(1968) 05 CAL CK 0029

Calcutta High Court

Case No: Appeal from Original Decree No. 226 of 1966

M. Gulamali Abdul Hossain and Co.		APPELLANT
	Vs	
Binani Properties Private Ltd. and Others		RESPONDENT

Date of Decision: May 2, 1968

Acts Referred:

- Bengal General Clauses Act, 1899 - Section 8
- Civil Procedure Code, 1908 (CPC) - Order 6 Rule 6
- Evidence Act, 1872 - Section 101, 106, 17, 18, 31
- Transfer of Property Act, 1882 - Section 106, 108, 109, 114
- West Bengal Premises Tenancy Act, 1956 - Section 13, 13(1), 13(1)(a), 13(1)(b), 13(1)(b)

Citation: 73 CWN 591

Hon'ble Judges: S.K. Mukherjee, J; A.N. Ray, J

Bench: Division Bench

Advocate: A.C. Mitra and Subimal C. Roy, for the Appellant;Amiya Kr. Basu, for the Respondent

Final Decision: Dismissed

Judgement

A.N. Ray, J.

This appeal is from the decree dated 10 August 1966 passed by Bijayesh Mukherjee, J. The decree is in the suit filed by the plaintiff against the defendants for possession of the premises mentioned in annexure A to the plaint and a decree for the sum of Rs. 16,500/- as arrears of rent and manse profits at the rate of Rs. 150/- per diem from 1 May 1959 until delivery of possession.

2. The plaintiff purchased the premises from Rakhal Das Pramanick in the month of August 1958. The defendant No. 1 Gulamali Abdul Hossain & Co, was a monthly tenant according to the English calendar in respect of the premises under Rakhal

Das Pramanick at a rent of Rs. 2,000/- per month. The plaintiff informed the defendant No. 1 of the said purchase and requested the said defendant to attorn the tenancy in favors of the plaintiff.

3. The plaintiff alleged that the plaintiff reasonably required the premises for the purpose of building and rebuilding and of making substantial additions and alterations. Secondly, the plaintiff alleged that the defendant No. 1 failed and neglected to pay any rent to the plaintiff since 25 Aug. 1958 and that the defendant No. 1 made default in payment of rent more than two months since 25 August 1958. Thirdly, the plaintiff alleged that the defendant No. 1 wrongfully and without previous consent in writing of the plaintiff and of Rakhal Das Pramanick sublet a major portion of the premises to defendants Nos. 2 to 22. In schedule B to the plaint the plaintiff gave particulars of the portions held by the subtenants and the rents paid by them to the defendant No. 1 The plaintiff alleged that among the sub-tenants, defendants Nos. 5 and 6 gave notices to the plaintiff and/or the plaintiff''s predecessor u/s 16 of the West Bengal Premises Tenancy Act, 1956. Fourthly, the plaintiff alleged that the defendant No 1 wrongfully constructed and/or caused to be constructed a permanent mezzanine floor and/or structure in between the celing and the floor of the ground floor of the premises without the consent of the plaintiff and/or the predecessor-in-title. The plaintiff alleged that the defendant did not use the premises as a person of ordinary prudence and/or used the premises for a purpose other than that for which it was leased out and/or has committed other acts of waste which are destructive and/or permanent injuries thereto. Finally, the plaintiff alleged that the said tenancy of the defendant No. 1 was duly determined by a notice to quit dated 18 March 1959 and served on the said defendant on or about 19 March 1959 whereby the said defendant was asked to quit, vacate and deliver vacant and peaceful possession of the premises to the plaintiff on the expiry of the tenancy in the month of April 1959. The plaintiff alleged that the defendant No. 1 was not entitled to protection of the West Bengal Premises Tenancy Act. The plaintiff claimed Rs. 16,500/- as arrears of rent from 25 August 1959 till 30 April 1959 at the rate of Rs. 2,000/- per month. The plaintiff also claimed mesne profits.

4. Written statement was filed by defendant No. 1 other defendants excepting defendants Nos. 11, 13, 18, 20 and 21 filed a joint written statement. Defendant No. 11 filed a separate written statement. Defendants Nos. 13 and 18 also filed separate written statements. It is necessary to refer to certain portions of the written statement. The plaintiff alleged in paragraphs 9 and 10 of the plaint that the defendant No. 1 without the previous consent in writing of the plaintiff and Rakhal Das Pramanick sub-let a major portion of the premises to defendants Nos. 2 to 22. The defendant No. 1 in paragraph 14 of the written statement admitted that defendants Nos. 1 to 22 were subtenants but deined that any sub-letting had been wrongful or without the consent of the landlord or that a major portion of the premises had been sublet as alleged or at all. In the joint written statement of

defendants Nos. 2 to 22 (excepting defendants Nos. 11, 13 18, 20 and 21) the allegations in paragraph 9 of the plaint were substantially denied. The further allegation in the said joint written statement were that defendant No. 1 was a monthly tenant in respect of the premises under the terms and conditions contained in the lease granted by Rakhal Das Pramanick to defendant No. 1 and that the lease authorized the defendant No. 1 to sub-let the whole or any portion of the premises and that various portions had been sub-let by defendant No. 1 to the defendants on various dates, particulars whereof were given in the schedule marked with the letter A. In the said schedule A to the written statements it will appear that defendants Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10, 12; 14, 15, 16, 17, 18, 19 and 22 had become sub-tenants in respect of the portions of the premises forming the subject matter of this suit long before the filing of the written statement in the month of January 1960. The oldest sub-tenant was defendant No. 9 who had been there for 43 years and the youngest sub-tenants were Nos. 8 and 17 who were there for about nine years prior to the filing of the written statement.

5. The defendant No. 11 alleged in paragraph 6 of the written statement that the defendant No. 1 was a monthly tenant under Rakhal Das Pramanick under a lease granted by the said Rakhal Das Pramanick and that the lease authorized the said defendant No. 1 to sub-let. The defendant No. 11 alleged to have become a sub-tenant in the year 1949. The said defendant further alleged that the said tenancy was confirmed by an order of the Additional Rent Controller, Calcutta, in the proceedings instituted by the said defendant on 25 August 1956.

6. The defendant No. 13 alleged in paragraph 7 in the written statement that the sub-letting was made long ago prior to the alleged conveyance dated 25 August 1958 and the same was binding on Rakhal Das Pramanick and the plaintiff.

7. The defendant No. 18 in paragraph 6 of the written statement alleged that the defendant No 1 was entitled to sub-let in terms of the lease granted by Rakhal Das Pramanick and gave particulars of the sub-tenancy in schedule A to the written statement. It will appear that the defendant No. 18 became sub-tenant in respect of several portions of the said premises between the month of June 1955 and the month of March 1958, namely two portions of the premises were sub-let to the said defendant in the month of June 1955 and one portion was sub-let in the month of May 1956, and another portion was sub-let in the month of January 1957 and another portion was sublet in the month of March 1958.

8. It is also necessary to refer to another aspect of the case in the written statement with regard to the allegations made by the plaintiff in paragraph 14 of the plaint as to construction of a permanent mezzanine floor. The defendant No. 1 in paragraph 17 of the written statement answered the allegation by denying that any construction was made wrongfully or without the consent of the landlord and the said defendant further denied in paragraph 17 of the written statement that any construction had been made wrongfully or without the consent of the landlord as

alleged or at all. The defendant No. 1 further stated that any construction, if made was with the full knowledge and consent of Rakhal Das Pramanick and no construction was made after the plaintiff became the landlord. The defendant No. 1 alleged that the plaintiff purchased the property with the alleged constructions, if any. The other defendants alleged that they had no knowledge of the allegations made in paragraph 14 of the plaint and did not admit the same.

9. Another aspect of the plaintiff''s case which also merits reference to the written statement is the allegation in paragraph 16 of the plaint where the plaintiff alleged that the tenancy of the defendant No. 1 was duly determined by notice to quit dated 18 March 1959 and served on the said defendant on or about 19 March 1959 whereby the defendant No. 1 was asked to quit, vacate and deliver over vacant and peaceful possession of the premises to the plaintiff on the expiry of the tenancy in the month of April 1959. The defendant No. 1 in paragraph 19 of the written statement denied the legality, validity and effect of the notice to quit. The other defendants stated that they had no knowledge of the allegations in paragraph 16 of the plaint and did not admit the same.

10. The trail commenced on 20 November 1964 and the suit was thereafter heard for a few days in the month of January 1965 and again in the month of February 1965. The judgment was delivered on 10 August 1966.

11. At the trial fifteen issues were suggested and the learned judge accepted thirteen issues. Of the said thirteen issues one was whether the premises were reasonably required by the plaintiff for the purpose of building and rebuilding. There was an issue as to whether the first defendant defaulted in payment of rent as alleged in paragraphs 8 and 19 of the plaint. The third important issue was whether the first defendant without the previous consent in writing of the plaintiff or Rakhal Das Pramanick sub-let a portion of the premises in controversy. The fourth important issue was whether the first defendant constructed or caused to be constructed a permanent structure to wit a mezzanine floor on the ground floor without the consent of Rakhal Das Pramanick. There was an issue as to whether the notice dated 18 March 1959 was legal or valid.

12. The learned judge gave the plaintiff a decree for vacant possession and a decree for Rs. 16,500/- as arrears of rent and mesne profits at the rate of Rs. 2,750/- a month until delivery of possession or the expiration of three years from the date of the decree whichever occurred first.

13. The learned judge came to the conclusion that defendant No. 1 was was guilty of unauthorized construction and that the defendant No. 1 was a defaulter in payment of rent as alleged by the plaintiff. The learned Judge also came to the conclusion that the plaintiff reasonably required the premises for the purposes of building and rebuilding as alleged in the plaint. As to the plaintiff''s allegation of sub-letting the learned Judge came to the conclusion that there were two instances of sub-letting

subsequent to the West Bengal Premises Tenancy Act, 1956 but the said sub-lettings were not wrongful. The reasons given by the learned judge were that the defendant No. 1 had authority under the lease given by Rakhal Das Pramanick to sub-let and that consent mentioned in the lease was available for the purposes of sub-letting.

14. Mr. Standing Counsel appearing for defendant No. 1 and Mr. Subimal Chandra Roy who followed him both placed in the forefront the contention that the plaintiff''s suit was bad and incompetent by reason of non-compliance with the provisions contained in section 13 (6) of the West Bengal Premises Tenancy Act, 1956. That sub-section is as follows:

Not with standing anything in any other law for the time being in force, no suit or proceeding for the recovery of possession of any premises on any of the grounds mentioned in sub-section (1) except the grounds mentioned in clauses (j) and (k) of that sub-section shall be filed by the landlord unless he has given to the tenant one month''s notice expiring with a month of the tenancy.

