PATNA HIGH COURT

Raj Kumar

Vs

Uchit Narain

A.A.D. No. 378 of 1975

(S. Sarwar Ali, S.K. Jha and Medini Prasad Singh, JJ.)

05.05.1980

JUDGEMENT

S.K. Jha, J.

1. This is an appeal by the plaintiff landlord against a judgement and decree of reversal. The appellant instituted the suit, out of which this appeal arises, on the 10th of Feb., 1968, for eviction of the tenant respondent from the building let out to the latter. The suit was brought under the provisions of Section 11 of the Bihar Buildings (Lease, Rent and Eviction) Control Act 1947 (Bihar Act 3 of 1947) hereinafter to be referred to as the Rent Act. It may not be out of place to mention here that the Rent Act ceased to have any force after the 31st of March, 1976, but Bihar Act 16 of 1977 has been given retrospective effect from the 1st of April, 1976. The provisions of the Rent Act have been, for all material purposes, perpetuated up to the 31st March, 1981.

2. The appellant had got a decree for eviction in his favour in the trial court. The court of appeal below however, has reversed the decree and dismissed the appellant's suit.

3. The appeal involves some interesting, although vexed, questions of law. The learned single Judge, before whom the appeal was initially placed for hearing, referred it to a Division Bench. When it came to be heard by two of the learned Judges of this Court (Lalit Mohan Sharma and S. Shamsul Hasan, JJ.), they found that there were some conflicting Bench decisions of this Court on 2 points and, therefore, expressed the view that the case be referred for decision by a Full Bench. Hence the case before us.

4. Three questions of law falling for our consideration in view of the order of reference are –

> (i) Whether there can be waiver or forfeiture by acceptance of rent by the landlord after a default has already occurred attracting the provisions of Section 11 of the Rent Act ? On this point the Division Bench observed that there seemed to be an apparent conflict between two Bench decisions of this court, namely, *Birendra Mohan Ghosh v.*

Mohammad Ummar[1] and *Hardwari Lal v. Most. Nandrani*[2]

(ii) Whether tender before remittance under Section 13 of the Rent Act by money-order is necessary to make the remittance by money-order a valid one ? On this point that learned Judges of the Division Bench have noticed an apparent conflict between two Bench decisions in the cases of *Mahabir Prasad v. Bibhuti Mohan*[3] and *Madho Lal v. M.M. Agarwalla*[4] (iii) Whether the remittance by money-order under Section 13 of the Rent Act must be cumulative for the entire arrears of rent due, to make it a valid remittance as was held by a Bench of this court in the case of *Rajendra Mohan Ghosh v. Kaushalla Devi*[5] the correctness of which decision has been doubted 'by the learned judges referring this case to the Full Bench ?

5. Before, however, dealing with the points of law hereinbefore mentioned, in the fitness of things I must state the facts of the case giving rise to these questions. The appellant instituted the suit for realization of Rs. 1,088 as damages and for eviction of the respondent from the suit premises detailed at the foot of the plaint. The grounds on which the claim was founded were that the respondent had caused damages to the suit premises, that the appellant required the building for personal necessity within the meaning of Section 11(1)(c) and that there had been default in the payment of rent within the meaning of Section 11(1)(d) of the Rent Act. The case of the appellant is that he is the owner and proprietor of a house bearing holding No. 12, circle, No. 16, ward No. 8, situate in mohalla Sabzibagh in the town of Patna and the respondent is in occupation of the said house as a monthly tenant at a rental of Rs. 76 per month. The respondent had caused damages to the building which is a 3 storeyed one and put the appellant to a loss of Rs. 10,000 but due to his inability to pay the court-fee on that sum, he had limited his claim for damages to Rs. 1,088 only. The appellant has alleged that he had admonished the respondent for his acts causing damages. Thereafter the respondent without any reasonable cause stopped paying monthly rent from February, 1963 to December, 1967, excepting some payments which he had made to the Patna Municipal Corporation towards taxes, thereby causing a default in the payment of 2 months' rent payable by the respondent which attracted the provisions of Section 11(1)(d) of the Rent Act and made the respondent liable for eviction. Furthermore, the building in question was in such condition and state of disrepair that it cannot stand any longer and it requires immediate major construction for safe and comfortable residence of the appellant himself and that of his children who seek to receive their education at Patna. The appellant apprehended that the damaged house will fall down and valuable materials will be destroyed. Accordingly a case of personal necessity reasonable and in good faith was sought to be made out so as to attract the provisions of Section 11(1)(c) of the Rent Act making the respondent liable for eviction on that ground also. The appellant requested the respondent to vacate the suit premises several times but his requests were not heeded to. A notice was sent to the respondent under Section 106 of the Transfer of Property Act (T. P. Act) determining the tenancy and asking him to vacate the house by the 1st of December, 1967. Reply was sent by the respondent containing unwarranted, false and incorrect facts. On the 2nd of February, 1968, however, the respondent paid all the arrears of rent up to January, 1968 but he showed his disinclination to vacate the house. Hence this suit.

