejudice to the rights and interests of either of the parties,” has dual connotations:- (a) rights and interests of the parties with regard to the demand in respect of Rs. 7,61,272/- which has been claimed by the instant opposite party in T.S. No. 86/2002, as demands of Corporation Taxes purportedly paid by it unduly, under distress order, and warrant of attachment issued by the KMC, and (b) rights of either parties respect of the entire demand of Rs. 1,63,372/- towards arrears of rent claimed by the opposite party in the 7(2) petition.*

*In terms of the Hon’ble Court’s order, it appears that approximately 50% of the total arrears of rent determined under section 7(2), (i.e., Rs 85,000/-) was allowed to be adjusted against the sum claimed to have been paid by the opposite party on behalf of the petitioner, towards taxes due and payable to the KMC. Against such adjustment, the opposite party is not to be deemed a defaulter for the period from July 1990 to March 2005. The order passed by this court under section 7(2) of the WBPT Act 1997 on 8/2/06, has been modified to that extent only, and no further. Accordingly, for the period from April 2005 till date, it is to be ascertained whether the opposite party is a defaulter in the following two aspects (i) payment of the balance amount or arrear rent determined under section 7(2), i.e. Rs 63,520/- (Rs. 1,63,372/- minus Rs 85,000/-), and (ii) payment of the current rent from month to month.*

*Exhibit-D series comprises of only current rent deposit challans, for the period from April 2005 to March 2007, at the rate of Rs 790/- per month. Throughout the entire case record, and the documents exhibited, I do not find any document filed by the O.P. to show that the balance amount of Rs 63,520/- towards arrears of rent, has ever been paid by the opposite party.*

*In his cross-examination, DW-1 has admitted that the opposite party was directed to pay the arrear rent to the tune of Rs. 1,63,372/- by the instant court. Rs. 85,000/- was directed to be adjusted by the Hon’ble High Court. He has admitted that he did not deposit the rest of the amount after adjustment. He has further admitted that Hon’ble High Court had not exempted him from paying the rest of the amount, being the arrear rent since July 1990.*

*If that be so, then there can be no hesitation to hold that the opposite party has committed default in payment of the arrear rent as determined under section 7(2) and as modified by Hon’ble Court in its order. Upon strenuous analysis of the order passed by the Hon’ble High Court I do not find anything therein which either (i) alters the quantum of arrear rent determined by this court while disposing off the petition. u/s 7(2) of W.B.P.T. Act 1997 vide its order dated 8/2/06, or (ii) exempts the O.P. from paying the balance sum, remaining after deduction of the amount of Rs. 85,000/- from the total sum of Rs. 1,63,372/- determined as arrears of rent under section 7(2) of the Act.*

*In other words, there has been no valid payment of the arrear rent determined u/s 7(2), as adjusted vide Hon’ble High Court’s order dated 5/7/06. Under the provisions of section 7(4) of the West Bengal Premises Tenancy Act 1997, if the tenant makes deposit or payment as required by sub section (1) or sub section (2), no 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 civil judge, but he may allow such cost as he may deem fit to the landlord.*

*Since such payment has not been made by the O.P., it is not entitled to the protection u/s 7(4) of the West Bengal Premises Tenancy Act 1997. In the order passed on the 7(2) petition, O.P. was adjudged a defaulter for more than three months within a period of twelve months. Hence, the ground of default stands established against the opposite party, and the petitioners are entitled to get a decree/order on the ground of default under clause (b) of section 6(1) of the Act. Thus, this point is decided in favour of the petitioner.*

**20.** When the matter was placed before the 1<sup>st</sup> Appellate Court he affirmed the judgment of the trial court in respect of granting decree on the ground of default with the following observation.

