PATNA HIGH COURT

Gulab Chand Prasad

Vs

Budhwanti

A.F.A.D. No. 51 of 1982

(S.S. Sandhawalia, C.J., L.M. Sharma and S.K. Choudhuri, JJ.)

22.05.1985

JUDGMENT

S.S. Sandhawalia, C.J.

1. Whether the excess rent paid by the tenant to his landlord consequent upon a mutual (though illegal) enhancement of rent would be automatically adjusted against all subsequent default in payment of monthly rent for purposes of Sections 4, 5 and 11 of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 is the significant question which necessitates this reference to the Full Bench. Equally at issue is the correctness of the view in the unreported Division Bench judgment of *Ramjeet Singh v. Shanti Devi*[1]

2. The plaintiff had brought the suit for eviction *inter alia* on the grounds of default in the payment of rent and personal necessity and had claimed a sum of Rs. 540/- as arrears of rent. The case set up on his behalf was that his brother Babu Lal was earlier the Karta and manager of the Joint Hindu family governed by the Mitakshara School of Hindu Law and the disputed premises belonged to the plaintiff, which were leased to the tenants, who carried on business in the name and style of Punjab Dental and Optical works, at a monthly rent of Rs. 60/-. Accordingly to the plaintiff-appellant, rent had been paid up to October, 1973 against receipts granted to them. But on the 14th of November, 1973, Babu Lal, the Karta of the family, died and plaintiff Gulab Chand became the Karta in his place. According to the plaintiff-appellant, tenancy was according to the English calendar month and the tenants had defaulted in the payment of rent since the month of November, 1973. Further the claim for eviction was rested on the ground of personal necessity for expanding business in the interest of the younger members of the joint family.

3. The suit was seriously contested on behalf of the respondent-tenants who, however, admitted that the premises belonged to Babu lal and were originally let out to Dr. Ramchandra Prasad, the husband of respondent No. 1 and the father of respondent No. 2, on a monthly rental of Rs. 16/- only. According to the respondents, the aforesaid rent was paid till 1943 and there after it was illegally raised to Rs. 20/- per month and again enhanced to Rs. 25/- in 1946 and further raised to Rs. 30/- in 1947
and then to Rs. 32/- in 1961 and again to Rs. 35/- in 1963 and to Rs. 40/- in 1967 and then to 50/-

in 1970 and to Rs. 60/- finally in 1971, and all these enhancements were illegal and under threat of eviction and the respondents were coerced to pay at the aforesaid various enhanced rates of rent. It was the stand that the alleged excess amounts paid were to be refunded or adjusted towards future rent due and consequently there was no default in the payment thereof.

4. The respondent-tenants also took up the plea that after the death of Babu Lal, the original landlord, they had approached the legal heir to know as to whom the rent was to be paid and they were informed to do so to Shri Ram Prakash Gupta, the eldest son of Babu Lal to whom allegedly the rent was remitted thereafter by money order since the month of November, 1973 which was however, refused by him. Lastly, the claim of personal necessity was disputed on the ground that the premises in their possession were very small as compared to those in possession of the landlords and further that the disputed premises were the only source of livelihood for their family as they have no property in the town of Gaya as they were refugees from West Pakistan.

5. The Trial Court framed as many as 9 issues and on a consideration of the evidence and an exhaustive appraisal thereof and the contentions raised came to the conclusion that the plaintiff-appellant was the landlord and the defendant-tenants had defaulted in payment of rent and further that the disputed premises were required by the plaintiff-appellant for his personal use. On these findings, the suit was decreed.

6. On appeal, the learned Subordinate Judge, Gaya held that the enhancement of rent from Rs. 16/- originally fixed in 1943 was illegal and the amount paid in excess thereof was automatically adjustable against the subsequent default in the payment of rent and, therefore, the respondent-tenants could not be held as defaulter in the present case. He also rejected the plea of any *pari delicto* in regard to the payment and acceptance of the mutually enhanced rent. He proceeded further to reverse the finding of the Trial Court on personal necessity, *inter alia,* on the ground that the original tenants were refugees from West Pakistan and they have no house of their own in the town of Gaya and therefore, whilst considering the requirements of the landlord, the inconvenience caused to the tenant should also not be lost sight of. Consequently the appeal was accepted and the suit of the plaintiffs-appellant dismissed.