6. The defence, *inter alia*, was that there was no personal necessity, that there was no default in the payment of rent for the months of February, 1963, to December, 1967, which was remitted by postal money order in accordance with the provision of Section 13 of the Rent Act and that no damage had been caused to the suit premises. In any event, the suit was barred by the principles of waiver, estoppel and acquiescence since the plaintiff (appellant) had already received all the arrears of rent up to January, 1968 on the 2nd of February 1968, before the institution of the suit, the date of which, as already noticed above, was the 10th of February, 1968. It was further the defence case that the tenancy had not been determined by a legal and valid notice under Section 106 of the T. P. Act.

7. On these pleadings, the trial court held, *inter alia*, that no personal necessity was proved by the plaintiff and no damage was proved to have been caused by the defendant to the suit premises and, therefore, the plaintiff was not entitled to any decree for damages or for eviction on the ground of personal necessity. It, however, held that there had been a legal and valid service of notice under Section 106, T. P. Act, that there was a default in the payment of rent within the meaning of the Rent Act and the suit could not be barred by the principle of waiver. For coming to the last two findings, namely, with regard to default in the payment of rent legally payable and non acceptance of the case of waiver, the trial court proceeded upon the following chain of reasoning :-

> (i) Rent for a several months was paid in a lump sum on 2-2-68.
> (ii) It is not the defence case that the rent of several months was payable in a lump sum. Rather, from the written statement of the defendant himself it appeared that the rent was regularly payable month to month.
> (iii) Remittance by postal money order of the rent from month to month was not a valid remittance under Section 13 of the Rent Act as the allegation of refusal of acceptance of rent by the plaintiff which was made in the written statement, had not been proved by evidence. Once this allegation is not accepted, the remittance of rent for the period from May, 1963 to December, 1967 by postal money order was not a valid and legal remittance and could not go to save, the defendant from being a defaulter within the meaning of the Rent Act. Inferentially, if once a tenant was a defaulter within the meaning of the Rent Act, he was liable to be evicted and no question of waiver could arise. On the ground of default in payment of rent legally payable within the time stipulated by the provision of the Rent Act and not on account of any personal necessity, therefore, the defendant was liable to be evicted although not liable for damages. The suit was accordingly partly decreed for eviction only.

8. The defendant respondent having appealed, the lower appellate court held as follows :-

> (a) The arrears of rent were cleared off before the suit was instituted and the plaintiff landlord had accepted the same. Relying upon a Bench decision of this court in Birendra Mohan Ghosh's case (AIR 1978 Patna 292) (supra) it was held that acceptance of rent by the landlord amounted to waiver of the claim to eviction on the ground of default of

payment.

(b) The rent for the period from May, 1963, to January, 1968, as already stated above, was paid on 2-2-68 and received by the plaintiff. Rent for the months of January to April, 1963, had been paid to the plaintiff landlord. Rent for the months of June, 1963, onwards had been remitted to the plaintiff by postal money order which he refused to receive. Even during the pendency of the suit rent for every month after the institution of the suit was paid and received by the plaintiff.