15. In order to appreciate this contention it is necessary to refer to the notice which appears at page 351 of the paper-book. The notice is dated 18 March 1959. The notice alleged the name of the client namely the plaintiff and that the notice was in respect of premises No. 81 Netaji Subhas Road. Calcutta and that the plaintiff purchased the premises from Rakhal Das Pramanick and that the defendant No. 1 to whom the notice was given was a monthly tenant under the plaintiff''s predecessor-in-title according to the English calendar at a rent of Rs. 2,000/-per month and that the plaintiff''s predecessor-in-title had requested the said defendant to attorn the tenancy to the plaintiff. The other statements in the notice were that as a result of purchase and the aforesaid request the defendant No. 1 was holding the premises under the plaintiff under the same terms of tenancy and that the said defendant had failed and neglected to make payment of rent since the date of purchase by the plaintiff and that the plaintiff bona fide and reasonably required the said premises for rebuilding. The other statements were that contrary to the contract with the predecessor-in-title of the plaintiff the said defendant had sublet major portion of the premises to various sub-tenants without any consent of the plaintiff and without any right or authority to sub-let. The notice then alleged that in breach of the agreement of tenancy the defendant unlawfully and improperly constructed a mezzanine permanent floor in between the ceiling and ground-floor of the premises. The notice concluded as follows:
Under instructions from my client and on its behalf I determine hereby your tenancy in respect of the said premises on the expiry of your tenancy for the said premises for the month of April 1959. I have to request you to quit the said premises and deliver vacant and peaceful possession of the same to my client on the expiry of your tenancy as aforesaid. In default of your compliance with the requests contained herein above my client will take such steps as it may be advised for your eviction without any further reference holding you responsible for all costs and

consequences. My client will charge mense profits at the of Rs. 150/-perdiem from the expiry of your tenancy as aforesaid till possession is recovered.

Both Mr. Standing counsel and Mr. Roy contended that sub-section 6 of Section 13 of the West Bengal Premises Tenancy Act required notice of suit or proceeding and that the notice in the present case was not institution of suit or proceeding. Emphasis was placed on the words "no suit or proceeding" and it was said that notice had to be given of "suit or proceeding". The notice dated 18 March 1959 was impeached by counsel for the defendants first on the ground that the notice did not allege that the landlord would institute suit or proceeding for recovery of possession. In the plaintiff''s notice the words used were "my client will take such steps as it may be advised for your eviction" and counsel for the defendants contended that the words "such steps as may be advised" meant that the plaintiff would be advised of the steps and the plaintiff would then act according to the advice and therefore the notice alleged of some advice in the future and there was no certainty as to what the advice would be and therefore the words "such steps as may be advised" could not be predicated in relation to suit or proceeding. Secondly, it was said that since the notice alleged that the plaintiff would take such steps as the plaintiff would be advised the defendant was not told what steps the plaintiff was going to take and steps might be for suit or steps might be for forcible possession or steps might be for settlement or steps might be for criminal proceeding and therefore it could not know from the notice itself and on the intrinsic evidence in the notice that it referred to any suit or proceeding for recovery of possession. Thirdly, it was said that the notice stated that the plaintiff would take such steps as the plaintiff would be advised for eviction of the defendant but the notice did not state as to from whom the plaintiff would receive advice namely, whether, it would be advice from lawyers and therefore it could not be said that the notice stated that the plaintiff would take legal steps. In short, it was said that the words "the plaintiff would take such steps as the plaintiff would be advised" could not refer to legal steps for eviction and therefore these words could not be said to refer to suit or proceeding for recovery of possession. Fourthly, it was said that the notice referred to advice to be taken in the future and on 18 March 1959 the date of the notice no advice was taken and therefore the defendant was left to speculate as to what might happen. Finally, counsel for the defendants contended that the provision contained in sub-section 6 of section 13 of the West Bengal Premises Tenancy Act required the landlord to elect as to whether the landlord would take recourse to a suit or to a proceeding and further that the word used in the sub-section was landlord and therefore it was contended that notice could not be given by an agent.

16. Counsel on behalf of the plaintiff contended that it was not open to the defendants to plead that no notice had been given in compliance with the provisions contained in sub-section 6 of section 13 of the West Bengal Premises Tenancy Act. It was said that the provisions contained in Order 6, rule 6 of the CPC contemplated

that anyone who contended the condition precedent had not been fulfilled was required to plead the same. The plaintiff in paragraph 16 of the plaint alleged of a notice to quit. The defendant in paragraph 19 of the written statement to which reference has already been made denied the validity of the notice to quit. The issues which were framed as to notice to quit will appear at page 127 of the paper-book No. 8A and B namely whether the first defendant''s tenancy has been duly determined and is the notice dated 18 March 1959 legal or valid. Counsel for the plaintiff contended that the defendants had not alleged violation of the provisions contained in sub-section 6 of section 13 of the West Bengal Premises Tenancy Act and had not alleged such lack of notice in the written statement if such a notice was required to be a condition precedent to the competency of the suit and no issue had been framed on that specific question and therefore it was not open to the defendant to impeach the validity of the notice dated 18 March 1959 on the ground that it was not a notice in accordance with subsection 6 of section 13 of the West Bengal Premises Tenancy Act. It was also contended by counsel for the plaintiff that if at the earlier stage of the suit a pleading had been taken by the defendants the plaintiff might have given another notice if so required or might have taken such steps as would be necessary for the plaintiff.

17. It appears that the learned judge allowed the parties to place their rival-contentions u/s 13(G) of the West Bengal Premises Tenancy Act and expressed the opinion at page 176 of the paper-book in paragraph 67 of the judgment that the notice was a notice of suit. There is also a finding in paragraphs 97 to 99 of the judgment at pages 203 to 205 that the notice dated 18 March 1959 is legal and valid.

18. Ordinarily these questions of invalidity of notice on the ground of non-compliance with the provisions of a statute should be specially pleaded. In framing issues it is also necessary to bring to the forefront the exact infraction or non-fulfillment of the provisions of the statute. The law of pleading and the framing of issues required exactitude and should not permit laxity. In the present case in view of the fact that elaborate arguments were made in the trial Court and again similar contentions were advanced at the hearing of the appeal and the question being one in the ultimate analysis of construction of the notice in the light of the provisions of the statute it will not be desirable to shut out the plaintiff purely on the ground of lack of pleadings or want of issues at the hearing of the appeal.

19. At the outset the contention on behalf of the defendants that notice is required to be given by the landlord may be dealt with. To accede to the contention on behalf of the defendants that notice by the solicitor is not permissible is to hold that the law of agency is wiped out. The construction of a non-obstinate clause came up for consideration of the Supreme Court in the case of (1) Aswini Kumar Ghosh and Another Vs. Arabinda Bose and Another, . The Supreme Court said at page 21 of the report that the meaning of the non-obstante clause should first be ascertained as to what the enacting part of the section provides on a fair construction of the words

used according to their natural and ordinary meaning and the non-obstante clause is to be understood as operating to set aside as no longer valid anything contained in relevant existing laws which is inconsistent with the new enactment. In the light of these observations of the Supreme Court the construction of non-obstante clause does not wipe out the law of agency. Therefore a notice by the solicitor of the plaintiff is valid.

20. Counsel for the plaintiff referred to the meaning of the word proceeding in Stroud''s Judicial Dictionary, 3rd Edition, Volume III, page 2309 where the words "any proceeding" occurring in Judicature Act are said to be equivalent to any action. The word action means a civil proceeding. Suit is a civil proceeding. The word suit or proceeding are used in sub-section 6 of section 13 of the West Bengal Premises Tenancy Act, 1956, to refer to civil proceedings in a Court of law. Possession of the premises could be either by suit instituted in the High Court or any other civil court or by taking recourse to proceeding in the Small Cause Court Act. In Stroud''s Judicial Dictionary, Volume IV, page 2923, it will appear that a suit is really synonymous with proceeding. Suit or proceeding is the procedure that the landlord will resort to.

21. The core of the matter is whether the notice dated 18 March 1959 can be said to amount to a notice that the landlord has given that suit or proceeding shall be filed for the recovery of possession. In the first place, this is a solicitor''s notice. A solicitor''s notice is to be understood by the person who receives it as a solemn notice of legal steps. Secondly, the solemnity of the document is established first by the fact that it is sent under registered cover with acknowledgement due and a duplicate of the notice is delivered by Peon-book. Thirdly, the notice dated 18 March 1959 refers to all the four grounds of eviction namely that there has been default with regard to payment of rent, the landlord requires the premises for rebuilding, there has been unlawful sub-letting and there has been unlawful construction of mezzanine permanent floor. It will appear from the oral evidence of Kalidas Sarkar the general assistant of the defendant No. 1 in questions 192 to 193 that the witness said that he was acquainted with the provisions of the West Bengal Premises Tenancy Act. Exhibit 7 which is dated 21 March 1959 and which appears at page 330 of the paper-book shows that the defendant stated in the letter that rent would be deposited with the Rent Controller in the event of the landlord''s non-accepting the rent. The oral evidence of Kalidas Sarkar as also the letter dated 29 March 1959 shows that before the receipt of the plaintiff''s notice dated 18 March 1959 on 23 March 1959 as will appear at page 353 of the paper-book, the defendant knew of the consequences of failure to pay rent as also of the import of the consequences of the provisions of the West Bengal Premises Tenancy Act.

22. In the Special Bench decision of (2) Abdul Samad Bepari Vs. Manasha Charan Bakshi, , Bachawat, J. said that the notice is to be judged with reference to the information conveyed by the landlord to the tenant who is conversant with the facts

and circumstances of the case.

23. Counsel for the defendant relied on the decisions in (3) Dulin Chand Dutta Vs. Sm. Renuka Banerjee, , (4) Subodh Chandra Singha Vs. Santosh Kumar Srimani, and (5) Mohammed Yusuf Vs. Ram Chandra Singh and Another, , in support of the contention that a notice under sub-section 6 of the section 13 of the West Bengal Premises Tenancy Act has to be in strict compliance with the provisions. Reliance was also placed on the observations of the special bench in (2) Suraya Properties case at pages 982, 985, 986, 995, 1001, 1003, 1005, 1010, 1016 of 67 CWN in support of the said contention. In Suraya Properties case (supra) the notice which came up for consideration was found to be a notice which gave the information that the landlord intended to file a suit or proceeding for recovery of possession of the premises. In (3) Dulin Chand Dutta Vs. Sm. Renuka Banerjee, the notice was described as a notice of ejectment and the defendant was asked to quit and vacate the disputed premises and the ground was stated that the disputed property was purchased by the plaintiff for her own occupation. The notice was held not to be a notice in accordance with the provisions of section 13(6) of the West Bengal Premises Tenancy Act. The ratio of the decision in Dulin Chand Dutta''s case (supra) is that the mere mention of the ground of ejectment would not make a notice to quit a notice of suit under the said section. In Dulin Chand Dutta''s case (supra) it was said that in deciding whether the notice was a notice of suit expressly or by implication it had to be found out from the words of the notice as to whether the landlord gave notice of a suit. It was said that a notice to quit would not by itself be a notice of suit. The mere mention of the ground of ejectment in a notice to quit was not held to amount to a notice of suit. In (4) Subodh Chandra Singha Vs. Santosh Kumar Srimani, the notice was that the plaintiff purchased the premises and the plaintiff terminated the defendant''s tenancy. The plaintiff mentioned the ground of reasonable requirement in the notice. The notice was held to be bad in relation to section 13 of the W. B. P. T. Act of 1956. In (5) Mohammed Yusuf Vs. Ram Chandra Singh and Another, the notice was a notice which called upon the defendant to quit, vacate and deliver up peaceful vacant possession to the landlord on the expiry of the period mentioned or else instructions were to adopt legal proceeding. That was held to be a good notice. Relying on these authorities counsel for the defendant contended that these decisions indicated that mere notice to quit would not suffice and it was incumbent to specify in a notice that a suit would be filed.