7. This second appeal originally came up before my learned Brother, L.M. Sharma, J. Who referred the same to a Division Bench because of the significant issue involved. Before the Division Bench of proposition that the alleged illegal enhancement of rent would become automatically adjustable against defaults by the tenants was hotly disputed on behalf of the appellant and firm reliance was placed on *Bishwanath Balkrishna v. Smt. Rampeyari Devi and others*[2]*,* and other Single bench authorities. Noticing a conflict of precedent on the point betwixt those judgments and the view expressed in *Ramjeet Singh v. Shanti Devi*, the case was referred to the Full Bench.

8. Taking the bull by the horns, the learned Counsel for the appellant first took the frontal stand that a mutual agreement to illegally increase the rent payable and the
excess money paid or received in consequence thereof is a wholly unlawful and illegal transaction. Such an increase would be an illegal violation of Section 4 of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 (hereinafter to be referred to as the 'Act') which, in express terms, declares that it shall not be lawful for any landlord to increase or claim any increase in the rent payable for the time being. Consequently, both the payment of the illegal

excess rent and its receipt would be in contravention of the express mandate of the statute and the agreement to do so would not only be void *ab initio* but illegal. One that is so, the hallowed rule of a party being in *pari delicto* would be attracted and neither party can claim the aid of the law for any rights flowing from any illegal transaction directly inflating the statute. In sum, the stand herein is that the illegal express rent paid is not recoverable under the general law and that being so, there can be no question of even express apportionment far from there being any automatic adjustment of the same against the rent due, except under an express and specific provision of the statute.

9. Inevitable the controversy herein would turn primarily on the language and import of Section 4. The same may first be read :

> "4. Enhancement of rent of building generally - Notwithstanding anything contained in any agreement or law to the contrary, it shall not be lawful for any landlord to increase, or claim any increase in the rent which is payable for the time being in respect of any building except in accordance with the provisions of this Act."

It is plain from the language thereof that section is intended to his directly at the illegal increase of the rent due. This is, indeed in line with the whole object and purpose of the rent legislation. To effectuate the same, Section 4, in terms, declares that such an increase or even a claim to an increase in the rent would be unlawful and, therefore, stamps and agreement to do so with patent illegality. It calls for pointed notice that Section 4 begins with the *non obstante* clause and, therefore, overrides any agreement or law to the contrary. However, the words "it shall not be lawful" designedly employed by the legislature are in my opinion the key to the import of the section. These words would leave no manner of doubt that the agreement in violation of the mandate of Section 4 is not only void but is indeed illegal in view of its frontal violation of the legislative mandate.Section 4 contains an absolute prohibition and, therefore, no agreement can either circumvent or override such prohibition, nor should it be so construed as to outflank the same. It is not permissible to the parties to contract themselves out of such prohibition nor would it be open to any person to put forward a claim to make something permissible which, the law says, is prohibited. This according to me would be the true meaning and correct interpretation of the works "it shall not be lawful" which must be given effect to with their full rigour. It is unnecessary to multiply authority on a point which seems plain on principle and it would suffice to refer to two English cases *The Gas Light and Coke Company v. Sameul Turner*[3], and *The King v. The Inhabitants of Gravesend*[4], The Indian decisions amongst other which have reiterated the view are *Laxmidas v. Smt. Jyotisnaben Chhaganlal*[5], and the forceful enunciation of the law by Chief Justice Chagla in *P.D.*
Aswani v. Kauashah Dinshah[6], Then in our own Court an identical view has been expressed by a Division Bench presided over by Ramaswami, C.J., in *Ram Krishna Shukla v. Thakur Sri Ramjanki through Sri Rambalak Das*[7], whilst interpreting the almost identical phraseology of Section 6(2) of the Act.

10. Now, once it is held that an agreement to increase the rent due and the receipt or payment

thereof is in contravention of Section 4 and, therefore, illegal it seems well settled that persons who have entered into such an agreement forbidden by law or condemned by public policy are not entitled to seek the aid of a Court for any relief. The parties must be held as being in *pari delicto* with all the legal consequences flowing from that rule. The classic enunciation of the rationale, therefore, is in the well known observation of Lord Mansfield in *Holman et al v. Johnson*[8]*,*

> "The objection, that a contract is immoral or illegal as between plaintiff and defendant sounds at all time very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff by accident, if I may say so. The principle of public policy is this *ex dolo malo non oritur acio.* No Court will lend its aid to man who founds his cause of action upon an immoral or on illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears *ex turpi* cause, or the transgression of a positive law of this country, there the Court, says he has no right to be assisted."