(c) Remittance of rent by postal money order month to month could, not be said to be invalid or in contravention of Section 13 of the Rent Act as tender of such rent from hand to hand to the landlord was not a condition precedent for the validity of such a remittance, as was held by the Bench in the case of Mahabir Prasad (AIR 1973 Patna 83) (supra). There was thus no default in the payment of rent within the meaning of the Rent Act.

The decree for eviction passed by the trial court was accordingly reversed and the plaintiff landlord's suit was dismissed.

9. This appeal has accordingly been filed by the plaintiff landlord.

10. The findings of fact recorded by the lower appellate court were not, and, indeed, could not be, challenged in this second appeal. I, therefore, proceed to consider and decide the questions of law first and then to examine as to whether, on the settled principles of law, the appellant can succeed or not. Out of the three points necessitating the reference to this Full Bench, the first point with regard to waiver stands on an independent footing and is of paramount importance in this case, from the point of view of law although not from the point of view affecting the fate of this appeal. I think therefore, that in the fitness of things the points should be dealt with seriatim.

11. As has already been noticed above, in the case of Birendra Mohan Ghosh (AIR 1973 Patna 299) (supra) a Bench of this court held that if before the institution of the suit the tenant remitted rent up to date and the landlord had accepted it, the latter would be deemed to have waived his right to claim eviction on the ground of non-payment of rent. On the other hand, in the case of Hardwari Lal (1977 BBCJ (HC) 678) (supra) another Bench of this court held that acceptance of rent after the default within the meaning of the Rent Act did not extinguish the cause of action unless there was waiver by the landlord, and acceptance of rent before the expiry of the period of notice under Section 106 of the T. P. Act did not amount to waiver, but such acceptance after the expiry of the period of notice may be a circumstance upon which waiver could be inferred. For the reasons that I shall presently set forth, I would, with great respect to the learned Judges of the two Benches, hold that none of these two decisions has laid down, the correct position in law. The first link in the chain of my reasoning is that Section 11 of the Rent Act is a self contained Section and it is wholly unnecessary to travel beyond the Act to determine whether a tenant is liable to be evicted or not and under what conditions he may be evicted. The Rent Act sets up a complete machinery for the rights and obligations of the landlords and the tenants, and being a self contained Act in the matter to which it is applicable the principle of specialia generalibus derogant must be held to apply, and there is no scope for invoking the provisions of notice for determination of tenancy under Section 106 of the T. P. Act. If a default has occurred within the meaning of Section 11 of the Rent Act, the tenancy stands determined by force of the statute

itself and the further requirement of any notice under Section 106 of the T. P. Act is irrelevant if not redundant I am reinforced in this view by a recent decision of the Supreme Court in the case of *V. Dhanapal Chattiar v. Yesodai Ammal*[6] This court has previously insisted upon the due service of notice under Section 106 of the T. P. Act in view of the earlier Full Bench decision in the case of *Niranjan Pal v. Chaitanyalal Ghosh*[7] That decision has since been overruled by the Supreme Court in the case of V. Dhanapal (supra). There being thus no necessity for any service of notice under Section 106 of the T. P. Act for the purpose of eviction on any of the grounds enumerated in Section 11 of the Rent Act, the question as to whether the acceptance of rent was prior to the expiry of the period of notice under that provision of the T. P. Act as held in the case of Hardwari Lal (1977 BBCJ (HC) 678) (supra) does not arise. On this point, therefore, the only question that falls for our decision is as to whether there can be any waiver by acceptance of rent before the institution of the suit although a default had occurred within the meaning of Section 11 of the Rent Act prior to the institution of the suit. The answer to this question, is in my view, must be in the negative for the following reason. The term 'tenant' has been defined in Section 2(f) of the Rent Act as follows :-

> "'tenant' means any person by whom, or on whose account rent is payable for a building and includes -
> (a) a person continuing its possession after the termination of the tenancy in his favor and
> (b) a person who occupies a building as an employee of the landlord of such building either on payment of rent or otherwise".