*“Accordingly, the appellant/opposite party was under obligation to pay the arrear rent for the said period amounting to Rs. 63,520/- at a time in terms of order dated 08.02.2006 passed by the Ld. Trial Court and modified by the Hon’ble Court in CO No. 967 of 2006 and current rent month by month from March, 2006 to till delivery of judgment i.e. 10.06.2009 under Section 7(1) of the W.B.P.T. Act, 1997. Admittedly, the appellant/opposite party has not deposited the arrear rent amounting to Rs. 63,520/- at a time in court and as such it can be said without any hesitation that the appellant/ opposite party has not complied with the order passed by the Ld. Court below under Section 7(2) of the W.B.P.T. Act, 1997 and modified by the Hon’ble High Court in CO No. 697 of 2006. It further appears that the appellant/opposite party has deposited rent in the Ld. Trial Court by challans till March, 2007 but no rent was deposited in the Ld. Court below in terms of Section 7(1) of the WBPT Act, 1997 from April, 2007 to June, 2009. Accordingly, I am of the view that the court below considering materials on record has come to right findings in a very comprehensive manner with regard to point no. 2 and that the said findings having been based on materials on record warrant no interference.”*

**21.** Therefore it is apparent that during the pendency of the suit, the appellant herein filed applications under section 7(1) and section 7(2) of the Act of 1997, seeking permission to deposit alleged last paid rent before the controller and for determination of the arrear amount of rent to be deposited respectively. Learned Civil Judge by an order dated 8<sup>th</sup> February, 2006 was pleased to held that the appellant is a defaulter in paying monthly rent since July, 1990 i.e. for a period of 188 months and directed the appellants to pay arrear rent of Rs.1,63,372/- together with interest at the rate of 10% to the respondents within 30 days and also to

pay current monthly rent within 15 days of each succeeding month. Said order, when assailed before this High Court the respondents have agreed to have adjusted a sum of Rs. 85,000/- against the total amount of property Tax paid, by appellant to KMC and the appellant would not be considered as a defaulter in payment of rent till March, 2005. The said order was passed without prejudice to the right and interest of either of the parties. It appears that even if it is taken for granted that Rs. 85,000/- was adjusted the appellants have nothing to show that he has paid the rest amount of arrear rent of Rs. 78,372/- along with interest within time. Thus the appellant remains statutory defaulter under section 7(2) and is not entitled to get benefit of protection against eviction under section 7(4) on the ground of default of rent and therefore liable to be evicted under section 6(1) (b) of the Act of 1997.

**22.** It also needs to be mentioned that appellant already obtained decree for recovery of sum of Rs. 7,61,272/- from the respondents as refund of arrears of rates and taxes paid by him to KMC and said decree has already been put into execution and the respondents herein have already filed a petition on September, 2015 in the said execution case regarding their intention to pay the decretal amount in full and final satisfaction of the exparte decree on January, 30 , 2016. Therefore the appellant itself gave a go by to the order passed by this High Court in CO 967 of 2006, regarding adjustment of Rs. 85,000/- also which culminates the fact that the appellants herein as tenant neither deposited the arrear of RS. 78,372/- (Rs. 163372/- --85,000/-) nor has adjusted Rs. 85,000/- from the arrear rent and as such

defendant/appellant has miserably failed to show compliance of section 7(2) of WBPT Act, in depositing the arrear rent as was directed by the Trial Court read with the judgement passed by the High Court in CO no. 967 of 2006 and as such he is not entitled to get benefit of protection against eviction under section 7(4) of the Act of 1997.