24. In the case of (6) Durgarani Devi v. Mohiuddin and others, reported in 86 CLJ 198, Bachawat, J. said at page 218 of the report that the test of sufficiency of the notice is not what it would mean to a stranger ignorant of all the facts and circumstances touching the holding but what it would mean to the tenants presumably conversant with all the facts and referred to the decision of the judicial committee in (7) Harihar Banerjee v. Ramsashi, reported in 45 IA 222, in support of that proposition. These decisions are in relation to notice u/s 106 of the Transfer of Property Act but the logic and the principle of these decisions should apply to notices given by landlords

to tenants unless any provision of the statute repels the application of these principles.

25. In the present case the notice stated that in default of compliance the plaintiff would take such steps as the plaintiff would be advised for the eviction of the defendant without any further reference holding the defendant responsible for all costs and consequences. Steps for eviction indicate eviction by legal process. It cannot be said that steps for eviction would mean settlement or forcible possession or criminal proceedings. Forcible possession would be something illegal. As Bachawat, J. said that a notice will have to be construed to uphold its validity. It cannot be said that a notice was given that the plaintiff would take illegal steps. The notice further stated that steps would be taken for eviction without any further reference and the defendant would be held responsible for all costs and consequences. Steps for eviction and holding the defendant responsible for costs and consequences imply recovery of possession through Court of law. Costs are recovered through a court of law. Costs indicate that the plaintiff will institute suit or proceeding for recovery of possession through a Court of law. Again, the notice concluded by stating that the plaintiff will charge the defendant mesne profits at the rate of Rs. 150/-perdiem. Mesne profits are awarded by a Court of law. Mesne profits again indicate that the plaintiff will file or institute suit or proceeding for recovery of possession. It was said in (5) Mohammed Yusuf Vs. Ram Chandra Singh and Another, that the words the instructions are to adopt legal proceedings indicated legal proceedings or contemplated nothing less than a suit for eviction. Counsel for the defendant contended that the words legal proceedings in Mohammed Yusufs case (supra) were different from the words used in the present case. The words used in the present case are steps for eviction and the further words are that the defendant will be held responsible for costs and consequences and the concluding words are that the plaintiff would charge the defendant mense profits. These features have the over whelming and cumulative effect of establishing the indisputable intention of the plaintiff by the intrinsic evidence contained in the notice that the landlord plaintiff would institute suit or proceeding for recovery of possession. It is manifest that costs and mesne profits repel any suggestion of criminal proceedings. There is notice of suit for recovery of possession and the grounds are also stated. I am therefore of opinion that the suit is valid and competent and there is no infraction of the provisions of sub-section 6 of section 13 of the West Bengal Premises Tenancy Act.

26. I shall now deal with the question as to whether the plaintiff is entitled to possession of the premises on the ground of reasonable requirement of the plaintiff for building or rebuilding. The relevant provisions of the West Bengal Premises Tenancy Act are to be found in section 13(1) (f) of the West Bengal Premises Tenancy Act, 1956 where it is said that recovery of possession can be had where the premises are reasonably required by the landlord either for the purposes of building or rebuilding or for making substantial additions or alterations or for his own

occupation if he is the owner or for the occupation of any person to his benefit. The case pleaded by the plaintiff is that the premises are reasonably required by the plaintiff for the purposes of building and rebuilding and for making substantial additions or alterations. There is evidence that the plaintiff purchased the premises and the rent is not economical. The learned judge dealt with the question of requirement of the premises in paragraph 137 following of the judgment.

27. Counsel for the appellants defendants contended first that the plaintiff did not produce any resolution to borrow money for the purpose of construction, secondly, that the plaintiff did not produce any resolution authorizing demolition of the building, thirdly that the plaintiff did not produce any resolution that the plaintiff required it and fourthly, that there was no record of the company produced to show that the company wanted to rebuild and finally there was no resolution of the company authorizing getting the plans sanctioned by the Corporation.

28. The indisputable evidence is that the price of the property was Rs. 3,50,000/-. The plaintiff borrowed the money from a sister concern. There is evidence that a sum of Rs. 5,00,000/- was required for construction. It is to be noticed that in the 1956 West Bengal Premises Tenancy Act there is no provision as in the 1950 Act regarding comparative advantages and disadvantages of the landlord and the tenant in relation to reasonable requirement of the premises. Reference may be made to section 12(1) (h) of the provisions of the West Bengal Premises Rent Control Act, 1950 and the explanation there of.

29. There is oral evidence in the present case that there is requirement by the plaintiff. The plaintiff is a private company which is desiring to invest money in an office area where vacant land is unobtainable. The plaintiff chose a hundred-years old building and paid Rs. 3,50,000/-. The gross rent is Rs. 2,000/-. It will appear from the oral evidence of the plaintiff in question No. 19 that the plaintiff purchased the premises with the intention of demolishing the existing structure and rebuilding a multistoried structure. It is also the evidence in questions 3 to 10 of Binani that the plaintiff company is really a family concern consisting of the father, the wife, the plaintiff himself and one Chunilal Gandhi. These are the four directors. There is oral evidence that a plan was submitted and loan was arranged. There is also evidence that estimates were taken. The affairs of the company are in the hands of these four directors. It is a family concern and the lack of a formal resolution will not prevent a company either from becoming the owner of the property or from having a multistoried building. It is said that the brain and the hands of the company are to be found in the directors. In the present case the directors are all members of a family. Their acts are writ large in acquiring the property and in developing it. I am satisfied beyond any doubt on the evidence that the plaintiff has established that the plaintiff reasonably requires the building as alleged in the plaint. The plaintiff is therefore entitled to succeed on this point.

30. Another question is whether the plaintiff is entitled to succeed on issue No. 7 namely whether the first defendant, constructed or caused to be constructed a permanent structure to wit a mezzanine floor. It should be stated here that the issue was framed as to whether the first defendant constructed a permanent structure. Criticism was made by counsel for the defendants that the way in which the issue was framed was wrong because the plaintiff alleged that the defendant constructed a permanent structure and the defendant in the written statement denied that the defendant constructed any structure as alleged or at all and therefore there was no admission that it was a permanent structure. Counsel for the defendants contended that there was no evidence of construction of any permanent structure and that the construction was in the year 1950 prior to the 1956 Act and therefore the plaintiff was not entitled to succeed. I have already referred to the state of pleadings on this question. The plaintiff alleged construction of a permanent structure in paragraph 14 of the plaint. The defendant No. 1 in paragraph 17 denied that any construction had been made as alleged or at all. Permanent structure is a question of fact. Facts are to be dealt with in the written statement. In dealing with issue No. 7 the learned judge expressed the opinion that it was a permanent mezzanine floor and it was admitted by the defendant under the law of pleading. Mr. Basu appearing for the plaintiff invited our attention to the issues which were presented to the Court by the respective parties. Counsel for both parties accepted the position that the issue was raised on the question in the form as to whether the defendant constructed a permanent structure. No issue was specifically and separately raised as to the permanent character of the structure. In my view, counsel for the plaintiff is right in his contention that permanent structure is not specifically denied. There is denial of a construction as alleged or at all. That means there was no construction. At the time of framing of issues the court relied on parties to raise issues. In view of the fact that both parties raised the issue in the form in which it appears I am of opinion that it is no longer open to the defendant to contend that the learned judge was not entitled to raise issue in that manner. Nor is any ground of appeal specifically taken that the learned judge should not have raised the issue in that manner.

31. Kalidas Sarkar in his oral evidence in questions 269 & 270 spoke of the fact that he was entrusted with all the work because it had to be done in English and the transaction was done through him. Kalidas Sarkar said that he had the oral consent of the landlord in regard to the construction. The learned Judge however rightly disbelieved the oral evidence of Kalidas Sarkar on the question of oral consent. Counsel for the defendants did not impeach that find in his argument. It can therefore be stated that the only argument that was advanced by the company for the defendant was that the learned judge should not have framed the issue in the manner in which it has been framed and there is no evidence of permanent structure. The word permanent implies that it is not transitory. The construction of a mezzanine floor is established on evidence. The evidence is that it was constructed in the mid-century that is 15 years before the trial. It is also in evidence that it was in

existence at the time of the trial. A construction which stays for 15 years can be said to have an element of permanence in accordance with the ordinary meaning of the word.

32. An argument was advanced by counsel for the defendants that the provisions contained in section 13 (1)(b) of the West Bengal Premises Tenancy Act, 1956 are that where the tenant has done any act contrary to the provisions of clause (m), clause (o) or clause (P) of section 108 of the Transfer of Property Act, 1882 there can be a decree for the recovery of possession and the words "has done any act" were contended to contemplate an act after the 1956 Act came into force. In the light of the evidence as to the time of construction and also the fact that the construction has been used for a long time it is established that it is a permanent construction. Further the 1948 and the 1950 Rent Acts prohibited construction of the offending type. The words "has done any act" contemplate a completed act because the provisions were there under the old Rent Acts of 1948 and 1950. Therefore the provisions contained in section 13(1) (b) are attracted to entitle the plaintiff to recovery of possession on that ground.