It would be wasteful to tract the reiteration of the aforesaid rule over the centuries and it suffices that its innate principle has never been deviated from. Within this jurisdiction the rule has been unreservedly followed and reference may instructively be made to *Jharia Coalfield Electric Supply Co. Ltd. v. Kaluram Agarwala*[9]*,* Therein Chief Justice Jha, speaking for the bench, concluded as follows :-

> "On revise of the authorities referred to above, I am clearly of the opinion that, where money is voluntarily paid under an illegal agreement which has been carried into effect, the money so paid cannot be recovered back, if parties are in *pari delicto* and they had knowledge of the illegality of the agreement before payment."

The Final Court sanctified the above rule innumerable cases and it suffices to refer to *Kuju Collieries Ltd. v. Jharkhand Mines Ltd. And others*[10]*,* Therein a lease had been executed which was clearly contrary to the provisions of the Mines and Mineral (Regulation and Development) Act, 1948, and the Mineral Concession Rules, 19.9. Holding that the parties to the lease were in *pari delicto* and, therefore, the plaintiff would not recover the amount therein, it was observed as follows :-

> "We consider that this criticism as well as the view taken by the Bench is justified. "It has rightly pointed out that if both the transfer of and transferee
> and in *pari delicto* the Courts do not assist them."

With particularity to the rent jurisdiction, identical or similar views have been taken in Ram Krishna Shukla's case (supra) *Raj Kishore Bhagat v. Dharamjay Sahu*[11]*,* and *Rikhabach and Saraugi v. The State of Bihar*[12]*,* The latest enunciation of the rule in somewhat stronger language is by the Division Bench in *Pandit Rudranath Mishir and others v. Pandit Sheo Shankar Missir*

and others[13],

> "If, therefore, the appellant having full knowledge of the illegality of the contract has made payment contrary to law without any oppression or coercion it cannot lie in his mouth now to say that since I have paid you more I shall pay you no further."

11. To conclude on this aspect, it must be held that where excess rent has been voluntarily paid under a mutual agreement from, the illegal enhancement of rent in the flagrant violation of Section 4 and such agreement has been carried into effect, the money so paid cannot be recovered back by the tenant nor can any claim or demand resting on such illegal agreement be raised by the landlord against the tenant under the general law, as both the parties would be in *pari delicto.*

12. In the light of the aforesaid enunciation, the matter here may now be examined. The trial Court had, in an elaborate judgment, after discussing every conceivable piece of evidence, arrived at the following conclusion :-

> "So far as enhancement is concerned, the same has been pleaded by the defendant in para 7 of the written statement. The defendant has never raised a whisper against alleged enhancement. P.W. 12 has stated that Dr. Ramchandar used to enhance the rent himself. In support of the increase in violation the plaintiff has filed Exts. 6 series which show that rent has been enhanced. Ext. 9 shows that there has been an agreement with the parties and no objection was ever raised by the tenant for enhancement of rent Ext. 8 indicates that petition for determination of fair rent was withdrawn by defendant No. 1 . In this case no objection was raised rather the defendant had withdrawn his petition for determination of fair rent. Under the circumstances it is not open to the defendant to challenge the enhancement. The amount of rent, i.e. Rs. 60/- per month is legal and valid. These issues are answered in affirmative in favour of the plaintiff and against the defendant."

The first Appellate Court reversed the aforesaid considered findings on a rationale which appears to me as wholly untenable and a ground which was patently fallacious. On the respondent defendants' own showing there had been no one but three increases of rent from Rs. 32/- to Rs. 40/- and later to Rs. 50/- and then to Rs. 60/- over a period of 11 years. Without a title of pleading or evidence the first Appellate Court concluded somewhat cavalierly that because the tenant was a widow, she could not have been aware of the legal position. The Appellate Court seems to have failed to notice upon not once but every month over 11 years, the onus lay heavily on the party which wanted to assert that it was not aware of the patent legal position. There is no and possibly cannot be, an omnibus presumption that widows are not aware of the legal position. The basic tenant is that every one is presumed to know the law and even more strongly that ignorance of law is no excuse. It cannot easily lie in the mouth of a party plainly in *pari delicto* by virtue of an agreement contrary to statutory provision that the or she was not aware of such a statute. The finding of the Ist Appellate Court on this ground has to be reversed due to this patent

