

CALCUTTA HIGH COURT

Krishna Das Nandy

Vs

Bidhan Chandra Roy

P Mookerjee and P Sarkar , JJ.)

28.01.1958

JUDGMENT

P.N. Mookerjee, J.

1. This difficult case has been well argued and our only regret is that, however much we wished the contrary, this litigation would not end here but must go back to the trial court, though on a short point, for its final disposal. Complex, indeed, and varied were the questions which arose for our decision and the excellence of the arguments on either side added to their intricacies and enhanced our difficulties. We spent a considerable time over this case which had to be argued twice,--on a new point on the second occasion,--but we do not regret it as this space of time has borne fruit and it has not gone in vain and, eventually, we have been able to reach an agreed conclusion which accords with our sense of justice and view of the law.

2. The suit, out of which this appeal arises, was a suit for ejectment and mesne profits. The appellant before us was the defendant in that suit. The suit was brought by the plaintiff respondent on 23-6-1955. It was decreed by the learned Sub-ordinate Judge on 10-8-1956, and, from the said decree, the defendant filed this appeal in this Court on September 11, 1956.

3. The relevant facts lie within a short compass and they may be stated as follows:

4. Premises No. 33, Rowland Road, which is the premises in suit, belonged to the Maharaja of Burdwan. Under the Maharaja, there was a lessee whose interest passed by successive transfers to the Hindusthan Co-operative Insurance Society Ltd. Under Hindusthan, the Great Indian Motor Works Ltd. held the suit premises as monthly tenant at Rs. 450/- per month according to the English calendar.

5. On 23-7-1951, an order was made by this Court on its Original Side for the winding up of the Great Indian Motor Works Ltd, (vide Ext. F), and, in the said liquidation proceedings, an order (Ext. F2) was eventually made by the Court on 4-5-1954, for sale of the property and assets of

the Company (including its tenancy right in the disputed premises) by public auction through Messrs. Mackenzie Lyall and Co.

6. The sale was duly held on 12-6-1954, and the defendant appellant became the purchaser therein for Rs. 1,42,500/- (vide Exts. G and F1). The sale was confirmed by the Court on 5-7-1954 (vide Ext. F1), and on the 24th of that month, the appellant got possession of, inter alia, the disputed premises (vide Ext. 2(b)).

7. In the meantime on 6-5-1954, the plaintiff respondent had purchased the lessee's interest in the disputed premises from the Hindusthan Cooperative Insurance Society Ltd. (vide (Ext. 1) and, just a week thereafter, on 13-5-1954, he also acquired the owner's or the superior landlord's interest from the Maharaja of Burdwan (vide Ext. 1(a)). The plaintiff respondent thus became the owner of the disputed premises with the Great Indian Motor Works Ltd. (then in liquidation) as the tenant thereof. As a matter of fact, the plaintiff accepted rent from the said Company (in liquidation) through its joint official liquidators up to 23-7-1954 (vide Ex. C3).

8. When, however, the appellant, as purchaser at the above auction sale, tendered rent from 24-7-1954, the date of his taking possession of the disputed premises to 31-7-1954, and also subsequent rent up to October 1954, the plaintiff refused to accept the same (vide Exs. 2(b), 2(e) and 7) and, thereafter, the rent from 24-7-1954 to October 1954 was deposited by the appellant with the Rent Controller, Calcutta, on 1-12-1954 (vide Ex. 8).

9. In the meantime, there appears to have been an interview between the parties and a letter (Ex. 2) was written by the defendant to the plaintiff on or about 10-9-1954. To that letter some further reference will be necessary in the course of this judgment.

10. On 11-5-1955, the plaintiff, through his Solicitor Sri Protap Chandra Chunder, sent a notice to quit (Ex. 4) to the defendant, asking him to vacate the suit premises and deliver vacant and peaceful possession of the same on the expiry of the said month of May, 1955. That notice was duly served on 13-5-1955 (vide Ex. 5) and, on June 23 following, the present suit was instituted.

11. In the suit, the plaintiff prayed for khas possession of the suit premises after eviction of the defendant therefrom and for recovery of mesne profits. The suit was valued at Rs. 6,400/-, namely, Rs. 5,400/- for ejection on the basis of the rental of Rs. 450/- p. m. and Rs. 1,000/- for mesne profits tentatively.

12. The plaint alleged inter alia as follows:

(i) that the plaintiff was the owner of the suit premises;

(ii) that the Great Indian Motor Works Ltd. was the tenant in respect thereof at Rs. 450/-- p. m.;

- (iii) that the said Company had gone into liquidation;
- (iv) that, in the said liquidation proceedings, the Company's business was sold by an order of Court and it was purchased by the defendant;
- (v) that the said sale and purchase was without the plaintiff's consent or concurrence;
- (vi) that the defendant was in occupation of the disputed premises;
- (vii) that the plaintiff was "in imperative need of building and rebuilding the said premises for his own occupation;" and
- (viii) that the defendant did not vacate the suit premises in spite of a proper notice to quit, expiring within the month of May 1955.

13. In the plaint, the date of the cause of action of the suit was stated to be 1-6-1955.

14. The defence inter alia was-

"(a) that the Great Indian Motor Works Ltd. was a tenant for manufacturing purposes;

(b) that the defendant duly acquired the said tenancy at the auction sale, held in the liquidation proceedings under an order of Court, and became the tenant of the disputed premises;

(c) that, the said sale having been held in public auction under the order of the Court, it was an involuntary sale and was not a transfer within the meaning, tenor and spirit of Section 12 of the Rent Control Act of 1950;

(d) that the plaintiff had no reasonable requirement of the suit premises within the meaning of the above statute and, in any event, the test of comparative advantages and disadvantages was in favour of the defendant; and

(e) that the notice to quit was illegal, insufficient, invalid and ineffective."

15. The plaintiff's claim for mesne profits was also denied and it was characterised as illegal and arbitrary and not maintainable in law.

16. On the above pleadings, the two broad questions which arose for consideration, so far as ejection was concerned, were (1) whether the notice to quit was valid and sufficient in law and (2) whether the defendant was protected from eviction by or under the Rent Control Act--the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 (W. B. Act XVII of 1950).

17. The first of the above two questions depended upon and involved consideration of the nature

of the suit tenancy, namely, whether the said tenancy was one for manufacturing purposes, requiring a six months' notice to quit for its termination, and the second raised two distinct matters, namely, (1) whether the defendant's purchase came within Clauses (a) and (b) of Proviso to Section 12(1) of the Rent Control Act (W. B. Act XVII of 1950) so as to disentitle him to any projection under the said section and (ii) whether the plaintiff's alleged requirement was one within proviso (h) of Sub-section (1) of the said section. Under this latter head, in addition to the usual considerations, a new consideration arose, namely, whether the proviso covered or contemplated a case of the landlord's requirement for building and rebuilding for his own occupation.

18. The relevant issues on the question of eviction were framed by the trial court in the following terms:

"1. Is the notice of ejectment, dated 11-5-1955, valid and sufficient to determine the defendant's tenancy?

2. Is the tenancy, held by the defendant, for manufacturing purpose?

3. Does the plaintiff reasonably require the premises in suit for his building and rebuilding purpose for his own occupation?" and

4. Is the plaintiff entitled to a decree for ejectment and for khas possession?"

19. The learned Subordinate Judge answered all the above issues in the plaintiff's favour. He also answered the 5th issue, relating to mesne profits, in the plaintiff's favour except as to the rate where he accepted the defence contention that it should be on the rental basis of Rs. 450/- per month, the period, of course, starting with 1-6-1955, which was stated in the plaint to be the date of the cause of action for the suit. All the above findings of the learned Subordinate Judge, including the decree for mesne profits, were challenged by the defendant. In this appeal, the substance of his contention being that the plaintiff was not entitled to a decree for ejectment and, necessarily, therefore, his claim for mesne profits must also fail, the plaintiff being entitled only to rent at the rate of Rs. 450/- per month, which had been duly deposited by the defendant with the Rent Controller. The propriety of this contention in its several branches or phases, as appearing in the issues, set out above, we shall presently examine.

20. We shall take up first the question of notice or, in other words, Issues Nos. 1 and 2, framed by the trial court. But, before we do that, it is necessary to say a few words on the defendant's legal status or position vis-a-vis the plaintiff under the general law, that is, the Transfer of Property Act, and also under the special statute, relevant for our purpose, namely, the West Bengal Premises Rent Control (Temporary Provisions) Act of 1950.