33. One of the issues was whether the first defendant without the previous consent of Rakhal Das Pramanick sub-let portion of the premises in controversy. This issue is important. It did not raise the questions as to when there was sub-letting and secondly whether there was previous consent to such sub-letting. I have already referred to the pleadings on this question. Counsel for the defendants contended that the defendant No. 1 admitted subletting and the defendants Nos. 2 to 22 except defendants Nos. 11, 13, 18, 20 and 21 in their joint written statement admitted sub-letting prior to the 1956 Act and therefore all the sub-tenancies mentioned in the written statement were prior to 1956 Act and therefore there was no violation of the provisions contained in the relevant section of the 1956 Act. Counsel for the plaintiff on the other hand contended that sub-letting was admitted by defendant No. 1 and it would appear from the written statement of defendant No. 18 that a portion of the premises was sublet after 1956 and therefore on that admission there was infection of the provisions of 1956 Act and the plaintiff was entitled to succeed. I am unable to accept either of the contentions. In the first place, the defendant did not proceed to trial on the basis that the sub-tenancies were prior to 1956. The defendant did not admit those subtenancies nor did the defendant require the plaintiff to admit those subtenancies as alleged in the joint written statement. The plaintiff also did not rely on any alleged admission. Counsel for the plaintiff contended that under the provisions of sections 17 and 18 of the Evidence Act the written statement of defendant No. 18 was to be accepted an admission. It is well settled that admissions in pleadings are to be taken in their entirety. In the present case the pleadings were not taken as admission. That does not appear from the judgment nor does the issue suggest that. Any document in order to be established as an admission is to be introduced into evidence by tendering that piece of admission if it is in the nature of document. In the present

case there was no such tender of document. The necessity of the tender of a document is important because it will give the parties an opportunity to test that which is going to be used against them as admission. Again section 31 of the Evidence Act indicates that admissions are not conclusive proof of the matters admitted but they may operate as estoppels under the provisions contained in the Evidence Act. The reason for section 31 of the Evidence Act is to give the parties an opportunity of dealing with admissions alleged to utilize or use as admission to show the circumstances under which it came into existence.

34. In the present case the question as to sub-letting in the form in which the issue has been raised was recognised by the learned judge himself to be embarrassing. The learned Judge in paragraph 102 of the judgment referred to the question of sub-tenancies and expressed the opinion that under the provisions contained in section 106 of the Evidence Act the onus of proof was on the defendants to show as to when the sub-tenancies were created. This is a very important question as to whether the onus of proof of creation of sub-tenancies will be on the defendant. The issue as framed in the present case is whether the first defendant without the previous consent in writing sub-let. There was no issue as to the time when sub-letting was done. It is a question of great importance namely the time when the sub tenancies were created. A party in order to succeed on the question of subletting as to alleged sub-letting is to allege that such sub-letting has been after the 1956 Act came into existence. When there has been such allegation the party against whom the allegation is made will deal with it. The law of pleading requires exactitude. The framing of issues also requires certainty and the law of proof requires "fundamentals of fair play" and giving full opportunities to the parties to deal with the case. In the present case, the way in which the issue has been framed no justice can be done to the case of the plaintiff or to the case of the defendant. Looking at the issue one will search in vain for the year of creation of sub-tenancies. The opinion of the learned judge that the sub-tenancies were created in 1956 rested on laying the onus of proof u/s 106 of the Evidence Act on the defendants. That finding as to onus of proof cannot be accepted in the facts and circumstances of the case because of the way the issue has been framed. That finding is set aside.

35. The other finding of the learned judge that the consent that is required with regard to such sub-letting under 1956 Act can be a consent before the Act came into existence is also aside in the present case because of the form in which the issue has been raised. If there was no issue as to the time when subtenancies came into existence and if that finding perishes the finding as to consent cannot also remain. Two very important questions are raised in connection with the sub-letting. First, whether the consent that is contemplated in section 14 of the Act has to be a consent after the commencement of the Act or it can be a consent before the Act came into existence. Secondly, whether in the case of holding over by a tenant whose lease contained power to sub-let it can be said that after expiry of the lease holding over at the time of the creation of the sub-tenancy would operate as a

written consent on the strength of the term of the lease. It is not necessary to go into any of these questions in the present case because the plaintiff has not proved the case of sub-letting in accordance with the provisions of the Act. The plaintiff has not proved that there was subletting in violation of the provisions of the 1956 Act.

36. In paragraph 104 of the judgment the learned judge expressed the opinion in favour of the contention that the age of the sub-tenancies not having been pleaded and no pleading having been taken either way by the first defendant that the sub-tenancies are pre-Act ones or by the plaintiff that the sub-tenancies are post-Act ones no amount of evidence can be looked into upon a plea which was not put forward. Thereafter the learned judge held that though no specific issue was there, arguments were advanced and therefore the learned judge was free to adjudicate upon the question whether the sub-tenancies were pre-Act or post-Act sub-tenancies. Finally the learned Judge held that the plaintiff could not have knowledge of the creation of subtenancies and it was within the knowledge of the defendants. The learned judge said that the onus lay on the first defendant to prove that the sub-tenancies were pre-Act ones and that the first defendant did not discharge that onus and therefore the finding must be that the subtenancies were not pre-Act ones but post-Act ones. This finding cannot be supported. As I have already indicated there was no issue between the parties as to when the sub-tenancies were created. If there was no issue it could not be said that the onus to prove was on the defendant or that the defendant did not discharge that onus and therefore it could be presumed that they were post-Act sub-tenancies. No abstract proposition should be laid down irrespective of the facts and circumstances of the case. I do not read the finding of the learned judge to mean that the onus to prove the sub-tenancies will be upon the tenants. If that be suggested such finding cannot be supported.

37. It should be noticed that the learned judge framed the issue as to whether the first defendant without the previous consent in writing of the plaintiff or Rakhal Das Pramanick sub-let a portion of the premises. The learned judge in the judgment noticed that the issue should have been raised in the form. "If so when? Before or after 31 March, 1956?" The learned judge in paragraph 101 of the judgment said that for the defect in the form of the issue the Court was blameworthy. After having made this observation the learned Judge said that the question as to when the sub-tenancies were created had to be faced. The learned Judge said. "I say, the question as to when so many sub-tenancies were created has to be faced, though the issue I am on now does not face it. But faced it has been, issue or no issue in the course of the trial. Evidence has been led on the point. Arguments have been advanced too. So, what does it matter that the issue is not what it should have been. Here is a case where the parties go to trial with the full knowledge that the question of "Pre-Act" sub-tenancies versus "Post-Act" sub-tenancies is at issue though no specific issue to that end has been framed, adduce evidence thereon and argue their cases just on that basis. That is enough to mend the defect which exists in the

form of the issue. "I am unable to accept the reasoning and the conclusion of the learned Judge. The question which is important at the time of framing of the issue is that the parties must know on whom the onus of proof lies. The creation of the sub-tenancies as I have indicated earlier is essentially a question of fact. It will not be just and proper to say that evidence has been led and therefore the issue should be answered in the light of the evidence as the learned Judge suggested. Counsel for the plaintiff submitted that it was not possible for the plaintiff to know when sub-tenancies were created. If they were not in a position the matter should have been decided at the trial and the onus should have been left on the proper party in the light of the controversies in the suit. It is necessary to refer to the observations of Bowen, L.J., in (8) Abrath v. The North Eastern Railway Company, 11 Queen''s Bench Division 440 at page 457-''Wherever a person asserts affirmatively as part of his case that a certain state of facts is present or is absent, or that a particular thing is insufficient for a particular purpose, that is an averment which he is bound to prove positively. It has been said that an exception exists in those cases where the facts lie peculiarly within the knowledge of the opposite party. The Counsel for the plaintiff has not gone the length of contending that in all those cases the onus shifts, and that the person within whose knowledge the truth peculiarly lies is open to prove or disprove the matter in dispute. I think, a proposition of that kind cannot be maintained, and that the exceptions are supposed to be found amongst cases relating to the game laws may be explained on special grounds." In the same case Bowen, L.J. said at p. 456 of the report that the test as to the burden of proof or onus of proof is that the question should be asked as to which party would be successful if no evidence or if no more evidence is given at a particular point of the case. It is obvious that any person who asserts affirmatively sub-letting is to prove that and similarly a person who alleges sub-letting at a particular point of time is also called upon to prove that. The learned judge in the present case was in error in holding that the onus of proof of sub-tenancies was on the sub-tenants. Section 101 following in the evidence Act deals with the question of burden of proof and section 106 does not relieve any person of that duty or burden but means that when a fact to be proved (whether affirmative or negative) is peculiarly within the knowledge of a party it is for him to prove it. There is to be evidence in that behalf. Cases are to be made. Pleadings should be on that basis and the controversy between the parties should be raised in that form. The finding of the learned Judge as to onus of proof is set aside and as a consequence the finding of the learned judge as to consent is also set aside.

38. The last question is whether the plaintiff is entitled to succeed on the question of allegation or default in regard to payment of rent. The plaintiff purchased the premises on 25 August 1958. The first tender of rent for the months of August 1958 to February 1959 was on 21 March 1959. It was said that before 3 February 1959 the defendant tenants did not known of the plaintiff having purchased the premises. Reliance was placed on the letter of attornment dated 31 January 1959 which will be

found at page 323 of the paper book. At one stage it was contended by counsel for the defendants that unless attornment was made and unless notice of attornment was given the tenants were not required to pay rent. In view of the provisions contained in section 109 of the Transfer of Property Act that contention was not pursued.

39. It will also appear from exhibit A which is at page 339 following of the paper-book that the joint receivers were in possession of the premises Which were purchased by the plaintiff. The defendant paid rent to the joint receivers up to 24 August 1958. It is significant that the defendant paid rent to the joint receivers up to that date which was the date of purchase of that property of the plaintiff. Exhibit G at page 379 of the paper-book establishes that fact. The question naturally arises as to why rent was paid to the joint receivers up to 24 August 1958. It is established in the oral evidence of Kalidas Sarkar in question 149 following that it was curious as to why rent was demanded for 24 days only by the joint receivers. In question 172 following:

Kalidas Sarkar said that he knew the Binanis namely the plaintiffs for 25 years. The oral evidence of Kalidas Sarkar is that the Binanis the plaintiffs posted a darwan at the premises for some time in the month of February or March, 1959. It will appear from exhibits H "1" & H "2" at pp. 380 & 381 of the paper-book that after 25 Aug. 1958, the receivers did not accept any rent. That was the allegation of the defendant. The question of knowledge of purchase of the premises is, in my opinion, irrelevant. The defendants were liable to pay rent. The learned judge has found that the defendants were defaulters in respect of rent from 25 August 1958 up to the month of February 1959. The learned judge gave the plaintiff decree and held that the defendants were not entitled to any relief of protection under the West Bengal Premises Tenancy Act.

40. The West Bengal Premises Tenancy Act, 1956 enacts in section 13 (1) that notwithstanding anything to the contrary in and other law, no order or decree for the recovery of possession of any premises shall be made by any court in favour of the landlord against the tenant except on one or more of the grounds enumerated in clauses (a) to (k) of that section. Clause (i) there of states that where the tenant has made a default in payment of rent for two months or for two successive periods in case where rent is not payable monthly, there can be order or decree for recovery of possession. In sub-section 4 of section 17 of the West Bengal Premises Tenancy Act as it stood prior to the amendment it enacted that if a tenant made deposit of payment as required by sub-sec. 1 or sub-sec. 2 of sec. 17 no decree or order for delivery of possession of the premises to the landlord on the ground of default shall be made by the Court but the Court may allow such costs as it may deem fit. Sub-section 4 of section 17 had the following proviso: "Provided that a tenant shall not be entitled to any relief under this subsection if he has made default for four months within a period of 12 months". Therefore, under the West Bengal Premises

Tenancy Act 1956 as it stood prior to the amendment thereof in 1968 there could be a decree for the recovery of possession where the tenant made default in payment of rent for two months within a period of 12 months, but if u/s 17 of the West Bengal Premises Tenancy Act the tenant after the institution of the suit deposited in Court or with the controller or paid to the landlord the relevant amount for the period for which the tenant might have made default including the period subsequent thereto and thereafter continued to deposit or paid month by month the sum equivalent to rent and also deposited or paid interest on the arrears, the tenant would be entitled to relief under sub-section 4 of Section 17 of the West Bengal Premises Tenancy Act, 1956, namely that there would be no decree for delivery of possession on the ground of default. The mere fact of deposit would not entitle the tenant to relief if the tenant fell within the mischief of the proviso namely that a tenant was a defaulter in payment of rent for four months. The learned judge came to the conclusion that the plaintiff was entitled to succeed and the defendant was not entitled to protection because of the operation of the proviso to sub-section 4 of section 17 of the 1956 Act.