Clause (a) of Section 2(f) thus includes a person who continues in possession after the termination of tenancy as a tenant. The termination of tenancy, thus does not preclude a person continuing in possession after such termination from remaining a tenant. Sub-Section (1) of Section 11 of the Rent Act incorporates a non obstante clause and lays down that –

> "Notwithstanding anything contained in any contract or law to the contrary but subject to the provisions of the Industrial Disputes Act, 1947 (Act XIV of 1947), and to those of Section 12, where a tenant is in possession of any building, he shall not be liable to eviction therefrom except in execution of a decree passed by the court on one or more of the following grounds :-"

Therefore, once a person is inducted as a tenant either under a contract or otherwise and he is in possession of any building, he continues to remain a tenant within the meaning of Section 2(f) until he is evicted from the premises in question in execution
of a decree passed by a court of competent jurisdiction on any of the grounds enumerated in Section 11. The initial induction of a tenant may be by a contract or may be statutory. That is of no consequence, Once the Rent Act is applicable to his case, he shall continue to remain a tenant within the meaning of the Rent Act until he is evicted by the process of execution of a decree of a competent court. If that be so, even if the default occurs within the meaning of Section 11(1)(d) and he forfeits for all practical purposes his right to remain a tenant, by legal fiction he continues to remain a statutory tenant. That is the cumulative effect of the provisions of Section 2(f) read with Section 11(1) of the Rent Act. It goes without saying that in law he remains a tenant, he is liable to pay rent and the landlord is obliged to accept rent from time to time. The relationship of

landlord and tenant does not cease to exist unless the decree for eviction on, *inter alia*, the ground of default in payment of rent within the Meaning of Section 11(1)(d) is executed. if, therefore, fails to appeal to reason as to how by acceptance of rent under a legal obligation there can be any question of waiver. At the cost of repetition, I may state that although the tenant has forfeited the right of tenancy for all practical purposes, he has to be treated as a tenant until so evicted. How then can the question of waiver arise in such of case ? I am fortified in my view by the decision of the Supreme Court in the case of V. Dhanapal (supra) which has dealt with this aspect of the matter and in which it has been held in paragraph 9 of the All India Reporter with reference to the petition under the Bihar Rent Act as follows :-

> "The definition Section permits the tenant to continue as a tenant even after the determination of the contractual tenancy. Section 11 gives him protection against eviction by starting with a non-obstante clause and providing further that he shall not be liable to eviction from any building except in execution of a decree passed by the court for one or more grounds mentioned in Section 11. Does it not stand to reason to say that a decree can be passed if one or more of the grounds exist and such a decree can be passed against an existing tenant within the meaning of the State Rent Act."

In the case of Birendra Mohan Ghosh (supra) the Bench of this Court, which decided that case, has given no reason for holding that the claim of eviction on the ground of non-payment of rent was barred by the principle of waiver. I, however, presume that it was under the general principle of law that a person, for whose benefit a legal provision is incorporated in a statute, has the option to give it a go-by and that, therefore, if the landlord, for whose benefit eviction on the ground or default in the payment of rent within the meaning of Section 11(1)(d) of the Rent Act has been prescribed, could well have, by the acceptance of rent before the institution of suit, waived his right to enforce the claim for eviction.

12. In the case of Hardwari Lal (1977 BBCJ (HC) 678) (supra) the learned Judges of the Division Bench have rightly held that the acceptance of rent after the default does not extinguish the cause of action, but the qualifying clause that unless there is a waiver by the landlord, extinguishing the cause of action, with due deference to the learned Judges, is not warranted by the provisions at the Rent Act, nor for that matter has it been correctly held that such acceptance after the expiry of the period of notice under Section 108 of the T. P. Act may be a circumstance upon which waiver can be inferred. The learned Judges have proceeded upon the premise that in view of Section 111 read with Section 113 of the T. P. Act, according to which the question of waiver will arise, it can so arise after the expiry of the period given in the notice under Section 106 of the T. P. Act, i.e., after the determination of the tenancy. As I have already held, there is no question of determination of the tenancy by a notice under Section 106 T. P. Act, as under the provisions of the Rent Act a tenancy does not stand determined even in spite of a notice under Section 106 which is not a pre-requisite for the purpose of determination of tenancy. According to the statutory provision of the Rent Act, of which notice has been taken earlier, as soon as a default occurs within the meaning of Section 11(1)(d), the landlord has the right to get the tenant evicted but until the tenant who is liable to be evicted is so evicted in execution of a decree passed by a court of competent jurisdiction, he continues to remain a statutory tenant within the meaning of the Rent Act. There is no forfeiture in the eye of law. The tenant becomes liable to be evicted and forfeiture comes into play only if he has incurred the liability to be evicted under the