21. There can be no question that, under the general law, to wit, the Transfer of Property Act, the tenancy of the Great Indian Motor Works Ltd. was a transferable tenancy. There was no contract to the contrary and plainly, therefore, it was transferable in law (vide Section 108(i) and the transferee, viz., the defendant, became, on such transfer, a tenant under the general law. For acquiring that status, the defendant had not to depend on the recognition of the landlord and the plaintiff could not treat him (the defendant) except as a tenant. The defendant, therefore, was entitled to a proper notice to quit and the suit against him for his eviction would be a suit for eviction of a tenant. There is nothing in the Rent Control Act to affect this position. Whether the Rent Control Act would apply to such a suit or not or whether the transferee--tenant would be entitled to its protection or not is an entirely different question which we shall examine in its appropriate place in connection with the issue or issues under that statute. For ascertaining the effect and validity of the notice to quit (Ext. 4) which, of course, is a matter, arising under the general law, or, to be more precise, under the Transfer of Property Act, we will proceed upon the footing that the defendant was a tenant under the plaintiff and consider whether his tenancy has been duly determined under the law.

22. There is no dispute that the notice to quit (Ext. 4) was duly served on 13-5-1955, requiring the defendant to quit and vacate on the expiry of the month of May, 1955. Clearly, therefore, it was a good fifteen days' notice to quit and, unless the defence contention that the suit tenancy was for manufacturing purposes, requiring a six months' notice to quit for its termination, be accepted, the notice (Ext. 4) must be held to be valid and sufficient. That, indeed, is not disputed by Mr. Gupta. The pertinent question, therefore, is whether the defendant's tenancy or, for the matter of that, the tenancy of the Great Indian Motor Works Ltd., was or can be regarded as one for manufacturing purposes.

23. Before we take up the above question on its merits, it is necessary to consider two preliminary points, raised by the learned Advocate General. Relying on the decision of P. B. Mukherji, J. in Sati Prasanna Mukherjee v. Md. Fazal, , and of the English Court of Appeal in the case of Green v. Marsh, (1892) 2 QB 330, he argued that Section 106 of the Transfer of Property Act must be held to be subject to Section 107 and that, in view of the latter section, in the absence of a registered instrument, no lease can be deemed or regarded to be for manufacturing purposes under Section 106 so as to get the benefit of its "deeming provision" about notice and duration of the tenancy. This argument has been developed in the following manner.

24. Under Section 106, a lease for manufacturing purposes is to be deemed to be a lease from year to year. Under Section 107, however, a lease from year to year can be made only by a registered instrument. Where, therefore, there is no registered instrument, the lease cannot be a valid lease from year to year and the "deeming provision" in Section 106 cannot affect or alter that position. To hold, therefore, where there is no registered instrument, that the lease is for

manufacturing purposes and thus attracts Section 106 of the Transfer of Property Act and becomes under its "deeming provision" a lease from year to year, requiring a six months' notice for its termination, would be tantamount to disregarding Section 107 and hence not permissible. Accordingly, in the present case, where admittedly there is no registered instrument, the tenancy or the lease, so contends the learned Advocate General, cannot be held to be for manufacturing purposes and hence the defendant's contention that it is a lease of that type, so as to require a six months' notice for its termination, must be rejected in limine.

25. The argument is ingenious and attractive but, if pursued to its logical end, it may react on the plaintiff himself. Whatever may be the effect of Section 107,--and, even if Section 106 be subject to that section,--a lease which is for manufacturing purposes cannot be converted by either of the above two sections into a lease for any other purpose so as to become terminable by a fifteen days' notice to quit under Section 106. Section 107 has nothing to do with the purpose of the lease and non-registration will not affect that purpose. It may, at the worst, if Section 107 controls Section 106, prevent the application of this latter section to make the lease a lease from year to year under its "deeming provision." The only result then will be that Section 106 will not be attracted to that lease and so the provisions as to notice, as contained therein, will not apply to the case and the requisites or essentials of a valid notice to quit to terminate the lease will have to be determined otherwise and de hors the section and, possibly, reasonable notice will be necessary and, if that be the position, the notice in the present case may not be sufficient, having regard to its particular facts and circumstances.

26. We do not think, however, that the argument of the learned Advocate General is sound. Section 107 of the Transfer of Property Act does not control Section 106 and, notwithstanding the former section, the latter will apply to a manufacturing lease, whether registered or unregistered, so as to make it a lease from year to year for purposes of that section (Section 106), terminable with a six months' notice to quit, or, in other words to control its duration and period of notice, in the absence of a contract or local law or usage to the contrary. The lease will be a lease from year to year for their limited purpose of Section 106, that is, for the limited purpose of its duration and period of notice, the duration being until the notice expires. This will not raise any conflict with Section 107. Where the lease is silent as to its duration, the omission is supplied by Section 106, according to the purpose of the lease, for applying the provisions of notice as contained therein. This view is amply supported by the observations of a Division Bench of this Court in the case of *Ram Protap v. National Petroleum*, , and of the Supreme Court in the case of *Ram Kumar v. Jagdish Chandra*, . Nothing more is necessary for our purpose. The section (Section 106) deals with the notice to quit,--its period and requisites,--and the implied duration under its "deeming provision" may well be for that purpose and no more and, in that view, it will be outside the mischief of Section 107. Only if Section 106, by virtue of its "deeming provision"

had sought to fix the period of the lease for all purposes so as to make it a fulfilled lease of that particular character, a conflict might have arisen with Section 107, although there also the position is not very clear (vide the observations in Ram Protap's case, which appear to give a wider scope to Section 106). The limited view, however, which we have taken of the said "deeming provision" does not raise any such conflict. In that view, apart from anything else, the English case cited is also distinguishable and does not assist the plaintiff, and the respondent's preliminary objection cannot be sustained on its authority.

27. That Section 106 was not intended to be controlled by Section 107 would also be clear if we study the implications of Section 116. That section deals with the effect of holding over and enacts that, "in the absence, of an agreement to the contrary," the tenancy by 'holding over' would be a renewal of the old or the original tenancy which has determined by efflux of time and the renewal would be "from year to year or from month to month according to the purpose for which the property is leased as specified in Section 106." The period of the original lease having expired, ex hypothesi there would be no period of the tenancy by 'holding over,' where there is no fresh agreement between the parties, and this omission is supplied by the statutory application of Section 106 which fixes the period of the renewed tenancy,--to wit, its duration and period of notice,--in terms of the section (Section 106) according to the purpose of the lease that is, according to the purpose of the expired, or the original lease. Thus, if the purpose of the original lease was manufacturing, the renewal would be from year to year and the renewed lease or the tenancy by 'holding over' would be one from year to year, terminable by six months' notice, expiring with the end of a year of the tenancy, in terms of Section 106. This will be so whether the original lease was registered or not as Section 116 contains no contrary indication and no other provision in this respect, and the statute certainly did not intend to leave the period of the tenancy by 'holding over' unprovided for in any case. In Section 116, therefore, the statute itself indicates by necessary implication, that Section 106 will apply to all, leases, covered by the statute, whether under registered instruments or not, to supply the omission as to duration and period of notice. To this aspect of the matter we drew the attention of the learned Advocate General during the course of arguments but we did not get any satisfactory answer.

28. The respondent's preliminary objection under the above head is, accordingly overruled.

29. The other preliminary point of the learned Advocate General raises the question of construction of the phrase 'for any other purpose' in Section 106 of the Transfer of Property Act in relation or contradistinction to the phrase 'for manufacturing purposes' as mentioned in the said section. The learned Advocate General argued that the words 'for manufacturing purposes' in the section meant "solely for manufacturing purposes" and, when the purpose of the lease was not merely manufacturing but some other purpose as well,--not, of course agricultural purpose,--the lease would be for "mixed and multiple purposes" and would fall within the residuary phrase 'for

any other purpose'. In support of his submission, he relied upon the decision of P. B. Mukherji, J. in the case , already cited, which was affirmed on appeal by Harries, C. J., and Banerjee, J. in Original Side Appeal from Original Decree No. 52 of 1950, decided on November 23, 1950, which latter decision again was relied upon by me, sitting singly, & followed as a binding authority in L. A. Saunders v. Land Corporation of Bengal Ltd., and, apparently also in Brohmananda Das v. Nagendra Chandra Sarkar, . Mr. Gupta tried to meet this point by drawing our attention to the language of the statute and he protested against introduction of the word 'solely' or, for the matter of that, of any other word, not used by the legislature, into the section and pointed out that, otherwise, the very purpose of a longer notice for manufacturing leases would be frustrated. He also asked us to consider or re-consider the matter and refer the case to a Full Bench, if necessary. As, however, we are holding against the defendant on the merits on this question of 'manufacturing purpose', so far as the suit tenancy is concerned, for reasons, which we shall presently record and which do not rest on, any of the cases cited and are independent of them, we do not deem it necessary to consider the above cases for purposes of the present appeal and we express no opinion on them.