illegality. In this very context, the second finding of the first Appellate Court is equally if not more, unsustainable. It was cryptically observed that no one would voluntarily agree to enhance the rent and even in the absence of any evidence either side in every case of enhancement of rent there would be an element of coercion. According to the Appellate Court, the tenant can never be in *pari delicto.* I am unable to subscribe to such a blanket dictum warranted neither by principle nor by authority. As in the present case, in one instance there was a marginal raise of rent from Rs. 30/- to Rs. 32/-. Where such an enhancement has been agreed to and carried over out of the years, the burden is heavy on the party which alleges that the same was the result of compulsive coercion. The rule of law is that the onus would lie on such a party alleging the same and in the case of the total absence of evidence no inference of coercion can *psofacto* be raised, nor can only easily agree to the conclusion that no body would voluntarily agree to enhance the rent. Where a landlord has sued under an impeable cause of action for eviction, a tenant wishing to hold the premises may not only voluntarily agree but in fact offer and tempt a larger rent to the landlord as an inducement for continuance of the tenancy. In the present case it was the admitted position that the tenant had moved an application for fair rent and voluntarily withdrawn the same. The first Appellate Court's finding on this ground thus suffers from patent illegality thus leaving no option but that of its reversal.

13. In taking the view which it did, the first Appellate Court sought tenuous aid from *Sita Ram v. Radha Bai and others*[14]*,* That case is plainly distinguishable and indeed of no relevance on the finding aforesaid. Its true import seems to have been misunderstood by the learned Judge.What their Lordships have ruled therein was that where parties were not in *pari delicto,* the less guilty party may be able to recover money paid, under a contract. Plainly enough this observation only covers case where the first finding arrived at was that the parties were not in *pari delicto.* Once that finding has been arrived at, no question of the three situations visualised by their Lordships at all arises.

14. To conclude on this aspect, it must be held that even on the assumption that there had been an illegal enhancement of the rent in violation of Section 4, the parties were plainly in *pari delicto* and under the general law neither of them could seek its aid and, consequently, claim for a refund or specific adjustment thereof far from there being any automatic adjustment of the excess rent.

15. Lowering his sights from the zenith of the stand under the rule of in *pari delicto,* learned Counsel for the Appellate then argued entirely in the alternative that the Act does not envisage any automatic apportionment at all and even with regard to express apportionment the same is visualised in an extremely narrow and limited field. Reliance was placed on Section 4 for contending that it does not either expressly or
implicitly refer to the payment of any excess rent or its subsequent adjustment or apportionment. It categorically prohibits any illegal enhancement. Reliance was placed on Section 5 and with particularity on sub-sections (2) and (3) of Section 8 which, according to the learned Counsel, provided only for a right of refund or express apportionment within their parameters and not even remotely for any automatic adjustment. Reference was also made to some provisions of Section 11-A by way of analogy.

16. To truly appreciate the stand of the learned Counsel in this context, it is first apt to read the relevant provisions of the statute, which is applicable, namely, the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 :-

> "5. Determination of fair rent of buildings in occupation of tenants -
> (1) When, on application by the landlord or by the tenant in possession of a building or otherwise, the Controller has reason to believe that the rent of that building is low or excessive, he shall hold a summary inquiry and record a finding.
> (2) If, on a consideration of all the circumstances of the case, including any amount paid by the tenant by way of premium or any other like sum in addition to rent, the Controller is satisfied that the rent of the building is low or excess, he shall determine the fair rent for such building."
> "8. Matter to be considered in determining fair rent - (1)(a) For the purpose of this Act the fair rent of any building shall be determined as for a tenancy from month to month.

x x x x

> (2) When the fair rent of a building has been determined or redetermined, any sum in excess or short of such fair rent paid, whether before or after the date appointed by the Controller under sub-section (3), in respect of occupation for any period after such date shall in case of excess, be refunded to the person by whom it was paid or at the option of such person, be otherwise adjusted and, in case of shortage, be realised by the landlord as arrears of rent from the tenant.