Rent Act and not otherwise. There is no forfeiture, as stated above, in the eye of law because even if the lease is determined under the T. P. Act. the tenant continues to be a statutory tenant. I am fortified in this view by the decision of the Supreme Court in the case of V. Dhanapal, (AIR 1979 SC 1745) (supra). The question of invoking the provisions of Section 111 or, for that matter of Section 113 of the T. P. Act is wholly irrelevant for the purpose. Section 111 of the T. P. Act lays down, *inter alia*, that a lease of immovable property determines on the expiry of the notice to determine the lease or to quit or of intention to quit the property leased duly given by one party to the other (refer to Section 111(h)). Section 113 of that Act lays down that "a notice given under Section 111(h) is served with the express or implied consent of the person, to whom it is given, by any act on the para of the person giving it, showing an intention to treat the lease as subsisting". If a notice determining the tenancy' under Section 106 of the T. P. Act under the provisions of the Special Act, namely, the Rent Act, is not a *sine qua non* for the determination of the tenancy then the question of waiver of notice to quit cannot be said to arise. There can, therefore, be no scope for the applicability of Section 113 of the T. P. Act in such cases. Where Rent Acts are in force acceptance of rent may be attributable to the statutory tenancy created thereby. If a statutory tenancy continues so long as there is no decree for eviction which is to be executed, the landlord has no option but to accept the rent from the statutory tenant. In such cases there cannot be said to be any relinquishment by the landlord of a legal right or abandonment of his cause of action. If he continues to remain a landlord by statutory fiction and the defaulter tenant continues to be a tenant by such fiction, the jural relationship between the parties continues so long as the decree for eviction is not executed. The statutory landlord in such cases has no option bat to receive the rent from his tenant who has already forfeited his right to continue as a tenant by force of law. It would only be meet and proper for me to notice another provision of the Rent Act which reinforces this view. We may as well, therefore, look to the provisions of Section 11A of the Rent Act, it lays down that –

> "If in a suit for recovery of a building the tenant contests the suit as regards claim for ejectment, the landlord may make an application at any stage of the suit for order on the tenant to deposit month by month rent at a rate at which it was last paid and also the arrears of rent....."

(the underlining is mine for the sake of emphasis). This provision will show that even while the suit for ejectment is pending, the landlord has been conferred upon the right not only to make a prayer for a direction to the tenant to deposit the arrears of rent but also for the payment/deposit of rent month by month. When the tenancy for all practical purposes has been determined, the status still enjoins that the landlord is entitled to receive rent and casts an obligation on the tenant to pay not only the arrears of rent but also the current rent month by month. Can the acceptance of such rent amount to a waiver or an abandonment of the right on the part of the landlord ? The statute, in my view, has intentionally and deliberately used the terms 'arrears of rent' and deposit of 'month by month 'rent'. The term 'rent' has a definite legal connotation and it cannot be said that the Legislature in its wisdom has loosely used the word 'rent' as a substitute for payment of compensation for use and occupation. In my considered view, therefore, there cannot 'be an inference of waiver or abandonment of any right by the landlord to press for eviction even if he has accepted rent till the decree for eviction has been put into execution and has been executed. That disposes of the first point referred to us. It is well settled that waiver is an intentional relinquishment of a known right or such conduct as warrants such an inference. In cases of the