41. It was contended by counsel for the defendants that the West Bengal Premises Tenancy (Amendment) Act, 1968 had the effect of disentitling the landlord to any decree and entitling the tenant to the benefit of protection under the West Bengal Premises Tenancy Act in the sense that the tenant would be entitled to relief once under subsection 4 of section 17. As a result of the amendment of the West Bengal Premises Tenancy Act, 1968 the proviso to sub-section 4 of section 17 is as follows: 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 12 months. Counsel for the appellants contended first that the appellants had not obtained any relief but that the Act made it imperative that the tenants were to obtain relief. Secondly, it was argued that the proviso as it now stood was that if having obtained relief once in respect of the premises the tenant again made default in the payment of rent for four months within a period of 12 months, the tenant would not be entitled to any relief and that in the present case the appellants not having obtained any relief there could be no question of the tenant again making default in the payment of rent after having obtained relief.

42. The West Bengal Premises Tenancy (Amendment) Act, 1968 contains several changes. In section 17 of the West Bengal Premises Tenancy Act there is, in the first place, a new sub-section 2A. That new sub-section 2A provides inter alia first, that the time limit for deposit of arrear of agreed rent u/s 17(1) and all arrears of admitted rent u/s 17(2) may be extended on the application of the tenant and secondly in case of deposit of the rent u/s 17(1) the Court may also direct instalments carrying interest. Under sub-section 2 of section 17 of the West Bengal Premises Tenancy Act prior to the 1968 amendment there was no power to grant instalments. Secondly, there is a new sub-section 2B in section 17 of the same Act.

The new sub-section 2B provides inter alia that the application for extension of time under the new section 17 (2A) has to be made before the expiry of the time specified in the original sections 17(1) and 17(2). The time mentioned in sections 17(1) and 17 (2) is within one month from the date of service of the writ of summons. Counsel for the plaintiffs contended that the new sub-sections 2A and 2B which spoke of application after the expiry of one month from the date of service of the writ of summons could not apply to pending appeals. The reason why counsel referred to this sub-section was in aid of the argument that the amendment to sub-section 4 of section 17 of the Act would not interfere with rights accrued and the obligations incurred and would not interfere with vested rights and obligations in appeal.

43. Counsel for the plaintiff appellants also contended that as a result of the amendment there were new sections namely 17A, 17B and 17C. The new section 17A confers power on the court to set aside an order striking out the defense against delivery of possession made under the old section 17(3) on an application made within 30 days from the date of commencement of the Act. That new section 17A further confers power on the Court to direct deposit of arrears within 30 days from the date of the order on which deposit being made the defense would revive. It should be noticed that the defense was struck out under old section 17(3) for failure to deposit or pay rent u/s 17 (1) or 17 (2) of the West Bengal Premises Tenancy Act, 1956. Counsel for the plaintiff appellants contended that the new section 17A contemplates arrears of less than 4 months within a period of 12 months.

44. The next contention of counsel for the plaintiff respondents was that the new section 17B confers power on the court to set aside decree in cases where defense against delivery of possession was struck out. The most significant feature of the new section 17B is what appears in sub-sections 4 and 5 of the new section 17B. Those provisions are that if the tenant deposits the amount ordered by the Court, the court shall allow an application under subsection 1 of section 17B and set aside the decree for the recovery of possession passed in the suit and order made under sub-section 3 of section 17 striking out the defense against delivery of possession and fix a date for hearing of the suit. In other words, in cases where defense had been struck out section 17B confers power on the court to restore the defense on certain conditions namely, that there is deposit of rent as contemplated in the new section and then the court would fix a date for proceeding with the hearing of the suit.

In sub-section 5 of section 17B it will appear that if the tenant fails to deposit the amount directed by the Court under new section 17B the application shall be dismissed.

45. The effect of the new section 17C is that deposit u/s 17A or section 17B will for the purpose of subsection 4 of sec. 17 be deemed to have been duly made as required by subsection 1 and sub-section 3 of section 17. The result is that in

decrees which were ex parte by reason of defense having been struck out, there will be restoration of defense upon deposits being made and the court will proceed with the hearing of the suit. The result will be that tenants whose defenses were struck out will be entitled to relief under sub-section 4 of section 17 of the Act. Defences were struck out in cases involving default of less than 4 months within a period of 12 months. The reason why I have referred to these new sub-sections is to keep in view the cases of tenants who never paid any rent and against whom there were decrees tenants were being given certain relief''s under the amendments to the Act.

46. In the light of these new sections is to be read section 5 of the West Bengal Premises Tenancy (Amendment) Act, 1968 which enacts that the amendments made to the principal Act by section 2 including the amendments to sub-section 4 of section 17 shall have effect in respect of suits including appeals which are pending at the date of commencement of this Act.

47. Counsel for the plaintiff respondents contended that the combined effect of sections 2 (3) (b) and section 5 of the West Bengal Premises Tenancy (Amendment) Act, 1968 is that if in any pending suit or appeal the conditions laid down in the new proviso are present the tenant shall not be granted relief under sub-section 4 of section 17 of the Act, and that these provisions I do not purport to interfere with cases where relief was not available under the old Act. In other words reliance was placed on section 8 of the Bengal General Clauses Act 1899 namely, that the old proviso has been repealed with the consequence that the decree subsists in cases of pending appeal and there was no intention to interfere with the decree as in cases falling under the new sections 17A and section 17B. The second contention of counsel for the plaintiff respondents was that if the proviso introduced into sub-section 4 of section 17 of the West Bengal Premises Tenancy Act by amendment applied a tenant could obtain relief once for two or three or four months as the case might be but if he again committed default for four months he would not be entitled to any protection.

48. The recent amendment came up for consideration in the two recent Bench decisions: (9) Gour Dev Mukherjee Vs. Purnima Devi and Others, and (10) Messrs. Bata Shoe Company Private Limited v. Mussammat Ayesha Bibi Matwalli, reported in 72 CWN 241. In Gour Dev Mukherjee''s case the tenant preferred an appeal against a decree for ejectment. In Gour Dev Mukherjee''s case, the appeal by the tenant was against a decree of ejectment passed in a suit instituted on 23 December 1959. The tenant entered appearance in the month of May 1960. The tenant made an application for determination of the amount payable and he raised a dispute denying the plaintiffs claim that the tenant was a defaulter. The amount was determined and there was an order u/s 17(2) of the West Bengal Premises Tenancy Act. The amount was deposited by the tenant defendant in the trial court on 12 March 1964 within the time determined by the court. Thereafter the suit proceeded to the trial. The learned Judge there was of opinion that the tenant was a defaulter

for more than four months namely, June, July, August and September 1959 and upon that footing it was held that the tenant was not en titled to benefit of section 17(4) of the Act. An appeal was preferred against that decree. The appeal was dismissed. Thereafter on appeal was preferred from the appellate decree and the second appeal was heard by this Court. The second appeal was the subject of a Bench decision. By that time the law had undergone change and the new proviso to sub-section 4 of section 17 was introduced. It was said in the Bench decision "in the instant case there is no doubt on the materials before the Court that there has been no second default for four months on the part of the tenant and he has complied with the provisions of section 17(2) read with section 17(1) in the matter of the relevant deposits. Accordingly, in view of the change of law noticed above the decrees for ejectment passed by the two courts below cannot stand and the said decrees must be set aside." Counsel for the plaintiff respondents contended that the Bench decision was an authority for the proposition that if in the same case there had been no second default for four months then the tenant would be entitled to protection. Counsel for the appellant defendants contended that the Bench decision did not hold that the second default for four months was referable to default in the same suit but contended that the second default was referable to default in a second suit or a subsequent suit after the tenant had obtained relief in the suit to which the Act applied.

49. In the (10) Bata Shoe Company case reported in 72 CWN 241 the tenant preferred an appeal in a suit for ejectment on the ground of default in payment of rent. The landlord alleged that the tenant defendant was a defaulter for more than four months namely from January 1959. The suit was instituted on 5 August 1959. The defence was that the tenancy was such that rent was payable quarterly and that the tenant was not a defaulter. The trial court found that the tenant was a defaulter for the months of January, February, March, April and May, 1959 and further that even if the tenant could be said to be one who was liable to pay rent quarterly the tenant would still be a defaulter for two quarters January to March 1959 and from April to June 1959 as the rent was payable in advance and the rent for the quarters was not tendered before the end of the particular quarter concerned. It was held in the Bench decision of Bata Shoe Company that on the materials the findings of the trial court could not be challenged and in any view the tenant would be a defaulter as a monthly tenant for more than four months and as a tenant who was liable to pay rent quarterly there would be default in the payment in rent for two quarters. Counsel for the defendants contended that the Bench decision in Bata Shoe Company case was in the special facts and circumstances of the case and on the admission by counsel for the tenant that the terms of the amendment could not be extended to the circumstances of the case. I am unable to accept the contention that court would not allow relief under the statute if a tenant was entitled to such relief.

50. The Bench decisions do not support the contention of counsel for the plaintiff respondents that the amendments will not apply to pending appeals. Section 5 of the Amendment Act, 1968 enacts that the amendments shall have effect in respect of suits including appeals which are pending on the date of commencement of the Act. This appeal was pending on the date of commencement of the Act. Therefore, provisions of the amending Act apply to the present appeal. Further the Bench decisions are authorities for the proposition that the amendments will apply to pending suits or appeals.

51. I am unable to accept the contention of counsel for the appellant defendants that the Bench decisions support the construction that the second default refers to default in a second or subsequent suit. In the Bata Shoe Company case there were defaults for five months. The Bench decision considered the question of granting relief and came to the conclusion that relief could not be granted to the tenant because there were defaults for more than four months. Those defaults were in the same suit. In Gourdev Mukherjee''s case the observations of the Bench decision that in that case there was no second default also indicate that because there was no second default in the same suit therefore relief was granted.