30. We proceed now to examine the purpose of the defendant's tenancy on the merits.

31. Here, again, some introductory remarks appear to be necessary:

32. So far as the suit tenancy is concerned, there can be no doubt, on the materials before us, that it started with the Great Indian Motor Works Ltd. There is nothing in writing about it to show its purpose. That purpose, therefore, will have to be gathered from the oral evidence, if any, on the point, and, in the absence of such direct evidence, from the evidence of circumstances and, particularly, of user of the premises by the tenant. In that connection, the surrounding circumstances may have to be considered to accept or reject the case of one party or the other and the landlord's interest in the premises at the time of creation of the tenancy or, at any other material time, when any special arrangement may be alleged to have been made between the parties, may also well be relevant.

33. The defendant has examined himself and he has asserted that the suit tenancy was for manufacturing purposes. He was a major shareholder of the Great Indian Motor Works Ltd. and he claims to have some knowledge of the original arrangement of this Company's tenancy. One Mayo has appears to have been the lessee of the suit premises at the time under the owner Burdwan Raj and the Company took its tenancy, or, rather, its sub-tenancy, from this Mayo. The defendant (D. W. 1) has purported to speak about the purpose, for which the tenancy was taken by the Company. It was, according to him, for development of the Company's business regarding manufacture. About this manufacture, however, the defendant's evidence is that it was of some parts,--rather of a minor character,--necessary for repairing cars (including taxis). His

evidence further shows that this manufacturing was subsidiary to find only for purpose of the repairing works and it was on a very small scale. That also appears from the other witnesses (D. Ws. 2 and 3) examined on the point by the defendant, and the documents (Exts. 12 and 13), filed by the defendant but marked on behalf of the plaintiff. The overall position thus seems to be that the tenancy was taken for starting a motor repair 'works' or a motor repairing workshop which would not, even ordinarily or prima facie--and, certainly not, necessarily--be a manufacturing purpose. The defendant has, no doubt, stated in his evidence that he communicated to the landlord Mayohas, when the Company took its lease, its intention to start a manufacturing business in the suit premises but, in the light of his cross-examination, it is difficult to accept his uncorroborated testimony on the point. On the defendant's own evidence, therefore,--and when the landlord Mayohas was admittedly a monthly tenant,--the Company's lease must be held to have been not for manufacturing purposes. It would thus come within the latter part of Section 106 of the Transfer of Property Act, namely, "any other purpose" and it would be terminable on a fifteen days' notice to quit as contemplated therein. The learned Sub-ordinate Judge's finding to that effect must, therefore, be affirmed.

34. Coming now to the issues, arising on the Rent Control Act, the first question is whether the case falls under proviso (b) to Section 12(1). Proviso (a), of course, is not directly relevant as the suit here is not against the tenant transferor but that proviso is relevant for showing who is the transferee, contemplated in proviso (b). This latter proviso speaks of 'such transferee' and it has obvious reference to the transfer, spoken of in the preceding proviso (a). Proviso (a) speaks of a transfer whereby "the tenant has transferred the tenancy." The real question, therefore, is whether, in the present case, the tenant, that is, the Company, has transferred the tenancy within the meaning of proviso (a).

35. Before, however, we take up the above question, it is necessary to consider two points in bar, raised by Mr. Gupta, on this part of the case. Mr. Gupta argued that the learned Subordinate Judge should not have allowed the plaintiff to rely upon the above proviso or provisos as no case thereunder was specifically pleaded in the plaint or raised in the issues, framed by the court, and, in this connection, he drew our attention to the decision of the House of Lords in the well-known case of North Western Salt Company Ltd. v. Electrolytic Alkali Co. Ltd., (1914) AC 461. We do not think, however, that this complaint of Mr. Gupta is justified in the facts of this case. It is the defendant himself who raised the question under the provisos in his written statement (vide Paragraph 10) and the point was argued before the court below without any objection on his part and no grievance was also made by him, in the memorandum of appeal, filed in this Court, about the absence of a specific issue on the point. In these circumstances, we do not think that the defendant can complain of any prejudice. He had ample notice of the point, he produced his materials thereon and argued the matter fully in the court below without protest and last but not

the least, did not make any grievance about it, when he filed this appeal. In short, he was not the least prejudiced on this point by the absence of issue or otherwise and, in our opinion, the instant case is fully covered by the principle of the decision of this Court, reported in Mohiuddin V. Pirthichand Lal, 19 Cal WN 1159: (AIR 1915 Cal 444) and of the Privy Council in Mt. Metna v. Syud Fuzl Rub, 13 Moo Ind App 573 and Mr. Gupta's present objection must fail.

36. Mr. Gupta also argued that the transferee, mentioned in proviso (b), refers to a transferee who has not been recognised by the landlord even for the purpose of ejection, that is, even for the purpose of a notice to quit or for purposes of the suit for eviction, and he contended that, as here, admittedly, the present suit was brought by the plaintiff against the defendant as a suit for eviction of a tenant, the defendant would not come within that proviso. We are unable to accept this argument too. As we have said above, the transferee defendant became a tenant under the general law and there is nothing in the Rent Control Act to affect his said status. The plaintiff, therefore, had to terminate the defendant's said tenancy by an appropriate notice to quit and he was entitled to sue him for eviction only after such termination or, in other words, his suit would be a suit for eviction of a tenant or, more correctly, of an ex-tenant. That, however, would not make the defendant anything else than a transferee of the tenancy or a "transferee-tenant" and he would prima facie come within proviso (b) of Section 12(1) unless the relative transfer falls outside its scope. Whether the landlord's recognition of this transfer or of the tenancy arising therefrom, by acceptance of rent or otherwise--which may create or amount to a new tenancy, distinct from the tenancy, flowing from the general law, as stated above, by reason of the transfer simpliciter--would take the defendant out of the mischief of the proviso is not a matter which calls for discussion in this case as there is nothing on the present record to show any such recognition. The plaintiff never accepted rent from the defendant and did not treat him as a tenant except for purposes of ejection. On the other hand, he has all along refused to recognise and accept him as a tenant. We do not, therefore, express any opinion on the above matter but we are perfectly clear in our mind that mere recognition for purposes of ejection, that is, only for serving the notice to quit and bringing the suit for ejection, would not put the transferee outside the proviso and give him immunity against the landlord's claim for eviction thereunder. In the above view, we overrule Mr. Gupta's contention.

37. We take up now the real question under the two provisos (a) and (b) of Section 12(1), namely, whether the transfer in the present case, under which the defendant came on the suit premises, is a transfer within the meaning of proviso (a) so as to make the defendant a transferee under proviso (b). There is now no dispute as to the facts and the only question is what, on those facts, would be the correct position in law.

38. Admittedly, the Company went into liquidation. The learned Subordinate Judge was of the opinion that it was a voluntary liquidation and, in that view, he found no difficulty in holding that

the transfer in the liquidation proceedings was really a transfer by the tenant,--to wit, a voluntary transfer,--within the meaning of proviso (a) and, necessarily, therefore, the defendant was a transferee within proviso (b). He also expressed the view that the transfer, contemplated by proviso (a), included both voluntary and involuntary transfers and as such the defendant would fall within the mischief of proviso (b) in any view of the case. He, however, also recorded the opinion that, had the liquidation in the present case been a compulsory winding up, the transfer here would have been an involuntary one : vide In the matter of West Hopetown Tea Co. Ltd., ILR 12 All 192 and would have been outside the provisos, if they did not embrace involuntary transfers.