**23.** In ***Bijay Kumar Singh and Ors. Vs. Amit Kumar Chamariya and ors.*** reported in **(2019) 10 SCC 660**, the Supreme Court specifically held that non-payment on determination of the arrears of the rent, will entail the eviction of the tenant, provided that the tenant takes steps as contemplated under sub section (2) of section 7 of the Act and deposits the arrear of rent on determination of the disputed amount. Para 21 of the judgment reads as follows:-

**21.** *Sub-section (3) provides for consequences of non-payment of rent i.e. striking off the defence against the delivery of the possession and to proceed with the hearing of the suit. Such provision is materially different from sub-sections (2-A) and (2-B) which was being examined by this Court in B.P. Khemka [B.P. Khemka (P) Ltd. v. Birendra Kumar Bhowmick, (1987) 2 SCC 407] . Sub-sections (2-A) and (2-B) of Section 17 of the 1956 Act confer unfettered power on the court to extend the period of deposit of rent, which is circumscribed by the proviso to Section 7(2) and sub-section (3) of Section 7 of the Act. Therefore, the provisions of sub-section (2) 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. There is an outer limit for extension of time to deposit of arrears of rent in terms of the proviso to sub-section (2) of Section 7 of the Act. The consequences flowing from non-deposit of rent are contemplated under sub-section (3) of Section 7 of the Act. Therefore, if the tenant fails to deposit admitted arrears of rent within one month of receipt of summons or within one month of appearance without summons and also fails to make an application for determination of the disputed amount of rate of rent and the period of arrears and the subsequent non-payment on determining of the arrears of rent, will entail the eviction of the tenant. Section 7 of the Act provides for a complete mechanism for avoiding eviction on the ground of arrears of rent, provided that the tenant takes steps as contemplated under sub-section (2) of Section 7 of the Act and deposits the arrears of rent on determination of the disputed amount. The deposit of rent along with an application for determination of dispute is a precondition to avoid eviction on the ground of non-payment of arrears of rent. In view thereof, 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. (emphasis added)*

**24.** It is true that the concurrent finding of fact that the tenant has not deposited the arrear amount of rent in terms of 7(2) of the Act of 1997 is based on question of fact and not question of law but still High Court can interfere if it is found that finding of fact as stated above is recorded dehors the pleading or is based on no evidence or misreading of material documentary evidence, or is recorded against any provision of law or the decision is one, which no judge acting judicially could reasonably have reached such ground within the periphery of section 100 of CPC.

**25.** In the present case the trial court and first appellate court recorded a concurrent finding of fact that appellant did not pay the arrear rent in terms of the order passed by the Trial Court read with order of this court passed in CO 967 of 2006, within the statutory period. It is not open to the High Court to interfere with the finding of the facts which was based on proper appreciation of evidence on record. The appellant herein is unable to state that he had deposited the entire arrear amount of rent within the statutory period as stated above. Such finding of fact on proper appreciation of evidence could not have been interfered with by the High Court within the scope of section 100 of CPC. Moreover default in payment of rent, in true sense does not give rise to any substantial question of law. It is entirely matter to be decided on the appreciation of the evidence. High Court does not have any scope to re appreciate the evidence and come to the conclusion that the appellant had deposited the arrear amount of rent, decided and or adjusted within the statutory period.

**26.** In ***Gurdev Kaur and Ors. Vs. Kaki and Ors.*** reported in **AIR 2006 SC 1975** the Apex Court has clearly laid down the legislative mandate of section 100 CPC which may be reproduced below:-

*71. The fact that, in a series of cases, this Court was compelled to interfere was because the true legislative intendment and scope of Section 100 CPC have neither been appreciated nor applied. A class of judges while administering law honestly believe that, if they are satisfied that, in any second appeal brought before them evidence has been grossly misappreciated either by the lower appellate court or by both the courts below, it is their duty to interfere, because they seem to feel that a decree following upon a gross misappreciation of evidence involves injustice and it is the duty of the High Court to redress such injustice. We would like to reiterate that the justice has to be administered in accordance with law.*

*72. When Section 100 CPC is critically examined then, according to the legislative mandate, the interference by the High Court is permissible only in cases involving substantial questions of law.*

*73. The Judicial Committee of the Privy Council as early as in 1890 stated that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be, and they added a note of warning that no court in India has power to add to, or enlarge, the grounds specified in Section 100.*