52. The important words in the new proviso to sub-section (4) of section 17 are "having obtained such relief once in respect of the premises." Two matters are to be noticed here; first; that relief is to be obtained once, second, that relief is in respect of the premises. It was contended by counsel for the defendants that inasmuch as no relief had been obtained relief could not be shut out. Relief will be given to the tenant in accordance with the law. It was contended that the relief under sub-section 4 of s. 17 of the West Bengal Premises Tenancy Act, 1956 is that no decree will be passed against the tenant if the tenant made deposit of rent in accordance with the Act and it was said that in the present case there was deposit of rent under the Act and therefore there could be no decree. I am unable to accept that contention. To accede to that contention would amount to nullifying the proviso. The effect of the proviso is that relief which would have been available within sub-section (4) is carved out as not falling within the provisions of the relief. It is to be found as to what these cases are. The words are that the tenant shall not be entitled to any relief under the 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 12 months. In Bata Shoe Company case, the default was for more than four months. It was observed in that case that "in any view the tenant would be defaulter as a monthly tenant for more than four months within a period of 12 months and thus disentitled to the protection of section 17and liable as a necessary consequence to ejectment u/s 13(1) (i)." The provisions contained in section 13(1) (i) are that if the tenant commit default in regard to payment of rent for two months within a period of 12 months or two successive periods a decree will be passed. Therefore, the Bench decision considered the application of the provisions of section 13(1) (i) along with section 17, sub-section 4 of the Act. The Paper-Book in

Bata Shoe Company case was referred to by counsel for both parties in aid of their rival contentions. At one stage it was said that counsel for the Bata Shoe Company case admitted that the benefit of the amendment was not attracted to the facts of the case and therefore that decision would not be of help to the facts and circumstances of the present case. I am unable to accept that contention. It was also said that in Bata Shoe Company case one of the orders in the order- sheet appearing at page 2 of the paper book being order No. 5 showed that the defendant prayed for depositing rent for October, November and December and the order was that the defendant might deposit at his own risk and it might be that deposit was not made and therefore the tenant was entitled to protection. The ratio of the decision is not that. The decision does not hold that the tenant is not entitled to any protection by reason of noncompliance with deposits contemplated in section 17.

53. At this stage reference may be made to the new amendments 17A, 17B and 17C which indicate that on restoration of the defense the Court will proceed with the hearing of the suit. At the hearing questions may arise as to defaults. If it were the intention of the legislation that on restoration of the defense on payment of deposit there would be no recovery of possession there would be no further necessity to proceed with the hearing of the suit with regard to recovery of possession. To hold that the words having obtained relief once in respect of the premises would have the effect of wiping out all defaults if there was payment of deposit would amount to introduce words in the statute that irrespective of the number of defaults relief would be granted to the tenant respect of the suit or appeal pending. To my mind it appears that the construction which has been put upon the proviso by the Bench decisions referred to above is that the Court will give relief to the tenant in suits or pending appeals in respect of the premises once for defaults for four months but if the tenant has again made default in the payment of rent for four months within a period of 12 months he will be disentitled to any protection. On that reasoning the Bench decision gave relief in Gour Dev Mukherjee''s case where the default was for four months and not more than that in the same suit. I should notice here an argument that was advanced by counsel for the plaintiff at one stage I that the tenant would be entitled to relief for two months because of the provisions contained in section 13 (1) (i) and would also obtain relief for three months on the reading of section 17, sub-section 4 but that the said tenant would be entitled to relief up to five defaults. The Bench decision does not take that view and I am therefore unable to accept that contention that relief will be available up to five defaults. As I understand the decisions the relief that will be available is up to and for four months but if having obtained relief once in respect of the premises the tenant has again made default in the payment of rent for 4 months within a period of 12 months he will not be entitled to any relief. In the present case the defaults are in respect of payment of rent from 25 Aug. 1958 up to the end of Feb. 1959. The defaults are for 7 months. The tenant appellant is not entitled to any protection. In my opinion the proviso does not confer any protection on the tenant because

having obtained relief once in respect of the premises the tenant has again made default in payment of rent for four months within a period of 12 months.

54. The essence of the contention on behalf of the tenants is that in pending suits and appeals if the tenant has made deposits or payments as required by sub-sections (1) or (2) of section 17 of the West Bengal Premises Tenancy Act, 1956, the relief under sub-section (4) of section 17 is that no decree or order for delivery of possession shall be made and this relief is to be given in all pending suits or appeals irrespective of the number of defaults and if the tenant after having obtained this relief in suits or appeals will again make default for 4 months within a period of 12 months the tenant will not be entitled to relief in the subsequent suit which will be instituted. First, this construction is reading many new words and provisions into the statute. Secondly, this construction is opposed to the views expressed by the Bench decisions. Thirdly, the grant of relief in pending suits and appeals is not dissociated from defaults. Fourthly, the process of administering relief is in the pending suit or appeal. Fifthly, to hold that relief will be given irrespective of the number of defaults in the first suit is, apart from introducing new ideas, robbing the words "has again made default in the payment of rent for four months within a period of 12 months" of their operation and effectiveness in the grant of relief. Sixthly to hold that the words "having obtained relief once" mean full relief regardless of the number of defaults in the first suit is to introduce new words of a second suit for the purpose of reading the words "has again made, default" as referable to a second suit. Finally, it may be noticed that previous to the amendment four defaults disentitled a tenant to relief and after amendment the tenant will be entitled to relief provided he has not after having obtained relief once relating to possession on the ground of non-payment of rent for four months has not again made default for payment of rent for four months within a period of 12 months.

55. No other contention was advanced apart from those indicated.

56. The learned Judge gave the plaintiff decree in terms of prayers (a), (b) and (c), prayer (a) related to decree for vacant possession of the premises. Prayer (c) was for mesne profits at the rate of Rs. 150/- per diem from 1 May 1959. It was modified at the rate of Rs. 2,750/- a month. Costs were also awarded and certificates for two counsel were given. Thereafter the learned Judge was pleased to direct that the operation of the decree should be stayed till the end of August 1967. The decree was made on 10 August 1966. The operation of the decree was stayed for a period of one year. In view of the fact that one year''s stay has expired it is not necessary to pronounce on that part of the case. Nor were arguments advanced on that aspect. It should also be re corded here that counsel for the appellant did not impeach the finding as to mesne profits. I am therefore of opinion that the appeal fails. The appeal is dismissed with costs.

57. Certified for two counsel.

58. Messrs. P. D. Himatsingka & Company will be at liberty to pay to their clients, the plaintiffs, the sum of Rs. 750/- per month which they are holding with them free from lien and subject to further orders of the Court under order dated 4 October 1966. This order is specially required by reason of the fact that the order for mesne profits is not impeached, and, secondly the plaintiff-landlord is kept out of the money for a long time.

S.K. Mukherjee, J.

59. One of the question raised in this appeal is whether the appellant is entitled to relief under sub-section (4) of section 17 of the West Bengal Premises Tenancy Act of 1956 having regard to the proviso to the said sub-section which has been substituted for the original proviso by Act No. 4 of 1968. In the present case, the appellants made defaults in payment of rent for seven months. After the institution of the suit, they duly deposited all amounts payable under and in the manner prescribed by section 17(1) of the Act. As the appellants had made defaults for four months within a period of twelve months, they were not entitled to any relief u/s 17(4) read with the original proviso. The learned trial Judge, therefore rightly held that the appellants were not entitled to relief u/s 17(4).

60. Subsequently, the West Bengal Premises Tenancy Act was amended by Act No. 4 of 1968. Section 5 of the Act provides that the amendments made to the principal Act by section 2, shall have effect in respect of suits including appeals which are pending at the date of commencement of the said Act.

61. The present appeal was pending at the date of commencement of Act No. 4 of 1968. Therefore the amendments made by section 2 of the said Act apply to the present appeal. By section 2(3) of the said Act section 17 of the principal Act was amended as follows:

In sub-section (4) -

(a) for the words, brackets and figure "or sub-section (2)", the words, brackets, and figures "sub-section (2) or of sub-section (2A)" shall be substituted;

(b) for the existing proviso, the following proviso shall be substituted namely : -

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 12 months.

62. It may be useful to set out sub-section (4) of section 17 and the proviso thereto, as it stood before the amendment.

If a tenant makes deposit or payment as required by sub-section (1) or sub-section (2), no 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 subsection if he has made default in payment of rent for four months within a period of 12 months.

For the purpose of the present appeal the consequential amendments made in the main body of sub-section (4) are of little importance. It is the effect of the new proviso substituted for the original proviso which has to be determined. If sub-section (4) stood by itself with no proviso at all, then in all circumstances, if a tenant made deposit or payment as required by sub-section (1) or sub-section (2) or sub-section (2A) of section 17, no decree or order for possession could have been passed against the tenant on the ground of default of payment in rent irrespective of the period of default. It is to be noticed that except in the proviso, sub-section (4) nowhere speaks of any period of default. In other words, taken independently of the proviso, all defaults are to be excused, irrespective of the period of default, once the tenant has made deposit or payment as required by sub-sections (1) or (2) or (2A) of section 17. None of the sub-sections (1), (2) or (2A) mention any period of default. Reading section 17 again without the proviso to sub-section (4) it is clear that a tenant has the right and is also under the obligation to pay or deposit the amounts required by sub-sections (1) or (2) or (A) and once he has done so, the Court is bound to grant him relief by refusing to pass an order or a decree for possession. In effect, relief is given against forfeiture. By the proviso to sub-section (4) as it stood before the amendment, the legislature restricted considerably the scope of the relief. It was provided by the original proviso that the tenant would not be entitled to any relief by sub-section (4) if he defaulted in payment of rent for four months within a period of twelve month. The legal position has altered by the substitution of the new proviso for the old. In my judgment, the proviso as it stands after the amendment is not attracted at all unless the tenant has obtained relief under subsection (4) once in respect of the premises. The relief contemplated under sub-section (4) is forbearance of the Court from passing an order or decree for possession. Payment or deposit of monies under sub-section (1) or (2) or (2A) of section 17 is not a relief. The relief is provided by sub-section (4). Therefore, if no relief has been granted by the Court once, the tenant is entitled to relief under sub-section (4) on the first occasion irrespective of the period of default, provided he has made deposit or payment in compliance with sub-section (1) or (2) or (2A) of section 17. If however, the Court has granted relief to the tenant once under sub-section (4), the proviso to the sub-section is attracted and the tenant disentitles himself to any relief under sub-section (4), if he makes default in payment of rent for four months within a period of twelve months.

63. In the present case, as deposit has been made by the tenant in due compliance with section 17(1) the Court must grant relief u/s 17(4) irrespective of the period of default having regard to the fact that no relief has been granted to him u/s 17(4) at all in the past.

64. In this connection, I may allude to the legislative history of the amending Act i.e. Act No. 4 of 1968. It is true that the statement of objects and reasons is not admissible as an aid to construction of statute. Nevertheless, as the Supreme Court has pointed out in (11) " The State of West Bengal Vs. Subodh Gopal Bose and Others, and in subsequent decisions, reference may be made to the same for the limited purpose of ascertaining the conditions prevailing at the time which actuated the sponsors of the bill to introduce the same and the extent and urgency of the evil which they sought to remedy.