39. The learned Advocate General, appearing for the plaintiff respondent, did not support the learned Subordinate Judge's view that, in the present case, the winding up was voluntary. He conceded that it was the case of a compulsory winding up but he contended that, even then, the transfer was a transfer by the Company, though through the liquidators and with the sanction and under the order of the Court, and, accordingly, it was clearly a transfer within proviso (a) and attracted proviso (b). He contended that, even if it was involuntary, the transfer being by the tenant Company as aforesaid, it was well within the words of the proviso and thus within its mischief. In support of his argument, the learned Advocate General placed strong reliance upon the decision of the English Court of Appeal in *In re Farrow's Bank Ltd.*, (1921) 2 Ch 164 and one case of this Court, *Amrita Lal v. Anukul Chandra*, ILR 43 Cal 586 and another of the Privy Council, namely, *Dawson's Bank Ltd. v. Nippon Menkwa Kabushiki Kaisha*, and he submitted that the Allahabad decision, ILR 12 All 192, purporting to hold the contrary view and cited by the learned Subordinate Judge on the point, was wrong. He also referred us to certain provisions of the English Companies Act and the Indian Companies Act to substantiate his proposition that they were founded on the same principle so far as the present point goes.

40. In answering the learned Advocate General, Mr. Gupta referred to certain differences in the relevant provisions of the Companies Act, here and in England, he also sought to explain and distinguish the English authority cited but his main submission was that, even though the transfer in the present case may fall within the letter of the relevant provisos, it would not come within their spirit, or to put it in clearer language, within their legislative intent, and that, on a proper construction of the said provisos, the disputed transfer should be held to be outside their mischief.

41. The authorities, cited by the learned Advocate General, may perhaps be distinguished but, even under them, and under the standard form, shown by the learned Advocate General (vide *Eiphinstories President's*, (sic) 14th Edn, Vol. 1 p. 500, Foot note (i)), the disputed transfer would, at the worst, be technically, or, in form, a transfer by the Company, the liquidators acting on its behalf or representing it in the transaction. When, however, the substance of the matter is

considered, it is clear that the transfer is by the Court or by operation of law.

42. In a compulsory winding up, the Company is put into liquidation against its will by force of law and the order of the Court and the sale is made by the liquidator, acting under the control of the Court and with its sanction. That is the dictate of law. The sale, therefore, is really by the Court, acting through the liquidator and the Company has no hand in the matter. It is thus a sale against the Company's will or a sale in invitum. This is particularly so under the Indian law where the Companies Act differs in an important particular in this respect from its English counterpart (vide Section 179 (C) of the Indian Act) under which the liquidator can sell only with the sanction of the Court, thus contemplating prior sanction, while, in the English Act (Companies (Consolidation) Act, 1908 which was considered in (1921) 2 Ch 164), the corresponding Section 151 (2), even when read with Section 151 (3), does not seem to require at least prior sanction of Court in case of the liquidator's sale). The Court directs the winding up and, as soon as the order is made, the assets of the Company are placed by law in the custody and control of the Court (vide Section 178) which eventually orders and sanctions the sale, acting under the imperative provisions of the statute (vide Section 179 (c)). In essence, therefore, it is a transfer by the Court or by operation of law and, looking to the substance of the matter, we do not find any difference in thy character of this sale (which, as we have said above, is really a sale in invitum) from a sale in execution or any other compulsory sale, to which, it is not disputed, the provisos will not apply.

43. The Rent Control Act, it must be remembered here, was passed for the protection of tenants. The man part of Section 12(1) gave absolute immunity to tenants from eviction and the provisos only mentioned the exceptions to that immunity. In this context, when proviso (a) speaks of a transfer by the tenant, it refers, in our opinion, to a transfer, in substance at least, if not in form also, by the tenant, and it will not apply where the transfer is by operation of law and the tenant has no hand in it, although, technically or in form, it is and appears to be a transfer by him. Whether the same principle ought to apply when construing a covenant against alienation is an entirely different matter which does not arise for consideration in this appeal and we prefer to express no opinion on the point and necessarily, therefore, on the English case cited, namely, (1921) 2 Ch 164, and the Allahabad decision, ILR 12 All 192 too. We hold, accordingly, that provisos (a) and (b) of Section 12(1) would not apply to this case and the defendant would not be deprived of protection under the Rent Control Act unless the plaintiff can succeed on the other proviso, pleaded by him, viz., proviso (h).

44. Now, proviso (h) permits ejectment "where the premises are reasonably required by the landlord either for purposes of building or rebuilding; or for his own occupation"

45. To this proviso (h) is appended an Explanation which runs as follows :

"The Court in determining the reasonableness of requirement for purposes of building or rebuilding shall have regard to the comparative public benefit or disadvantage by extending or diminishing accommodation and in determining the reasonableness of requirement of occupation shall have regard to the comparative advantage or disadvantage of the landlord and of the tenant"

and then appears a proviso (which will be referred to hereafter, wherever necessary, as the disputed proviso) in these terms :

"Provided that where the Court thinks that the reasonable requirement of such occupation may be substantially satisfied by evicting] the tenant from a part only of the premises and allowing the tenant to continue occupation of the rest and the tenant agrees to such occupation the Court shall pass a decree accordingly and fix a proportionately fair rent for the portion in occupation of the tenant which portion shall thenceforth constitute the premises within Clause (8) of Section 2 and the rent fixed shall De deemed to be the standard rent fixed under section 9."

46. The relevant allegation in the plaint is contained in paragraph 8 which states that "the plaintiff is in imperative need of building and rebuilding the said premises for his own occupation."

47. The relevant issue is Issue No. 3 which, as finally worded, stands thus :

"Does the plaintiff reasonably require the premises in suit for his building and re-building purposes, for his own occupation ?"

48. This issue was originally framed in the following terms :

"Does the plaintiff reasonably require the premises in suit for his building and re-building purposes as also for his own occupation ?"

but at the time of trial the words "as also" were deleted and the issue was recast as set out above in the preceding paragraph.

49. There was a controversy in the court below as to whether the plaintiff was claiming the benefit of both parts of proviso (h), namely, of requirement for building and/ or re-building purposes and also of requirement for his own occupation, so that if he could succeed under either head, that is, in establishing either of the above two requirements, he would be entitled to evade the bar of the Rent Control law, or whether his case was only of requirement for his own occupation so that if he failed to establish that requirement within the meaning of the statute his suit for eviction would fail. Before us, that controversy has not been raised and both parties have proceeded on the footing that the plaintiff's case is one of requirement for his own occupation, although after building and re-building, as the premises in its present condition is not fit for the

plaintiff's residence or habitation, such building, and re-building, being subsidiary to the main purpose viz., the plaintiff's own occupation. That is the argument of Mr. Gupta and also of the learned Advocate General and, accordingly, we are not called upon to consider that part of the judgment of the learned Subordinate Judge where he held that the plaintiff was entitled to a decree for ejectment in view of his requirement for building and re-building irrespective of any requirement for his own occupation. The statutory Explanation, therefore, so far as it relates to requirement for building and re-building and the finding of the learned Subordinate Judge, whereby it was held to have been satisfied by the plaintiff, and Mr. Gupta's submissions against that finding do not fail to be considered by us.

50. As we have said above, the plaintiff's case is that he requires, the disputed premises for, building and/ or re-building for his own occupation or, in other words, that he requires it for his own occupation and, for that purpose, he will build and/ or re-build it. Mr. Gupta first contended that such a requirement of the landlord would not come within the relevant phrase ("for his own occupation") of the proviso. He argued that the proviso contemplated two classes of requirement, one for building and re-building and the other for the landlord's own occupation and the two classes of requirement were mutually exclusive. They could not be amalgamated and a composite or amalgam requirement, necessitating building and re-building for making the premises fit for the landlord's own occupation, would not be relevant for purposes of the proviso. Where the requirement is for building and re-building, that must be for purposes other than the landlord's own occupation and where the requirement is for the landlord's own occupation, no question of building and re-building should arise; or, to put it straight, if the landlord's case is that he requires the premises for building and re-building, he cannot claim to occupy it himself and if his case be that he requires it for his own occupation, he must occupy it as it is and must not think of building and/or re-building it and if, on his own showing or admission, it will not be fit for his own occupation unless built and/or rebuilt, his case of requirement for his own occupation must fail under the statute. Whatever may be said with regard to the first part of this argument which does not really concern us here but in which there may be a good deal of substance, we are wholly unable to accept the latter part. In the course of argument, I put to Mr. Gupta one concrete illustration. That was the case of a landlord who was about to be ejected from a rented premises but who had a premises of his own, let out to a tenant and unsuitable for his own occupation unless built and/or re-built, and I asked Mr. Gupta whether, in such circumstances, the landlord would be entitled under the proviso to get possession of the premises on the ground that he required it for his own occupation and he intended to build and/or re-build it for that purpose and to occupy it after such building and/or re-building. Mr. Gupta's answer was an emphatic 'no.' I do not think, however, that that would be a reasonable construction of the statute and I refuse to believe that the legislature intended to leave the landlord without a remedy and without a residence for himself and his family, even though he had a premises and a reasonable