*74. The High Court seriously erred in interfering with the findings of facts arrived at by the trial court and affirmed by the first appellate court.*

**27.** In ***Kondiba Dagadu Kadam Vs. Sabitribai Sopan Gujar and Ors.*** reported in **(1999) 3 SCC 722** supreme court has reiterated that in a second appeal under section 100 CPC, the High Court cannot substitute its own opinion for that of the first appellate court, unless it finds that the conclusions drawn by the court below was erroneous being;

- I)** Contrary to the mandatory provisions of the applicable law or
- II)** Contrary to the law as pronounced by the supreme Court or
- III)** based on inadmissible evidence or no evidence

**28.** It was further observed by the Court in the aforesaid decision that if the first appellate court has exercised its discretion in a judicial manner,

its decision cannot be recorded as suffering from an error either of law or of procedure requiring interference in second appeal. It was further observed that the trial court could have decided differently is not a question of law, justifying interference in second appeal.

**29.** In the instant case the observation of both the courts below that appellant failed to comply the statutory mandate of section 7 (2) of the Act is based on evidence and document and both the courts below have given satisfactory explanation in coming to the conclusion. It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at by the last court of fact.

**30.** It is well settled that even in a case wherefrom a given set up circumstances two inferences of fact are possible, the one drawn by the lower appellate court will not be interfered by the High Court in second appeal. The High Court is expected to interfere, if it is found that the conclusion drawn by the courts below were erroneous being contrary to the mandatory provisions of law applicable ( here Section 7(2) of the Act of 1997) or its settled position on the basis of judgment pronounced by the Apex Court in ***Bijay Kumar Singh*** (Supra) or if it was shown that the decision is based upon ignoring any material evidence that the defendants/appellant have duly complied the statutory mandate, laid down under sub-section (2) in depositing the arrear rent in time.

**31.** Mr. Chatterjee though argued in favour of remanding the case for fresh evidence on the point of excess payment made by the appellant in order to nullify the ground of default. But I do not find any substance in such argument since the decision rendered by the court below on the

material question did not violate any settled position of law or is liable to be vitiated by perversity. It is nobody's case that the evidence taken as a whole does not reasonably support the finding of the court below that total arrear amount of rent determined by the court while disposing section 7(2) of the application, has been deposited or that the courts below have interpreted the evidence on record in an absurd or capricious manner. There is also nothing to show that the courts below have arrived at its decision ignoring or acting contrary to any legal principle. Therefore, I do not find that the decision rendered by the courts below in granting decree of eviction against the appellant herein on the ground of default warrants any interference by this court.

**Substantial Question No. 3**

**32.** Whether in absence of the provision in the decree for giving back possession after the building and re building is complete within a specified period of time is sustainable in law or not, cannot be a substantial question of law, in view of the fact that it is no more *res integra* that in absence of such direction by the Trial Court, it does not vitiate the judgment and the High Court in second appeal can issue such direction. Failure on the part of the court below to issue direction as provided in section 11(1) of the Act, would not render the judgment or decree for eviction under section 6(1) (c) invalid and the appellate court after hearing the appeal can issue such direction in view of the judgment passed by this High Court in ***Mahananda Vs. Biswanath***, reported in **AIR 1976 Cal 185** wherein it was held as follows:-

*“4. It has next been submitted by Mr. Bhunia that the judgment is vitiated as there is no time stipulated in the plaint of the construction as required under Section 18-A of the West Bengal Premises Tenancy Act. According to sub-section (1) of Section 18-A of the Act when the court passes a decree for recovery of premises on the ground mentioned in clause (f) of sub-section (1) of Section 13, it shall specify the period within which building or rebuilding or the additions or alterations to such premises shall be completed and may on the application of the landlord extend such period from time to time for good and sufficient reason. Of course in the present judgment we find no such direction. But the absence of such direction does not vitiate the judgment when the second appeal is pending because this Court sitting in second appeal can pass necessary direction under Section 18-A of the Act. Of course Mr. Bhunia has conceded that this Court has power to pass such directions.”*