65. The West Bengal Premises Tenancy Act, 1956 was amended by Ordinance No. VI of 1967. By the said Ordinance the proviso to section 17(4) was substituted by a new proviso, which was the same as is the proviso to section 17(4) substituted by Act No. 4 of 1968. By Ordinance No. II of 1968, Ordinance No. VI of 1967 was repealed and the very same proviso was substituted for the original proviso to section 17(4) of the West Bengal Premises Tenancy Act. In the "reasons for the enactment" of Act 4 of 1968. It is said :

Under section 17 of the West Bengal Premises Tenancy Act, 1956 as it stood before the amendment by the West Bengal Premises Tenancy (Amendment) Ordinance, 1967 (West Bengal Ordinance No. VI of 1967) a tenant who has defaulted in payment or rent for four months within a period of 12 months was debarred from avoiding ejectment by making a deposit or payment as required by sub-section (1) or sub-section (2) of section 17. The Court had no powers, even in cases of real hardship, of extending the time for making the deposit since the provisions of the Act were causing severe hardship to the tenants in some cases, it was considered necessary by the Government of West Bengal to give the tenants some relief by amendment of the Act. Accordingly, the West Bengal Premises Tenancy (Amendment) Ordinance, 1967, was promulgated by the Governor of West Bengal. The main provisions of the Ordinance were as follows :

(a) * * * *

(b) * * * *

(c) The tenant had the opportunity for once only to avoid ejectment on the ground of default in payment of rent, irrespective of the period of default by making deposit or payment of all arrear dues. On any subsequent occasion, however, default in payment of rent for four months within a period of twelve months debarred him from getting any relief.

The West Bengal Premises Tenancy (Amendment) Second Ordinance was promulgated by the Governor of West Bengal to continue with certain modifications the provisions of the First Ordinance.

The proposed measure seeks to replace the Ordinance No. II of 1968.

66. I may repeat that the altered proviso to sub-section (4) of section 17 as substituted by Ordinance No. VI of 1947, Ordinance No. II of 1968 and Act No. 4 of 1968 is precisely the same.

In the Statement of Reasons, it is recongnised that one of the objects of the parent Ordinance was to afford to the tenant an opportunity for once only to avoid ejectment on the ground of default, irrespective of the period of default by making deposit or payment of all arrear dues. The substitution of the altered proviso for the original proviso to section 17(4) by the first Ordinance sought to achieve that object. The same object was achieved by the Second Ordinance which substituted the very same proviso for the original proviso in the Act. The same proviso was again introduced by Act No. 4 of 1968 for the attainment of the same object. It may, therefore, be said that the sponsors of the amending statutes, with the object of mitigating the severity of the law and the harshness of procedure, sought to give the tenant an opportunity for once only to avoid ejectment, irrespective of the period of default, by making deposit or payment of all arrear dues prescribed by law.

67. It was contended by Mr. Amiya Kumar Basu, learned counsel for the landlord respondent that the words ''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'' mean that having made default in payment of rent for two months as contemplated in clause (i) of sub-section (1) of section 13 and lost the protection of section 13 against eviction he has again made default in the payment of rent for four months within a period of twelve months. In that view of the matter, Mr. Basu contended that once a tenant has committed default in payment of rent for mere than five months, he is disentitled to any relief u/s 17(4) of the amended Act even though he has made payments or deposits as required by section 17(1) or 17(2) or 17 (2A). In other words, he argued that while u/s 17(4) as it originally stood the tenant was entitled to relief if he had not made default in payment of rent for more than three months within a period of twelve months, by making payment or deposit as required by section 17(1) or 17(2) under the amended Act he is entitled to such relief by making such deposit or payment, provided he had not made default in payment of rent for more than five months within a period of twelve months. Mr. Basu did not contend that under the Act as amended a default of four months disentitles the tenant to any relief u/s 17 (4).

68. In my opinion, the words are not capable of bearing the construction for which Mr. Basu contended. The proviso says that the tenant shall not be entitled to any relief under sub-section (4) if having obtained such relief once he has again made default in the payment of rent for four months within a period of twelve months. The words ''such relief means relief under sub-section (4). That relief is, as I have said, forbearance of the Court from passing a decree for eviction on the ground of default in payment of rent, as is clearly laid down in sub-sec. (4) itself. Default in

payment of rent for two months as contemplated in section 13(1) (i) is not a relief but a ground for losing protection against eviction. Moreover, payment or deposit of rent made u/s 17 (1), or (2) or (2A) is not a relief but a ground or condition for relief under sub-section (4). It is a right given by as well as an obligation imposed by the statute. Having lost the protection against eviction by operation of section 13(1) (i), relief is offered by section 17 (4) to the tenant if he duly complies with the requirements of sub-sections (1) or (2) or (2A). The relief is given by the court by refraining from making an order or a decree for possession, as required by section 17(4).

69. Mr. Basu relied on section 8 of the Bengal General Clauses Act and contended that once a decree had been passed under the amended Act, the decree cannot be re-opened under the amended Act, in an appeal or at least not in the circumstances of the present appeal. In view of the express provision of sec. 5 of Act 4 of 1968, sec. 8 of the General Clauses Act is of no avail to the respondent decree-holder because relief can be given u/s 17 (4) of the amended Act at the appellate stage, if the appeal remained pending at the date of the commencement of Act 4 of 1968.

70. It was then submitted that under sections 17A and 17B of the amended Act where defense against delivery of possession has been struck out or where a decree has been passed in a suit in which such defense was struck out, the tenant is given only one opportunity to deposit the sum fixed by the Court within thirty days or sixty days from the date of commencement of Act 4 of 1968. Moreover, the application to set aside the order for striking out defense or setting aside the decree has to be made within thirty days or sixty days from the date of commencement of the Act. If the tenant makes the application within the prescribed time and deposits the sum determined by the Court within the period stipulated by section 17A or 17B, the order or the decree will be set aside. It was argued that the framers of the statute having imposed stringent provisions on the tenant u/s 17A and section 17B could not have contemplated that u/s 17(4) a tenant will be entitled to relief irrespective of the period of default. For one thing, the language of section 17(4) and the proviso thereto, is clear and unequivocal. It is not therefore permissible, in my opinion, to whittle down its force and effect by invoking some other provision in the statute unless the provision controls or directly bears on section 17(4). In any event, the argument lacks substance. Both u/s 17A and section 17B as also u/s 17(4) read with the proviso thereto, the tenant is given one opportunity only to make amends for default and to be restored to his rights, the right to defend the suit in one case, and the right of protection against eviction in the other. Both under sections 17A and 17B and also under secs. 17(1), 17(2) or 17 (2A) payments or deposits have to be made within the time prescribed by the statute or as extended by an order of court. In either case, applications for setting aside the order or decree or applications for extension of time to pay or deposit arrear dues have to be made within the prescribed time. Therefore, it cannot be said that the statute is unduly severe to the tenant in one case and liberal in the other.

71. Attention of the Court was drawn to two recent Bench decisions in (9) Gour Dev Mukherjee Vs. Purnima Devi and Others, and (10) Bata Shoe Co. Pvt. Ltd. v. Ayesha Bibi Mutwalli, 72 CWN 241. At one stage, relying on those decisions, it was argued that under the amended Act, a tenant is not entitled to relief u/s 17 (4) once he has made default in payment of rent for more than four months although he has made payments or de posits u/s 17(1) or 17(2) or 17(2A) as required by section 17(4).

72. These judgments, as I have understood them, did not lay down or intended to lay down any such proposition. In Gour Dev Mukherjee''s case, the tenant had made default for four months, namely, June, July, August & September 1959. The suit was filed in December 1959. After the suit was filed, the tenant duly deposited the sums payable u/s 17(2) within the time fixed by the appellate Court. The learned trial judge rightly held that the tenant was disentitled to relief under sub-section (4) of section 17 having regard to the proviso to sub-section (4) as it then stood. An appeal preferred against the decree was dismissed. The tenant preferred a second appeal. Before the appeal was heard Ordinance No. VI of 1967 came into force. The Ordinance remained in force at the time of hearing of the appeal. The Division Bench held that having regard to the altered proviso to sub-section (4) of section 17 which was substituted for the old proviso with retrospective effect, the tenant would not be prejudiced in the matter of relief u/s 17 (4) provided the default of four months was only of the first instance, or in other words, that there was only one default for four months. As in the case case before their Lordships, there was no second default for four months, that is to say, "no default of the second instance" and the tenant had complied with the provisions of section 17 (2) read with section 17(1) in the matter of deposits, the appeal succeeded and relief was granted u/s 17 (4). Their Lordships nowhere said or suggested that if the default on the first occasion was for more than four months, the tenant would have lost his right of relief under sub-section (4). In the context of the statute, the words "second default" in the judgment clearly means, default made after the Court has granted relief once u/s 17(4) by not passing a decree for possession on the ground of default. "Second default", does not mean default in payment of rent succeeding a period of default for four months, all made on the first occasion, that is to say, before relief is granted once u/s 17(4).

73. This decision does not, in my opinion, support the case of the landlord respondent. On the contrary, P. N. Mookerjee, J., who delivered the judgment made a clear distinction between defaults of the first instance or first occasion and defaults made on the second occasion, that is to say, "second defaults". His Lordship spoke of "the default of four months only of the first instance" because in the case before him the tenant had made default in payment of rent for four months before the Court had granted him relief u/s 17(4) once. The default for the period of four months was in this case purely for tuitions. His Lordship did not intend to say that if the default had been for five, six or seven months but of the first instance, the tenant would have lost the benefit of section 17(4). As I understand this judgment,

the test which has been laid down is whether the default is made on the first occasion, or on the second occasion i.e., before relief has been granted once u/s 17(4) or after such relief has been granted. The test is not whether the default on the first occasion is for four months or for a longer period. There is no question that if default is made on the second occasion for four months within a period of twelve months, the tenant will disentitle himself to relief. That is why P. N. Mookerjee, J., in granting relief u/s 17 (4) pointed out that there has been no second default of four months.

74. Incidentally, this decision concludes Mr. Basu''s argument that the Court, cannot at the appellate stage reverse the decree for possession by granting relief u/s 17 (4) of the amended Act where the relief has been refused under the proviso to section 17 (4) of the unamended Act by the trial Court. Such relief was given at the appellate stage in this case, and rightly, if I may say so with respect. In view of section 5 of Act 4 of 1968 the amendments made in section 17 of the principal Act applies to pending appeals. It can hardly be argued that the Court cannot apply the amended section at the appellate stage.

75. Reference was made to the Bench decision in (10) Bata Shoe Co. P. Ltd. v. Ayesha Bibi Mutwalli. I have looked into the paper book in that appeal. The suit was filed in the City Civil Court on August 5, 1959. In the plaint it was alleged that the defendants were monthly tenants who had made defaults in payment of rent from January 1959 and their eviction was sought on the ground of default in payment of rent.