requirement of it for his own occupation or residence and also the means of making it fit for his habitation. The extreme position,--and its utter reasonableness--which Mr. Gupta had to take up to support or sustain his argument makes it clear that his said argument cannot be sound and we find no justification for accepting the unreasonable view of the statute which is necessarily involved in Mr. Gupta's submission. There is nothing in the Act which compels such acceptance and Section 15, to which, our attention was particularly drawn by Mr. Gupta, does not present any obstacle to our point of view as occupation of the premises for purposes of building and/or rebuilding in order to make it fit for one's own occupation would be part of such occupation. We, accordingly, overrule this extreme argument of Mr. Gupta.

51. On the above question Mr. Gupta cited the decision of the Privy Council in the New Zealand case of *Mckenna v. Porter Motors Ltd.*, (1956) AC 688 and sought to deduce support from it to his extreme submission as set out above. He did not dispute that prima facie that decision would appear to be against his contention but he submitted that, on a careful and closer reading and on the distinction, pointed out by him, it would prove to be the contrary. For this purpose, he drew our particular attention to the concluding observations of the Board at page 696 of the report where their Lordships purported to re-inforce their construction of the disputed provisions (Section 24(1) clauses (paragraphs) (h) and (m),--and incidentally also Clause (g),) of the New Zealand statute before them by reference to Section 30 and he contended that Section 15 of our statute which corresponds to the said Section 30 shows a different intention and points to a different conclusion and suggests--and, indeed, compels--a different construction of Section 12(1) proviso (h) of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, which corresponds to the above clauses of Section 24(1) of the New Zealand Act. We are unable to accept this contention.

52. To us there appears to be no material difference between Section 30 of the New Zealand Act as quoted and relied on by the Privy Council for supporting their construction of clauses (paragraphs) (g), (h) and (m) of Section 24 (1) and Section 15 of our Act to the extent that it may be relevant for Purposes of construing Section 12(1) proviso (h). In the observations of the Privy Council on Section 30 of the New Zealand Act, the relevant emphasis was on the penal provision in case of re-letting or re-sale and the absence of it in case of demolition or re-construction, where possession of the premises was recovered by the landlord for his own occupation substantially. The same failure is found on Section 15 of our Act and the only material difference appears to be that while, under the New Zealand Act, reletting or re-sale would be penal, if made within two years, in our Section 15 the corresponding period is six months. Our Act no doubt also provides that building or re-building, where possession is recovered on that ground, should commence within six months and, where it is for the landlord's own occupation, such occupation must be entered into within two months, or else the penalty may be imposed, but we do not think

that that would affect the construction as suggested by the Privy Council. True, the Privy Council did not refer to any such provision in the New Zealand Act. That may be either because there was no such or similar provision or because it was considered irrelevant for their purpose, but, in our opinion, such a provision, even if it was there, would not have altered or affected the reasoning or the conclusion of the Privy Council. The relevant emphasis would still have been on the distinction, pointed out by the Privy Council in their discussion of Section 30, namely, the enactment of the penal provision in case of re-letting or re-sale and the absence of it in case of demolition or re-construction, within the period specified and the presence or consideration of the additional or further provision, quoted from our statute, although it might" not have provided any additional or added ground or support for the suggested construction, would not certainly have negated or contradicted it. At the worst, it would have required the landlord to occupy the premises for demolition or re-construction as part of and for making it fit for his own occupation, where he recovered possession on that ground, within the period of two months, specified for the purpose. We do not think, therefore, that the purpose for which Mr. Gupta cited the Privy Council case can succeed and the decision is really against his attempted construction of the statute.

53. What we have stated above will be further clear if we examine briefly the facts of the New Zealand case and the manner in which the Privy Council approached and decided it. To that task we shall at once proceed.

54. The action was one in ejectment, brought by the landlords (Porter Motors Ltd.) against the tenants (Mathew James Mekenna and another). The premises comprised land with, a hotel on it. The plaintiffs claimed ejectment for their own occupation, namely, to use it for a garage after demolition and reconstruction of the existing building (hotel). The relevant statute (the New Zealand Tenancy Act of 1948) contained, inter alia, the following provision, namely, "Section 24:--

(1) An order for the recovery of possession of any dwelling-house or urban property or for the ejectment of the tenant therefrom maybe made on one or more of the grounds following

* * * *

(g) in the case of a dwelling-house, that the premises are reasonably required by the landlordfor his own occupation as a dwelling-house;

(h) in the case of urban property, that the premises are reasonably required by the landlordfor his own occupation.....

* * * *

(m) that the premises are reasonably required by the landlord for demolition or reconstruction....."

55. Sub-section (2) of Section 24 left a discretion to the court to refuse ejectment on consideration of comparative hardship of the parties and "all other relevant matters."

56. Section 25 enabled the landlord, if he had given the tenant a year's notice to quit, to get ejectment under Clause (h) aforementioned without offering alternative accommodation to the tenant, which offer was otherwise necessary for ejectment under that clause and which was an essential prerequisite for ejectment under the other relevant Clause (m).

57. There was a previous action, brought by the plaintiffs in the year 1949 against the defendants for a similar relief. The plaintiffs landlords, however, did not offer alternative accommodation to the tenants, nor do they appear to have given them (the tenants) the one year's notice under Section 25. The action was dismissed by Hutchinson, J., who held, inter alia, that "a landlord could not require premises for his own occupation within paragraph (clause) (h), if his intention was to demolish the existing building. In other words, a landlord who intended to demolish must proceed under paragraph (clause) (m), although he intended himself to occupy after demolition and reconstruction."

In short, the learned Judge's view was that, where demolition and/or reconstruction was necessary, the case would not come within Clause (h) but would fall under Clause (m).

58. After the said dismissal of the previous action the plaintiffs gave the required year's notice under Section 25 and brought the present action in 1953 claiming ejectment under Clause (h).

59. The action succeeded before the trial Judge (Cooke, J.) and also before the Court of Appeal (Gresson, Hay and Turner JJ.) which, in a material part of its judgment, held that 'premises', at least in the case of urban property for purposes of Clause (h), comprised the demised land and such buildings as are from time to time situate thereon as distinguished from the (original) subject-matter of the lease. That was also the view of the trial Judge (Cooke, J.).

60. The defendants appealed to the Privy Council and contended that the word "premises' had been wrongly construed by the courts below and that, but for that wrong construction, ejectment would not have been decreed,

61. The Privy Council accepted the first part of the above contention but rejected the second and it maintained the decree for ejectment upon the view that 'own occupation' in Clause (paragraph) (h)--and in Clause (g) too--included occupation for purpose of demolition and/or reconstruction for making the premises fit for the landlord's occupation and that Clause (Paragraph) (m) would not apply where demolition and/or reconstruction would be part of such occupation as aforesaid

but that the said Clause (Clause (m)) was limited to cases, where the premises were required by the landlord not for his own occupation but for other purposes, e.g., reletting, resale etc.

62. In holding as above, the Privy Council rejected the opinion of Hutchinson J. on the point and agreed with Williams J. of the High Court of Australia in the view, expressed by him on the two clauses (g) and (1) of the Australian statute (The National Security (Landlord and Tenant) Regulations), corresponding to the above clauses (h) and (m) of the New Zealand Act, in the case of *Burling v. Chas. Steele and Co. Pty. Ltd.*, (1948) 70 CLR 485, at pages 490 and 491. The relevant observations of Williams J. as quoted by the Privy Council, appear as follows:

"This ground" (that is (g)) "applies wherever the lessor requires the premises, which means the land leased together with the buildings thereon for his own occupation As part of such occupation he is quite entitled to do what he likes with his own land including reconstructing or demolishing the existing buildings. Ground (1) applies where the landlord requires the premises for reconstruction or demolition with a view to letting or selling them or making some use of them other than his own occupation....."