### **Substantial question no.2**

**33.** If section 6 (c) of the West Bengal Premises Tenancy Act 1997 is considered with clause (f) of Section 13(1) of the West Bengal Premises Tenancy Act 1956, it appears that the word ‘*reasonably*’ has been omitted in the present Act. However, the expression as used in 1956 Act “*where the premises is required by the landlord for the purpose of the building or re building or for making thereto substantial addition or alteration and such building or re building or addition or alteration cannot be carried out without the premises being vacated*”, still retained in the present Act. Therefore, the said ground of ejectment in both the statute have laid the stress on the fact that such building or re building cannot be carried out without the premises being vacated.

**34.** This condition is important one, even though in the present Act the expression “required” is only used instead of “reasonably required”. Emphatically the word “require” means “to be in need of”. So there must be element of need in demanding vacant possession from the tenant for the purpose of building or rebuilding. Therefore in order to get decree for eviction under clause (c) what is needed is the landlord’s honest intention

and genuineness of his claim, which has to be satisfied from surrounding circumstances. For determining whether the landlord requires the premises for the purpose of building or re building and/or substantial addition or alteration, the land lord still has to establish that his requirement in respect of the suit premises is genuine and not fanciful. If this was not the intention of the legislature, then they would not have retained the word “required” in the present statute also.

**35.** In fact in absence of such interpretation the view expressed in the judgment passed in ***Netaram Vs. Jiwan lal***, reported in **AIR 1963 SC 499**, i.e. the purpose of the rent legislation which protects the tenant from eviction, would be frustrated. The land lord still has to prove his bonafideness if he requires the premises for building or re building or for substantial addition or alteration. In the said judgment supreme Court held that before a land lord can obtain a decree of ejectment on the ground of his requirement of reconstruction of a house, he must satisfy about the genuineness of his claim and this can only be established by looking at all the surrounding circumstances namely conditions of the building, the situation, the possibility of its being put to a more profitable use for reconstruction, the means of the landlord and so on. It is also pointed out in that decision that it is not enough that the land lord comes forward and says that he entertains a particular intention, however strongly, said to be entertained by him and that it is impossible therefore to held that the investigation should be confined only to the existence of an intention in the mind of the landlord to re-construct and that this intention must be honestly held in relation to the surrounding circumstances. This principle

has been reiterated subsequently in ***Pachmal Vs. Basthi*** reported in **AIR 1971 SC 742**. Therefore, it is clear that the aforesaid ground of eviction required more than mere financial capacity or the question of sanction plan for the building and re building. The plaintiff must establish his “requirement” as genuine.

**36.** In the present case while dealt with the said issue the trial court held as follows:-

*“On a through analysis of the evidence adduced by Pw-1, I find that no evidence has been brought on record by the petitioners to show as to what expenditures are required to be incurred on behalf of the deities from year to year, for holding its ceremonies, and other religious observations, and no materials have been produced to show the present income of the deities, and the source thereof.*

*In absence of these particular, this court cannot subjectively ascertain whether the present income arising out of the properties belonging to the deities, are insufficient for their maintenance, so as to justify the plea of augmentation of income of the deities. It is to be remembered that the nature of requirement of a deity, which is a juristic person, is dissimilar to that of a natural person, as, in the case of a natural person, a mere motive for earning more profit by putting the premises to a more profitable venture, may justify a plea of building and rebuilding for augmentation of income, whereas, in the case of requirement of a deity, there cannot be any existence of a “mere profit” motive, and a case of requirement of augmentation of income may arise only when the existing income of the deity becomes insufficient for the purpose of its maintenance, including daily “Seva Puja”, periodical ceremonies, etc.*