instant nature under the Rent Acts what is the known right which the landlord, by acceptance of rent, can be said to have intentionally relinquished ? The answer is evidently that the landlord knows that -he has a right to get the tenant evicted in execution of a decree passed by a court of competent jurisdiction and until such a decree is legally executed, he continues to be a statutory landlord and is entitled or, rather impelled by the law, to receive rent from the defaulting tenant. There is thus no known right which can be said to have been abandoned by the landlord merely by acceptance of rent even while the suit for eviction is pending, No question of waiver can, therefore, in my view, arise in such cases. It may be a different matter that the landlord may enter into a fresh contract of tenancy with a tenant whose right of occupation is determined and who remains in occupation by virtue of the statutory immunity. Apart from an express contract, conduct of the parties may undoubtedly justify an inference that after the determination of the contractual tenancy the landlord had entered into a fresh contract with the tenant but whether the conduct justifies such an inference must always depend on the facts of a particular case. That automatically presumes that in order to take shelter behind such a plea, the defaulting tenant defendant must plead that there had been the creation of a new contractual tenancy. In this view of mine, I am fortified by a decision of the Supreme Court in *Ganga Dutt Murarka v. Kartik Chandra Das*[8] wherein it has been held that where a contractual tenancy, to which the rent control legislation applies, has expired by efflux of time or determined by notice to quit and the tenant continues in occupation of the premises by virtue of statutory protection, acceptance of rent by the landlord from the tenant after the expiry or determination of the contractual tenancy will not afford any ground for holding that the landlord has assented to a new contractual tenancy.

13. Then comes the question as to whether tender by hand before remittance under Section 13 of the Rent Act by postal money order is necessary to make the remittance a legally valid one. As I have already indicated at the outset, the learned Judges of the Division Bench thought that there was an apparent conflict between two Bench
decisions of this court in the cases of Mahabir Prasad (AIR 1973 Patna 83) (supra) and Madho Lal (supra). In my view, in substance there is no conflict between the two decisions. In the case of Mahabir Prasad (supra) it has been held that rent could initially be tendered through postal money order and it cannot be contended that only if the landlord refuses to accept the rent hand to hand, the tenant may remit it by postal money order. And, even assuming that the tender of rent is a condition precedent for remittance by postal money order, tender by postal money order is a valid tender and if it in refused by the landlord, the tenant becomes entitled to remit such rent and continue to remit any subsequent rent, which becomes due, by postal money order. I think on the interpretation of Section 13(1) of the Rent Act, the decision lays down the correct position in law. Section 13(1) reads thus :-

> "When a landlord refuses to accept any rent lawfully payable to him by tenant in respect of any building the tenant may, remit such rent and continue to remit any subsequent rent which becomes due in respect of such building, by postal money order to the landlord". In this context, another statutory provision deserves to be noticed. Section 11(1)(d) of the Rent Act reads thus :-
> "Where the amount of two months' rent lawfully payable by the tenant due from him is in arrears by not having been paid within the time fixed by contract or, in the absence of such contract, by the last day of the month next following that for which the rent is

payable or by not having been validly remitted or deposited in accordance with Section 13."