63. Commenting on the above and accepting the view of Williams J. in preference to Hutchinson J.'s, their Lordships of the Privy Council made the following observation at pages 695-6 of the Report ((1956) AC):

"The real question turns on the meaning of 'his or their own occupation'. Apart from paragraph (m) there would be no doubt that a landlord required demised premises for his own occupation although he was intending for the purposes of his occupation to make substantial alterations or put up a wholly new building. The difficulty arises from the existence of paragraph (m). Is that to be construed as covering all demolition or reconstruction cases including those where the landlord will remain in occupation or do the words of paragraph (h) limit its operation in the way stated by Williams J. Their Lordships are of opinion that its scope is so limited. This gives their natural meaning to the words 'for his or their own occupation' while leaving a scope for paragraph (m) which accords with the distinction plainly drawn by paragraph (g) and paragraph (h) between landlords who require to relet or resell and landlords who require to occupy."

64. Their Lordships then reinforced their above construction by reference to Section 30 in the following terms:

"This construction is supported by Section 30 which provided inter alia that a landlord who within two years relets or resells premises of which he has obtained possession under paragraph (g) or (h) shall be guilty of an offence. If the appellants argument is right one might have expected the demolition and reconstruction of a building within two years on premises of which possession had been so obtained also to have been made an offence."

65. We have already shown that Section 15 of our Act which corresponds to the above Section 30 introduces no change in the situation and, accordingly, the case cited by Mr. Gupta, namely (1956) AC 688, far from supporting his contention, really goes against it and the distinction, sought to be made by him by referring to Section 15 of our Act, does not, as we have already pointed out, strictly arise or aid his submission.

66. The next question is whether the plaintiff has made out his case of reasonable requirement of the suit premises for his own occupation. This, indeed, is a difficult question in the facts of this case. The plaintiff has admittedly a good dwelling house and he is not in need of any extended or greater accommodation. He has been perfectly candid about it and, whatever be the legal inference, deducible from his evidence, and whether it aids him in the suit or not, and whatever comments may be made against his other witnesses, it must be said in fairness to the plaintiff that he has very fairly placed his case before the court. Indeed, at one stage of the arguments Mr. Gupta remarked that "the plaintiff has placed all his cards on the table and has given the facts fairly and truly and has not suppressed or concealed anything and that, barring certain expressions of feelings and emotions here and there, his evidence may, on the whole, be accepted as a correct statement of facts."

He, however, contended and that is the real point here for consideration that the facts, as stated by the plaintiff, do not make out a case of reasonable requirement of the disputed premises for his (the plaintiff's) own occupation within the meaning of the statute, the more so when the relevant Explanation is taken into consideration.

67. Let us then turn to the plaintiff's evidence and collect the relevant facts. Briefly put, they may be stated as follows:

"The plaintiff (who was about 74 years old at the date of his deposition) resides at No. 36 Wellington Street, which is on Wellington Street opposite Wellington Square. Since 1946 and, particularly, after he became the Chief Minister (which was on 23-1-1948), he was finding it difficult to live there as it (meaning, of course, the locality) is very noisy. The Wellington Square again, since the plaintiff became the Chief Minister, has become the venue of meetings, sometimes every evening, and the promoters of the meetings took care to point one of their loud speakers towards his house. He feels the strain because it disturbs his much-needed rest after the day's strenuous work. Processions often pass in front of his house shouting slogans and that adds to his strain. He had a heart attack possibly due to strain and want of rest.

Sometime in 1945, he had deposited a sum of Rs. 16,000/- with the Hindustan Co-operative Insurance Society Ltd. for purchasing the disputed property. After his heart attack he felt the necessity of removing from his Wellington Street residence and so he approached Hindustan

Co-operative Insurance Society Ltd. for a loan on mortgage of his Wellington Street premises to enable him to purchase the disputed property for purposes of his residence. He purchased the disputed property including the superior lessor's (owner's) interest by mortgaging his Wellington Street house. He knew that the property was tenanted but he was assured by the Hindusthan's Board of Directors that the tenant would vacate. Failing to get possession for 3 or 4 months he approached the defendant who saw him and promised to vacate as soon as possible. In September thereafter he received the letter (Ex. 2) and- as suggested therein, he went to inspect the disputed premises for making arrangement for starting the construction work. He purchased the disputed premises for the purpose of his residence, As it is, the disputed premises is not fit for his habitation and he proposed to build a house there and, for that purpose, he got a plan sanctioned by the Corporation and collected the necessary funds by selling his Shiliong house. He chose the disputed premises for his residence as it was in a quiet locality and not in front of an open street like the busy and noisy Wellington Street."

68. On the above facts the plaintiff's case of reasonable requirement of the disputed premises is founded. Whether, on them, a case of requirement and of reasonable requirement, as required by law, has been made out or not is the point for consideration. For that purpose it is necessary to refer to and examine certain statements, made by the plaintiff and some of his witnesses in their cross-examination and also certain statements, made by the defendant (D. W. 1) and his son (D. W. 3) in their evidence. Nothing else appears to be relevant on the point.

69. The statute, as we have seen above, uses the phrase "reasonably required by the landlord for his own occupation ' in the relevant proviso (h) and to that proviso is appended an Explanation which lays down that, in judging this reasonable requirement, the comparative advantages and disadvantages, of the landlord and the tenant should be taken into consideration. Bearing this in mind, we shall now examine the merits on the plaintiff's case on the point, leaving aside, for the present, the proviso which appears after the Explanation and on which, we shall only make just a few preliminary observations at this stage

70. The above proviso appears in the statute after the Explanation and the way or the manner in which it has been placed and its punctuation may suggest that it is really a proviso to the Explanation and is intended to control its main part in the sense that, even before the question of comparative advantage and disadvantage is taken up for consideration, this proviso will have to be considered and, if the Court thinks that the reasonable requirement of the plaintiff for his own occupation, considered from the plaintiff's point of view and apart from the question of comparative advantage and disadvantage, be substantially satisfied by partial eviction, the Court will consider the proviso and, only when the proviso will fail to apply either by reason of the defendant's non-agreement or otherwise, that the question of comparative advantage & disadvantage will arise for consideration for deciding whether ejection should be decreed or

not. The same approach may also be justified even if this proviso be considered to be a part of the main proviso (h), that is, a further proviso to that proviso. The third possible view (which is usually accepted and which also treats the above further proviso as a proviso--the 2nd proviso--to proviso (h)) is that when the Court takes the view that the plaintiff is entitled to a decree for ejectment on the ground of reasonable requirement for his own occupation in the light inter alia of the Explanation but thinks that partial eviction will be sufficient for the purpose, it will take the said further proviso (which we shall hereafter call, whenever necessary, the disputed proviso) into consideration and examine its applicability and effect in accordance with law. In the present case, it is unnecessary to consider which of the above three views is preferable as, in view of our conclusion on the question of comparative advantage and disadvantage and in view of the fact that, in our opinion, the disputed proviso should be considered in this case, all the above three views will lead to the same result. We, therefore, proceed first to consider the question of comparative advantage and disadvantage.

71. We have set out in brief the plaintiff's evidence in support of his case. In cross-examination, the plaintiff has stated that he never looked for any other suitable plot or any other rented house for a quieter living and that his intention was either to have a house on the disputed plot or not at all. On these statements Mr. Gupta laid some stress for showing that the plaintiff had no requirement--in any event, no reasonable requirement--of the disputed premises. We do not think, however, that that inference would be justified in the facts of this case. The plaintiff, as his evidence shows, has already deposited a good sum for the purchase of this property and, if he otherwise reasonably requires a change of residence, insistence on this property for that purpose would not affect the genuineness or the reasonableness of that requirement. This, of course, must be subject to the test of comparative advantages and disadvantages of the contending parties, which we shall consider immediately hereafter. Mr. Gupta also pointed out that the plaintiff's story of disturbance of rest by the meetings and processions would be contradicted by the evidence of his witness No. 3 Protap Mitra in the light of the uncontradicted statement of the defendant's son (D. W. 3) and he referred in that connection to Protap Mitra's statement in cross-examination that he could not say when the plaintiff used to return home, although the witness (Protap Mitra--P. W. 3) stayed at the plaintiff's house practically the whole day up to 6 p. m. in the evening, thus suggesting that the plaintiff did not return before 6 p. m. and to the evidence of the defendant's son (D. W. 3) that the meetings in Wellington Square were generally finished by 7 p. m. Those statements, however, are too vague to cast any doubt on the plaintiff's positive statement that he is greatly disturbed by the meetings and processions when he needs rest most after his day's strenuous work. There was also no such suggestion made to the plaintiff when he was cross-examined and, in such circumstances, we do not find sufficient reason to discard the plaintiff's positive statement on the point. Mr. Gupta also made a comment that there was really no evidence of the alleged disturbance of the usual night's rest of the plaintiff as there was no

allegation that the meetings and processions used to continue beyond evening or the early part of night. But, here also, no such suggestion was made to the plaintiff when he was in the witness-box and, in the absence of any such suggestion, there is not the slightest justification for rejecting the plaintiff's sworn testimony. In the above connection, must be remembered also the plaintiff's other allegation that the locality was very noisy and disturbing which fact, in the context of his deposition, may also well be a strain on his tired nerves at his age after his day's strenuous work and constitute sufficient disturbance to his usual night's rest and sleep.