76. The learned trial Judge found that the defendants were obviously in default for January and February. They tendered the rent for those months out of time. Rent for March and April was tendered by money order also out of time. It appears that the landlord refused to accept those payments. The defendants deposited rents for Jan., Feb., March, April & May in the office of the Rent Controller but they did so again out of time. The learned judge held that the deposits of rent in the Rent Controller''s office having been made out of time, they were invalid. In these circumstances, he found that the defendant company was a defaulter in the eye of law in payment of rent for five months within a period of twelve months. He also found that the contention that the defendant company were not monthly tenants were accepted, then the defendant had made default for no less than six months. It appears from the order sheet in the case that the summons in the suit was served on the defendant prior to September 5, 1959. On September 28, 1959 the defendant prayed for depositing rents for October, November and December 1959. The Court granted leave to make the deposit at the defendant''s own risk. It is clear from the order sheet and the records that the defendants did not deposit arrears of rent or pay the same to the landlord as contemplated in section 17(1) or section 17(2) of the Act of 1956, may be because they were under the impression that the deposits made at the office of the Rent Controller were valid deposits. Be that as it may, the

defendant company having been a defaulter for five or six months within a period of twelve months, and not having made payments or deposits as required by sub-sections (1) or (2) of section 17, were not entitled to any relief under sub-section (4) of section 17 of the Act as it stood before the amendments or as it stands after the amendments. It is, in this context, that one has to appreciate the observation of P. N. Mookerjee, J., that "the tenant, further is not entitled to any protection or benefit under the new Ordinance, as fairly and frankly admitted by Mr. Chakravarti, who appears for the tenant appellant, because of the terms of the said Ordinance which cannot attract or extend its operation or benefit to the instant case. Moreover, u/s 17(4) of the Act thee defendant would not have been entitled to relief even if he had made payments or deposits as required by sub-sections (1) or (2) of section 17 because as the proviso then stood, he had made defaults for four months within a period of tewelve months.

77. As His Lordship pointed out, "the findings of default could not be challenged and in any view, therefore, the tenant would be a defaulter as a monthly tenant for more than four months within a period of twelve months and thus disentitled to the protection of section 17, and liable as a necessary consequence to ejectment u/s 13(1) (i). "The observation in the judgment was made in the context of the fact that the decree was made under the unamended Act and that no payment or deposit had been made by the tenant u/s 17 (1) or (2) in the absence of which section 17 (4) is not attracted at all. In the case before their Lordships, the default was" of the first instance, as it was made before the Court had granted any relief once u/s 17(4). The tenant was not therefore hit by the new proviso to the Act of 1956 as amended by the Ordinance. But even then, in the facts and circumstances of the case, the tenant was not entitled to any relief under sub-section (4) because, as the order sheet and the records clearly show, he had not made payments or deposits as required by sub-sections (1) or (2) or (2A) of section 17 of the amended Act. That is why, it seems to me, Mr. Chakravarti, the learned Advocate appearing for the tenant appellant admitted that his client was not entitled to the benefit of the Ordinance and P. N. Mookerjee, J. described it as a fair and frank admission. On a careful consideration of the pleadings, the order sheet, the evidence, the judgment of the trial Court and the judgment of the Division Bench delivered by P. N. Mookerjee, J. I am unable to agree that P. N. Mookerjee, J. held or intended to hold by his judgment that once a tenant makes default in payment of rent for more than four months, he disentitles himself to relief u/s 17(4) of the amended Act although he has made payments or deposits as required by section 17(1) or (2) or (2A) and although the Court has not given him relief once u/s 17(4).

78. In the view I have taken of the ratio and effect of the Bench decisions cited above. I must hold that those decisions are of no assistance to the landlord respondent and they do not support the construction of section 17 (4) of the Act and the proviso thereto, for which his counsel contended.

79. I desire to add that in my opinion the amendments made In the Act of 1956 do not work any injustice or hardship to any one. It only gives the tenant one opportunity and one opportunity alone to make amends for his default, irrespective of the period of default by payment of all arrear dues with interest. After all, a landlord is not obliged to wait indefinitely to bring an action for ejectment against a tenant if the tenant continues to make defaults in payment of rent. Once the tenants makes default in payment of rent for two months within a period of twelve months he loses the protection of section 13 and is liable to be evicted. The landlord may very well institute a suit at that stage. No doubt, the tenant can obtain relief u/s 17(4) by making deposit or payment u/s 17(1) or 17(2) or 17 (2A). But once relief is obtained u/s 17 (4) and the suit is dismissed the proviso to sub-section (4) at once comes into operation and if the tenant again makes default for four months within a period of twelve months he is no longer entitled to the protection of section 17(4). I do not think there is anything unfair in the situation. If section 17(4) is unfair to the landlord so is the provision for relief against forfeiture u/s 114 of the Transfer of Property Act, but I do not think either provision is unfair.

80. In the view I have taken I would have allowed the appeal if the decree had been passed on the ground of default in payment of rent alone.

81. I now propose to address myself to the question whether the notice of March 18, 1959 is a valid notice u/s 13(6) of the Act. The relevant portion of the notice which was served by the landlord''s solicitor reads:

You have failed and neglected to make payment of any rent whatsoever since the date of purchase of the said premises by my client. My client bona fide and reasonably requires the said premises for re-building. Contrary to the contract with the said predecessor-in-title you have sub-let major portion of the aforesaid premises to various sub-tenants without any consent of my client and without your having any right or authority to sub-let.

82. Under instructions from my client and on his behalf, I determine hereby your tenancy in respect of the said premises on the expiry of your tenancy for the said premises for the month of April 1959. I have to request you to quit the said premises and deliver vacant and peaceful possession of the same to my client on the expiry of your tenancy as aforesaid. In default of your compliance with the requests contained hereinabove my client will take such steps as it may be advised for your eviction without any further reference holding you responsible for all costs and consequences. My clients will charge mesne profits at the rate of Rs. 150/- per diem from expiry of your tenancy as aforesaid till possesion is recovered."

83. In (2) Abdul Samad Bepari Vs. Manasha Charan Bakshi, , the special Bench held that a notice contemplated under sec. 13(6) is essentially a notice of suit. A notice u/s 13 (6) may be combined with a notice under sec. 106 of the Transfer of Property Act. It was also held that it was not necessary to mention in a notice u/s 13(6) the

ground or grounds of ejectment for which a suit is to be instituted for recovery of possession. There is however nothing to prevent the landlord from setting out such grounds in the notice.

84. It was argued that this is not a threat of suit or legal proceedings for eviction; that the possible steps to be taken by the landlord are to be determined in the light of the advice he will receive in future; such advice has not yet been given and what the advice will be is uncertain. As the advice to be given is uncertain, the straps which will be taken in conformity with the advice are also uncertain. The advice may be the advice not to institute a suit at all but to settle the matter amicably or even to recover possession by the use of force; or the landlord may be advised to institute criminal proceedings against the tenant.

85. Shorn of their context and on grounds purely of abstract logic, I cannot say that the words are not capable of the construction for which counsel contends. The words have however to be understood in the context of facts and circumstances in which they are used. They have also to be read in the context of the existing laws. There can be no settlement without further reference. Settlement is therefore not contemplated. It is also clearly indicated that the steps the landlord intends to take are such as will enable him not only to evict the tenant but also to recover mesne profits and costs. In criminal proceedings mesne profits and costs cannot be recovered. Nor can they be recovered by use of force. Moreover it is not to be expected that the steps threatened by a Solicitor''s notice are intended to be extralegal steps such as use of force. It is idle to suggest, as has been suggested, that no advice may be given at all. Advised the landlord will be and steps he will take, but the nature of the steps will be such as he may be advised.

86. In my judgment, the impugned notice is evocative of one image and one image alone, the image of a suit to be initiated by the landlord for recovery of possession, mesne profits and costs. This is inescapably so because under the law, only by a suit and by no other legal proceedings can that object be achieved. A suit is, therefore clearly intended. In (5) Mohammed Yusuf Vs. Ram Chandra Singh and Another, , where the notice required the tenant to deliver up possession and in default threatened legal proceedings making the tenant liable for all costs and damages, P. N. Mookerjee, J. said "the legal proceedings contemplated therein, in the context of what precedes the threatened adoption of such legal proceedings and also what follows, cannot be anything else than a suit for eviction. The demand was for delivery of possession and the legal proceedings as threatened were to be in default of compliance with the said demand. The legal proceedings contemplated involved, again, a claim for costs and damages, which obviously excluded criminal proceedings, if any such proceedings would have been otherwise relevant or available, with the result that, by necessary implication, a suit for eviction was contemplated by the landlords, or in other words, that there was the necessary threat of suit for eviction, as required u/s 13 (6) of the Act". In the case before us, the

notice, in my opinion, contains a threat of a suit for eviction by necessary implication.

87. Although I was tempted to do so, I have deliberately refrained from stressing that in the language of the legal profession, the words "client will take such steps as he may be advised" have by long usage come to mean "client will institute legal proceedings", because it is not to be expected that every layman is familiar with every Old Post Office Street cliche.

88. I desire to add that the notice cannot be held to be invalid on the authority of the Bench decisions in (3) Dulin Chand Dutta Vs. Sm. Renuka Banerjee, and (4) Subodh Chandra Singha v. Santosh Kumar Srimani, 68 CWN 134, because the notice does not merely state the grounds of eviction but clearly indicates that steps, will be taken to recover possession, mesne profits and costs.

89. As no issue has been raised on the question whether the premises were sub-let before or after the Act of 1956 came into force, I agree that the learned trial Judge''s finding on the onus of proof and also his finding that the consent given by the landlord in writing before the Act came into force is ''previous consent in writing'' within the meaning of section 13(1) (a) ought to be set aside. In my judgment these findings have to be set aside on those grounds alone. I like to make it clear, that I do not express any opinion on these questions on merits. In particular, I do not intend to say that the learned trial judge was not right in holding that the consent given in writing by the landlord in the lease does not satisfy the requirements of "previous consent in writing" as contemplated u/s 17(1) (a) of the Act of 1956. On the pleadings and on the evidence in this case I am satisfied that the respondent landlord reasonably required the premises for the purposes of building and re-building, and the appellant by building a permanent structure in the premises without the con sent of the landlord, has done an act contrary to the provisions of clause (p) of section 108 of the Transfer of Property Act. I am also of opinion, for reasons given earlier, that the notice served on the appellant by the respondent landlord is a valid notice u/s 13(6) of the West Bengal Premises Tenancy Act, 1956. In that view of the matter I hold, as I must, that the appellants are not entitled to protection against eviction by reason of clauses (b) and (f) of subsection (1) of section 13 of the said Act. In the view I have taken, the appeal fails and I agree with the order which my lord has made.