It will be seen from the provisions of Section 11(1)(d) that where there is no contract fixing the time within which the payment of rent should be made, the rent is legally payable by the last day of the month next following that for which the rent is payable or by not having been validly remitted or deposited in accordance with Section 13. On the findings of the courts below, there was no contract fixing the time within which the rent must be paid. In the absence of such a contract the law enjoins that rent for any month must be paid by the last day of the month next following or by being validly remitted or deposited in accordance with the provisions of Section 13. And, Section 13, as quoted above, entitles the tenant, in case of refusal by the landlord to accept any rent lawfully payable to him, to remit such rent and to continue to remit any subsequent rent, which became due in respect of the building let but, by postal money order to the landlord. If the law, as in the cases under the Rent Act, gives the liberty to the tenant under Section 11(1)(d) to make the payment in the absence of a contract by the last day of the month next following then can it be said that if on such last day the landlord refuses to accept the rent and subsequently a date later than the last day of the month next following the tenant remits such rent by postal money order, he can yet be called a defaulter ? The answer, in my view must be in the negative. When Section 11(1) speaks of the remittance of rent by postal money order to the landlord on refusal on the part of the landlord to accept such rent, the law clearly envisages two possibilities. If the tenant apprehends that for some ulterior motive the landlord could refuse to accept rent for the purpose of making the tenant a defaulter within the meaning of the Rent Act, he may well remit such rent by postal money order by the last day of the month next following. That would make the remittance a valid payment within the meaning of Section 11(1)(d). The other option given to the tenant is to pay hand to hand or tender the rent lawfully payable by the last day of the succeeding month and in the case of refusal on the part of the landlord to make a remittance by a postal money order on a date subsequent thereto, i.e., the last day of the succeeding month. That, in my considered view, is the cumulative effect of the provisions of Section 11(1)(d) read with Section 13(1) of the Rent Act and that justifies the Bench decision in the case of Mahabir Prasad (supra). The question then arises as to whether the Bench decision in the case of Madho Lal (AIR 1975 Patna 154) (supra) can in any way be said to militate against the principle laid down in the earlier case. Having given the matter my anxious consideration, I do not think that the ratio of the two Bench decisions is in any way inconsistent. In the case of Madho Lal (supra) the Bench, of which I was also a member, merely lays down that the tender to the landlord can be made on the last day of the month next following that for which the rent is payable and on the refusal by the landlord to accept, the tenant may remit such rent and that means the rent for that month by postal money order as well as the remittance of any subsequent rent which becomes due in respect of the building. It further goes on to hold that in order to escape the liability of being evicted on the ground of non-payment of rent, as expressly provided in Section 11(1)(d), rent must be validly remitted or deposited in accordance with Section 13. In that case, it has been emphasised that if there is a tender and refusal by the last date of the month then it goes without saying that remittance by postal money order has got to be within a reasonable period after the refusal on the last date. That brings out a distinction between the tender through money order under the general principles of law and remittance by money order under Section 13(1) of the Rent Act. The tender under the former must be before the expiry of the last day following that month for which the rent is payable. Under the latter the remittance

may be made within a reasonable time after the expiry of that date. This case, therefore, visualises both the possibilities and has consequently laid down that remittance by postal money order on refusal can be made subsequent to the last day of the succeeding month on refusal of acceptance by the landlord when the tenant tenders the rent lawfully payable. But in such an event such a remittance by postal money order must be within a reasonable time after the expiry of the period by Section 11(1)(d). Therefore, I do not find any inconsistency, much less any contradiction in terms, between the two Bench decisions on any at the grounds for which a reference to this Full Bench has been necessitated.

14. That then leads us to the third point referred to us as to the correctness or otherwise of the Bench decision in the case of Rajendra Mohan Ghosh (AIR 1978 Patna 292) (supra). With great respect to the learned Judges deciding that case, I am constrained to hold that has not been correctly decided and not laid down the correct legal position under our Rent Act, in so far as it held that there cannot be a valid payment of rent unless the remittance is at the full amount of rent in arrears every occasion and in every month which such remittance is made. The judge of Section 13(1) of our Rent is so clear and unambiguous that I not persuade myself to agree with the view of the learned Judges deciding case. I have already quoted the language of Section 13(1) above which says that on refusal by the landlord to accept any rent lawfully payable him by the tenant, the tenant liable to remit such rent and continue to remit any subsequent rent which becomes due in respect of such building by postal money order to the landlord (the underlining is mine for the sake emphasis). What is required of the tenant is to remit, in the first instance such rent as has been refused to be accepted by the landlord and any subsequent remittance by postal money has to be with regard to any subsequent which becomes due. The sub rent, which becomes due, cannot my view, embrace within its sweep all arrears of rent as may have accrued due till the time of such remittance. The subsequent rent which becomes due is the rent month by month and, there cannot include cumulatively all which has thereto before fallen due. On the construction of the plain language Section 13(1) of the Rent Act, I must hold with the greatest respect to the learned Judges deciding the case of Rajendra Mohan Ghosh (supra) that in this regard it does not lay down the correct legal position. Mr. R.S. Chatterjee learned counsel far the appellant, invited our attention to a Bench decision of the Calcutta High Court in the case of *Kabiraj Srinarayana Sarma v. Baijnath Bhartia*[9], in support of the view taken by the Bench of this court. The reliance on the Calcutta decision is misconceived. Section 21 of the Vest Bengal Premises Tenancy Act, 1956 (Act 12 of 1956) was the basis of that decision which bears no analogy to Section 15(1) of our Rent Act. It was held by the Bench of the Calcutta High Court in the case of Kabiraj Srinarayana Sarma (supra) that the language of Section 21(1) of the West Bengal Premises Tenancy Act puts the matter beyond all doubt as it says that where the landlord does not accept any rent tendered by take tenant within the time referred to. Section 4, the tenant may deposit such rent with the Rent Controller in the Prescribed manner. The words 'such tent' towards the latter part of the Sub- Section obviously refers to any rent in the first part and must manifestly mean rent for every month. That is not the case here, Under our Rent Act, the language is unambiguous that the remittance has to be in respect of any subsequent rent which becomes due. In my view, therefore, learned counsel for the appellant has not rightly pressed into service the Calcutta decision in this case in his favor.