72. From what we have stated above, it is fairly clear that, subject to the test of comparative advantage and disadvantage which we shall presently consider, the plaintiff has made out a case of reasonable requirement of the disputed premises for his own occupation. Reasonable requirement is a relative term. What is reasonable requirement for A may not be so for B and, again, what may not be reasonable requirement for A may well be reasonable requirement for B. The status of the plaintiff, the nature of his work or avocation, the state of his health etc.--all may be relevant considerations for judging his requirement and the reasonableness of it. As Chief Minister the plaintiff is certainly not entitled to any privileged treatment in law and it is fair to observe that he does not claim any. He has placed the above facts before the court and giving them a dispassionate and anxious consideration, we have reached the conclusion that, subject to the test of comparative advantage and disadvantage, as laid down in the Explanation and subject also to the proviso--the disputed proviso,--appearing thereafter, if the same be eventually found applicable, the plaintiff, on the facts before us, may be said to have made out a case of reasonable requirement of the disputed premises for his own occupation within the meaning of the West Bengal Premises Rent Control (Temporary Provisions) Act of 1950.

73. As to the test of comparative advantage and disadvantage, the position of the parties will have to be very carefully considered. Indeed, this appears to be a crucial question in the present case. The plaintiff's position and his requirement and the reasons therefor have already been stated. The defendant carries on business at the suit premises, the nature of which also has sufficiently been set out above. That business appears to have seen better days and, although it might have seen worse days too, there can be no doubt that it is in a running condition now. We do not for a moment believe P. W. 3's evidence that the defendant wanted to wind up his business and retire and go to Kashi. The defendant has invested a considerable amount in the business,--indeed, the major part of his life's earnings and savings,--and, practically speaking, the business appears to be his main hope and the principal means of livelihood of his family, it is absurd to think that the defendant would close up the business and retire and go to Kashi. This much, however, is clear from the papers (K and L series), produced by the defendant himself, and in the light of the evidence of his son (D. W. 3) that his business is being carried on on a much restricted scale.

74. Leaving aside the disputed proviso for the moment, the point is whether the defendant can remove from the suit premises without greater disadvantage to him than the disadvantage which the plaintiff would suffer from non-obtaining of possession of the same. Giving, again, the matter our best and most dispassionate consideration in the light of the materials before us, including the facts and circumstances, set out hereinbefore, we are inclined to think that, given sufficient time, the defendant will be able to remove without greater disadvantage to him than what the plaintiff will suffer from non-obtaining possession of the disputed premises. This appears from his own evidence (vide the concluding part of his cross-examination) which suggests that he will not have much difficulty in removing without much loss if he gets sufficient time for the purpose. This is also confirmed by the trend of his letter (Ext. 2) which, though it is otherwise irrelevant for purposes of the Rent Control Act, would be available to the plaintiff to show that the defendant would not experience much difficulty in removing his business from the suit premises. We are also not convinced on the evidence before us that the defendant made any adequate serious attempt to find out alternative accommodation. The evidence of the defendant (D. W. 1) and of his son (D. W. 3) rather gives a contrary impression and, on the materials before us, we feel that, given sufficient time, the defendant will be able to find out suitable alternative accommodation for this part of his business which is located at the disputed premises.

75. In my dealing with these cases under the Rent Control Act and, in particular, with this question of comparative advantage and disadvantage, I have often found this time factor a very helpful element and it has frequently been employed by me with great success and highly satisfactory result. I do not find any sufficient reason to make any departure or deviation or exception in the present case and, in our view, unless the proviso, appearing after the Explanation, applies to this case to justify the making of a partial decree for ejection, the requirements of law and justice will be fully met by affirming the decree of the trial court subject to this that the defendant should have time till the end of November 1958 to vacate the suit premises. That will give the defendant more than ten months to find out suitable alternative accommodation for the part of his business which is located at the disputed premises and, on the materials before us, we have little doubt that he will be able to do so in terms of his reasonable requirement within that space of time provided he makes honest and sincere efforts in that behalf and that, in such event, his comparative disadvantage will not be greater than the disadvantage which the plaintiff would suffer from a refusal of a decree for possession.

76. We would, accordingly, answer the question of comparative advantage and disadvantage in favour of the plaintiff.

77. Now we take up the disputed proviso, As the statute stands, this proviso would apply only where the Court thinks that the plaintiff's reasonable requirement for occupation may be substantially satisfied by evicting the tenant from a part only of the premises and allowing him to

continue in occupation of the rest and the tenant agrees to such occupation. If, however, these elements are satisfied and the proviso is attracted, the Court is to pass a partial decree for ejection in terms of its above finding and fix a proportionately fair rent for the portion (premises), to be thenceforward occupied by the tenant. This was a new provision in the 1950 Act and it appears to have been introduced to provide for some adjustment of the needs of the parties, consistent with their rights under the statute and in consonance with its declared object and policy and, possibly also, to prevent avoidable prejudice to either party. For myself, I have always considered it to be an important and wholesome provision and endeavoured to give it the fullest scope, consistently with the rights of the parties, and I have never allowed any technical consideration to defeat its salutary object. I do not, therefore, agree with the learned Advocate General that, as the defendant did not take any plea under this proviso in the written statement or before the trial Court, he should not be allowed to urge it in this Court. The proviso appears to have been overlooked in the trial court and the question of partial eviction was not raised or considered there. The plaintiff was seeking total eviction of the defendant from the suit premises and the defendant was fighting out that case. The plaint alleged the plaintiff's reasonable requirement of the suit premises but it did not contain any particulars of such requirement nor mentioned any facts from which the extent of such requirement could be gathered or inferred. In such circumstances, it would be unreasonable to expect the defendant to contend in the written statement that partial eviction would be sufficient to meet the plaintiff's reasonable requirement. It was only in evidence that the extent of the plaintiff's requirement was somewhat indicated and, at the earliest, therefore, it was at that stage or during arguments that the defendant could have mooted this question of partial ejection. The defendant's failure to do so, however, does not relieve the Court of its duty under the Statute and having regard to the object and scheme of the disputed proviso and, particularly, its wording, it seems to us that it is open to the Court--and that, indeed, seems to be its duty--to consider this question of partial eviction, if it thinks, on the materials before it, that that ought to satisfy substantially the plaintiff's reasonable requirement of occupation and, if the defendant agrees to occupy the portion of the premises that will be left after satisfying the plaintiff's reasonable requirement, to pass a decree for partial eviction in terms of the proviso if the same be otherwise applicable. It may be that, for finding out exactly what portion of the premises should be given to the plaintiff or whether it is practicable, in the circumstances of a particular case and consistently with the rights of the parties, to divide the premises into two portions--one for satisfying the plaintiff's reasonable requirement and the other to be retained by the defendant--the Court may require further materials but it is open to the Court to call for such further materials from the parties. As the statute stands, it is only when the Court thinks that a portion of the premises will substantially satisfy the plaintiff's reasonable requirement that the question of the defendant's occupying the rest or of his agreement to do so will arise. The defendant certainly cannot be expected to anticipate what portion the Court will

take as sufficient for the plaintiff's legitimate purpose or reasonable requirement of occupation and to agree in advance to occupy the rest without knowing what that 'rest' will contain. He may, no doubt, suggest a division or a particular division but he is not bound to do so. There is thus enough justification under the statute to allow this plea of partial eviction to be taken by the defendant for the first time before the appellate Court if it had not been considered or considered properly by the trial court (vide in this connection *Sardar Singh v. Bimal Krishna Basu*, 59 Cal WN 430) and, if, on the materials before it, the appellate court be of the opinion that a partial eviction or occupation of a portion of the premises would meet the plaintiff's reasonable requirement, it would pass a decree accordingly, allowing the defendant, if he so agrees, to continue in occupation of the rest, provided, of course, the proviso otherwise applies.