*Although it has been expressly admitted by the petitioners that there are other properties of the deities in and around Calcutta and particularly at Chinsurah, where the deities themselves have their seat or “adhistan”, no explanation is forthcoming as to why such other properties cannot be developed in likewise manner, for the purpose of augmentation of income. More importantly, PW-1 has expressly resented from furnishing particulars of such properties, inspite of being asked to do so.*

*On perusal of Exhibit-2, which is the certified copy of arpannama dated 10/4/1950, I find that there are 9 items of immovable properties spread over Chinsurah, Chandannagar and Calcutta, which had been settled in favour of the deities. No evidence has been adduced to show, what income accrues from these properties.*

*Accordingly, in absence of any evidence on such vital aspects, I have no constraints to hold that the petitioners have miserably failed to establish the requirement of augmentation of income of the petitioner nos. 1 to 7, so as to justify a claim of eviction on the ground of building and rebuilding.....However , so far as the entire question of building and rebuilding of the suit premises for augmentation of income is concerned, I find that two vital aspects involving the same, have not been established before this court, namely, (i) requirement of augmentation of income of the deities, and (ii)*

*the necessary preparations on the part of the landlords or their collaborators for implementing the project of building and rebuilding, by procuring sanctioned plan of the proposed building, and necessary permissions from the Corporation and other authorities.*

*In absence of proper satisfaction of these two vital ingredients/aspects, I have no constraints to hold that the requirement of the suit premises by the petitioners as a whole, for the purpose of building and rebuilding the same, to ensure augmentation of income of all of them, has not at all been established before the court with adequate strength and credibility, so as to demand a decree/order of eviction of the opposite party by virtue of the same. Accordingly, this question is decided against the petitioners.*

**37.** Admittedly suit property partly secular and partly devattar.

Respondents nos. 1 to 7 are deities and the respondent no., 8 to 12 are other individual co-sharer of the suit premises. The deities have been represented by the shebait. Admittedly the suit premises has not been partitioned amongst the co sharer by metes and bounds. PW1 has deposed in the trial court on behalf of all the respondents, on the strength of power of attorney executed by them being exhibit 14 herein. However 1<sup>st</sup> Appellate Court has granted decree of eviction on the ground of building re building on a different consideration. The relevant portion may be reproduced below:-

*“I am not in agreement with the submissions of the Ld. Lawyer appearing for the appellant/opposite party. Sanctioned plan is only a piece of evidence without which the conclusion about the landlord’s requirement for building and rebuilding can also be reached. It is not rule that no sanctioned plan no requirement. In the case in hand, respondents/petitioners have proved all the factors as required under law except the sanctioned plan. Exhibit no.9 is the development agreement entered into by and between the respondents/petitioners and M/S Merlin Project Ltd. In the said agreement nature and extent of proposed multi-storied building are clearly mentioned and that the Ld. Court below has not casted any doubt on the said agreement. On the other hand, the Ld. Court below relying upon Exhibit NO.9 has come to a finding in terms that the respondents/petitioners in the necessary financial support required for implementing the proposed project of building and rebuilding on the suit premises. The area of the suit premises is more or less 2 bighas and 16 cottahs and the project undertaken in the development agreement is big one. To prepare a effective sanctioned plan for such big project measurement of the land and testing of soil are highly required and such things can only be done when the respondents/petitioners and their collaborator will have access in the suit premises for the aforesaid purpose. Accordingly, I am of the view in the facts of the present case that the case of the respondents/petitioners is not affected any way for not having*

*sanctioned plan. Considering the pleadings and evidence on record and also in view of above discussions I am of the view that the respondents/petitioners have proved their case of building and rebuilding for augmentation of income and as such findings of the Ld. Court below with regard to point no.3 is set aside.*