15. That disposes of all the three points which have been referred for decision to this Full Bench. There cannot be said to be any waiver on the part of the appellant-landlord nor can there be said to be an invalid tender through postal money order, on the ground that such remittance has been

made before it had been tendered to the landlord and had been refused by him. All the same, this appeal must be dismissed, Once it is held, as I have already held above, with regard to the third point discussed above that the tender of cumulative arrears of rent every month is not a legal pre-requisite under Section 13(1) of the Bent Act, then, in view of the finding of fact recorded by the lower appellate court, which is binding on us in this second appeal the tenant-defendant has been regularly making remittance of rent by postal money order within the time prescribed by the statute for every month from the month of June, 1963 onwards which the plaintiff landlord had refused to accept or receive. Even during the pendency of the suit, rent for every month after the institution of the suit was paid and received by the plaintiff. Therefore, there cannot be said to be any default on the part of the tenant respondent and the ground for eviction as contained in Section 11(1)(d) of the Rent Act is not available to the appellant. There being no cause of action on account of any default in the payment of rent on the part of the tenant defendant within the meaning of Section 11(1)(d), the plaintiffs suit has been rightly dismissed by the lower appellate court. I, accordingly, am constrained to dismiss this appeal. Since the decision on the first point has been in favour of the appellant, on the facts and in the circumstances of this case I shall make no order as to
costs.

S. Sarwar Ali, J.

16. My learned brother S.K. Jha, J., has formulated the three points that fall for consideration in paragraph 4 of his judgement. I entirely agree with his reasoning's and conclusions in relation to the second and third points formulated by him. In so far as the first point is concerned, I agree that the mere fact of acceptance of rent by the landlord after a default has occurred attracting the provisions of Section 11 of the Rent Act does not constitute waiver but I am not prepared, as at present advised, to say that the fact of acceptance of rent coupled with other facts, will not, in appropriate cases, constitute waiver. I would also not like to express a concluded opinion whether if a default has occurred within the meaning of Section 11 of the Rent Act the tenancy stands determined by the force of the statute itself. As at present advised, I am inclined to think that the occurrence of default only gives a right to the landlord to terminate the tenancy, Subject to these reservations I agree with the conclusion of my learned brother even on the first point. I also agree that this appeal should be dismissed without costs.

Prasad Singh, J.

17. I agree.

Appeal dismissed.

Cases Referred.

[1](AIR 1973 Pat 299)
[2](1977 BBCJ (HC) 678)
[3](AIR 1973 Pat 83)
[4](1974 BBCJ 895) : (AIR 1975 Pat 154)
[5](AIR 1978 Pat 292)
[6](AIR 1979 SC 1745)
[7](AIR 1964 Fat 401)

[8](AIR 1961 SC 1067)
[9](AIR 1968 Cal 56)