78. In the above view, we would entertain this plea of the defendant at this appellate stage and that in spite of the fact that it was not urged at the original hearing of the appeal. The point was taken in the memorandum of appeal but it appears to have been lost sight of at the time of hearing in the heat of discussion. While considering our judgment and, in particular, the question of the plaintiff's reasonable requirement, it appeared to us prima facie that this was pre-eminently a case where the disputed proviso may have application to bring about a happy blending of law, justice and equity. On the materials before us, an area of about a bigha appeared to be prima facie sufficient to satisfy substantially the plaintiff's reasonable requirement of occupation. Even the plaintiff's own plan, Ext. 3, of his two proposed buildings in the disputed premises, assuming they are both necessary for satisfying his reasonable requirement for his own occupation under proviso (h), would not require any larger area for the purpose. They need not also be necessarily located, where they are shown in the said plan (Ext. 3), to satisfy his said requirement, as appearing on the present materials before the Court, and they may conveniently be shifted and accommodated within a bigha or so to leave a decent compact area, appropriate and sufficient for the defendant's business in its present condition, for the latter's use and occupation, out of the total of 2 bighas and 5 cottahs more or less, which constitute the disputed premises. That appears to be the prima facie position on the record as it stands, but, as we shall indicate hereafter, further materials may be necessary and ought to be called for from the parties before the matter can be finally disposed of and it can be justly determined whether a division, as contemplated above, would be legal or would be practically possible without infringing the rights of either party under the law and consistent with such rights.

79. In the above view, we thought that there was a case for consideration of the above proviso which we have termed herein the disputed proviso and which is usually regarded as a further--to wit, the second,--proviso to proviso (h), as it appeared likely to us that the defendant might agree to a division as envisaged above. As, however, it was the plan (Ext. 3), which, when studied in the light of the plaintiff's evidence, removed all doubts from our mind about the above prima

facie position and as neither the said plan (Ex. 3) nor the above aspect of the matter had been placed before us at the original hearing of the appeal, we deemed it necessary to have a further hearing to ascertain the views of the parties on the question of the above proviso and to hear arguments on the same and, accordingly, we directed the appeal to be put up as "to be mentioned" for fixing a date for further hearing and, with the consent of the parties, the appeal was placed on the list as 'to be mentioned' on the 18th November 1957. To suit the convenience of the parties, this further hearing was adjourned sine die with liberty to mention, and, eventually, the appeal was finally heard by us on the 16th of December last, and, when, at this hearing, Mr. Gupta told the Court that he ought to have urged this point under the disputed proviso and that his client would agree to partial eviction to the extent necessary for satisfying the plaintiffs reasonable requirement, we were reluctant to shut out the defendant from urging this plea on the technical ground of delay or default at earlier stages.

80. Sitting in this Court for administering justice, I have never refused to listen to a point, relevant to the case, merely because it was not mooted earlier unless the other party happened to be prejudiced thereby beyond recompense. The instant case does not, in my opinion, come within that exception. Where, moreover, the statute casts a duty on the Court to consider a particular aspect of the matter, the question of delay or default on the part of a party may not be strictly relevant. It is, therefore, necessary to consider whether the disputed proviso would apply to the present case and, if it does, what will be its effect.

81. At the further hearing of the appeal, Mr. Gupta produced a plan of the disputed premises, on which was shown the portion which the defendant offered to release to the plaintiff, retaining the rest for his (the defendant's) purposes. That plan we are marking 'X' for identification but, as we intimated to Mr. Gupta during the course of arguments, the portion, offered to be released as shown in the said plan, measuring roughly about 14 cottahs, would not have been sufficient, in our opinion, to satisfy even substantially the plaintiff's reasonable requirement, for which we thought about a bigha at least would be necessary, and, if the matter had rested there, we would have maintained the decree for ejection, giving the defendant time till the end of November, 1958. to vacate the suit premises and no remand would have been necessary. Eventually, however, when the matter was further examined on the entire materials before the Court, Mr. Gupta agreed that the plaintiff should have about a bigha and his client (the defendant appellant) ought to be satisfied with the rest of the premises and he suggested that the disputed premises be divided into two blocks by drawing a line straight northwards, or slightly inclined on one side or the other, from the eastern point of the central gate on Rowland Road and allotting the eastern portion to the plaintiff and the western to the defendant and, his client having agreed to that and it appearing to us that such division may conveniently leave about a bigha to the plaintiff, we thought it worthwhile to consider the disputed proviso further in the light of the respective

positions of the two parties before us.

82. We have since given the matter our fullest consideration and examined and re-examined the materials before us with a view to decide this question of the disputed proviso--its applicability and effect in the facts of this case. There are, however, two difficulties in disposing of the matter finally here. In the first place, it may well be that the plaintiff--and, possibly, the defendant too,--has overlooked or ignored the disputed proviso and his or their evidence on the question of the plaintiff's reasonable requirement (which is now on record) may not be as full as it might have been had this aspect of the matter been present before them or before the learned Judge in the court below and that fuller materials as to the plaintiffs said requirement--to wit, its nature and extent,--may be available to enable the Court to decide justly the question or questions under the said proviso and, secondly, that further details about the nature of the disputed premises--its configuration, disposition and structural alignment and arrangement or the nature and location of the structures etc.--may be necessary to determine the applicability of that proviso and the manner of its application, if eventually it be found applicable to the case. It would be unfair, in our opinion, and unsafe too, to decide the question of the above proviso without the fuller and further materials, spoken of hereinbefore, if the same be available.

83. We would, accordingly, remit this case to the Court below for consideration of the question of the disputed proviso--its applicability and effect in the facts of this case--and final disposal of the suit (including the plaintiffs claim for mesne profits) in accordance with its finding on that question. That will be the only point to be considered at the rehearing and it will be decided on the materials, now on record, and such further materials as either party may choose to adduce--and for adducing which the parties are given the necessary leave--to enable the Court to come to a just and proper decision and, in the light of that decision, the suit will be disposed of finally by the court below in accordance with law and in terms of this judgment and, if, eventually, the plaintiffs claim for ejectment be decreed in full, the Court will give the defendant time till the end of November 1958 or four months from the date of its final judgment, whichever is later, for vacating the suit premises. It must be clearly understood that we are expressing no opinion on the applicability or otherwise of the above proviso or on any part of the question, now being remitted by us to the Court below, and the whole of that question in its fullness and entirety--is left open for consideration by that Court. It is also necessary to state that, for purposes of dividing the premises for convenient application of the above proviso, if the same be otherwise applicable, the parties will be entitled to make and the Court will be bound to consider any other suggested division and they will not be limited to the division or divisions, set out or suggested above. If, however, there be any legal impediment to any such suggested division or if any suggested division be not practicable without infringing any legal right of the plaintiff or consistently with the legal rights of the defendant or consistently with law, such suggested division should be

rejected and the Court will not give effect to the disputed proviso on the basis of the same. We would also make it clear that, the answer to the question of mesne profits being dependent on the fate of the plaintiff's claim for ejectment, that question may require reconsideration and it will be open to the Court below to reconsider it, if necessary, in the light of its finding on the plaintiff's claim for ejectment and to make an appropriate decree for rent in place of mesne profits to the extent necessary if the claim for ejectment fails to any extent whatsoever.

84. The appeal thus succeeds in part; it is allowed, the decree of the trial Court is set aside and the case is remanded to that Court for further consideration and final disposal according to law in the light of this judgment and in terms thereof. All costs (including the costs of this appeal which would include inter alia the Paper Book costs) will be in the discretion of the Court below when it finally decides the suit.

85. The Court below will try to dispose of the matter as expeditiously as possible.

86. The order for deposit of rent or mesne profits made in the connected Rule (Civil Rule 3431 F of 1956) will continue until the final disposal of the suit by the Court below.

P.K. Sarkar, J.

87. I agree.