*In result, appeal fails and cross-appeal succeeds.*

**38.** As I have stated above that the suit premises is partly secular partly devattar and the plaintiff no. 1 to 7 represent the devattar property where as plaintiff no. 8 to 12 represent the person who are secular, I find sufficient force in the submissions made by learned counsel for the Appellants that the rights of the respondents in regard to the suit premises are not similar and as such the cause of action for two separate groups can also be different. There are restrictions as regard how far a devattar property can be transferred for sale to the Marlin Group and the same does not apply to the persons who own the property in their own right. It is also doubtful whether the property of the deity can be transferred to an outsider who is not shebait in order to augment the income of the shebait, as admittedly the property in question is unpartitioned. Another tricky point is also involved in the instant case as to whether the property of a deity can be divested by the shebait for augmentation of their own income and not for the welfare of the deity. Such divest of the property by the shebait in favour of third party in respect of devattar property is also beyond the intention of the settler. It is also pertinent to be mentioned that in the previously instituted suit, the shebait has failed to show that they had sufficient fund for the purpose of building and rebuilding.

**39.** Mr. Chatterjee on behalf of the appellant strenuously argued that after being defeated in the previous suit, in the present suit also the shebait has failed to show that they have sufficient income of their own

for development without transferring a portion of developed property to the Marlin Group. Therefore he argued that there is no change of circumstances of previous suit to the present suit in regard to the income to the plaintiff no. 1 to 7 who have failed to show that they have any fund to their own to develop the property and therefore the suit is barred by the principles of res judicata. Mr. Chatterjee also argued in this context that section 34 of trust Act 1881 have no manner of application as regards sale of devattar property. It is evident that the owner of the property having no means, have decided to engage promoter for augmentation of their income, and have proposed to hand over the property to Marlin Projects Limited, whereby said Marlin would get a lion share of 76% of the total property. PW1 admitted in his evidence that there is no demarcation of share of the deities with the individual share. The plaintiff nos. 8 to 12 are not the shebait of the deity and they are the owner of 1/3<sup>rd</sup> undivided share and the deity is the owner of 2/3<sup>rd</sup> share. In cross examination PW1 stated that they have never given permission to sell their portion of the property.

**40.** Therefore it appears that the plea of augmentation of income is mere desire to earn more money or derive surplus financial benefit. Over and above whether plaintiffs actually have the genuineness of the claim have not been established. It is also evident from the cross examination of PW1 that they have other properties in Kolkata but they have not filed any document to that effect. He also does not know whether other account of the deity are regularly maintained or not. No evidence has been brought on record on behalf of plaintiff to show what expenditure is required to be incurred on behalf of the deities. The two vital aspect involving the issue of

building and rebuilding have not been established i.e. the requirement of augmentation of income of the deities and the necessary preparation on the part of the land lord that they have obtained sanction plan or they are collaborates for implanting the project of building and rebuilding by procuring sanction plan of the proposed building and necessary permission from the corporation and other authority.

**41.** In order to pass a decree by the court on the ground of building or rebuilding, he has to satisfy himself about the genuineness of the claim and also about the reality of the claim made by the landlord and this can only be established by looking at all surrounding circumstances as decided in **Netaram's Case** (supra). The requirement of the plaintiffs for building rebuilding must be honest and should not be confined only to the existence of an intention in the mind of the landlord to divest the interest with the object of augmentation of personal income.

**42.** Therefore according to this court, all relevant factors have been taken into consideration in the illustrated and well reasoned judgment passed by the Trial Court and the finding of the trial court in arriving at a conclusion on the point of appellant's eviction on the ground of building rebuilding hardly calls for interference, special when first appellate court has failed to deal with the issues in connection with surrounding circumstances as stated above.

**43.** In view of above, the judgment and decree passed by the trial court and the first appellate court in passing decree of eviction of the appellants from the suit premises on the ground of default is hereby affirmed but the judgment and decree passed by the first appellate court in granting decree

of eviction on the ground of building and re building in TA No. 40 of 1990, is hereby set aside.

**44. SA 98 of 2011** thus stands disposed of.

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

**(Dr. AJOY KUMAR MUKHERJEE, J.)**