x x x x x

> (3) In every case in which the Controller determines or re-determines, the fair rent of a building, he shall appoint a date with effect from which the fair rent so determined shall take effect :-

x x x x x

Provided further that in any case in which the fair rent is determined under Sections 5 or 6, the fair rent shall not take effect from any date earlier than three months prior to the date on which the application was made or, as the case may be, the proceedings were started by Controller on his own motion." Before adverting to the afore quoted provisions, one may recall those of Section 4. Plainly enough these do not either expressly or implied refer to pay payment of any excess rent consequent upon an illegal enhancement and, there for, in no way provided for even an express adjustment or apportionment thereof, fare from the same being automatic. Section 4 simply prohibits an illegal enhancement. It does not proceed further to visualise the consequences or infraction of this prohibition. It does not provide for any apportionment of any such illegal exaction if made nor does it envisage the situation where a tenant himself has agreed to pay a higher rent by way of enhancement of rent earlier due. Learned Counsel for the

appellant was thus right in contending that Section 4 gives no handle for any claim or express or automatic apportionment of the excess rent paid.

17. Adverting now to sub-section (2) of Section 8, it would appear that even in cases where fair rent had been determined and an amount in excess thereof had been paid, the primary right visualised is that of refund of the same to the person by whom it was paid. The statute in express terms says so in the first instance. The secondary right provided by the same provision is for adjustment but only at the express option of the person paying the excess. It is manifest from the provisions of sub-section (2) that the legislature in terms adverted to the aspect of the excess rent paid above the fair rent and provided for only two contingencies, namely, the refund thereof or an express adjustment at the option of the person paying the same. The statute, therefore, provides these two remedies alone and nothing beyond the same can be coined.

18. Again reference to sub-section (3) of Section 8 and the second proviso thereto is equally instructive, even if the fair rent is determined, the law does not provide that the same shall be deemed to be so from its very inception. It expressly mandates that the Controller must appoint a date with effect from which the fair rent so determined shall take effect. The second proviso then proceeds to place either a limitation or a constriction on the right of refund or express adjustment spelt out under sub-section (2). This lays down the outer limit for giving effect to the fair rent and is limited to only three months prior to the date of the application or the date when the proceedings were started by the Controller on his own motion, as the case may be. It is plain that the statute when giving the specific remedy with regard to the excess rent, circumscribes its effect within narrow limits. This directly cuts at the very root of the alleged theory or any automatic adjustment of excess rent paid without any limitation of time. If it was the intent of the legislature that any rent in excess of the lawful one is recoverable after any length of time or even automatically adjustable, then it could not possibly have placed a limitation of merely three months prior to the date on which the application for fair rent is made or, as the case may be, the proceedings were started by the Controller at his own motion. It seems manifest that the legislature intended that even where the fair rent has been duly determined, the claims of excess or shortage are not to travel beyond the outer date of three months from the date on which the application was made. To hold that despite this provision the excess would be recoverable without any limitation of time in the past or adjustable without any such limitation in future, appears tome as running against the very grist of the provisions of the Act.

19. Reference is also called to the provisions of Section 11-A with regard to deposit of rent by the tenants in suits for ejectment. This visualises a deposit by the tenant month by month of the rent at a rate at which it was last paid. This provision had been the subject-matter of some controversy which has been finally set at rest by a Full bench of 5 Judges in *N.M. Verma v. Upendra Narain Singh*[15], Therein it has been held that under this provision a tenant can be directed to deposit rent at the rate at which it was last paid even though it was an enhanced rent by the landlord and, therefore, illegal by virtue of Section 4 of the Act. It has been pithily observed that the rate of rent at which it was last paid is not to be construed as rent "lawfully payable". Therefore, Section 11 still visualises the payment of rent even though it may have been illegally enhanced if it was the rent last paid and this in a way would plainly run counter to any automatic adjustment of the excess rent.

20. The issue may then be also examined from another refreshing angle as well. The concept of a

fair rent or an illegal enhancement thereof despite the agreement of parties is wholly a creature of rent legislation. Both the right and the remedy therefor must consequently stem from the same statute, namely, the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947. This provides for a refund or express apportionment at the option of the tenant under Section 8 and it would be impermissible to coin an other remedy of automatic adjustment under the general law, which does not find the remotest, express or implied mention in the Act. It was rightly highlighted before us that apart from the fixation of fair rent under Section 5 and the matters to be considered in determining fair rent under Section 8, there does not exist any other provision with regard to excess rent or its refund, adjustment or apportionment. The meritorious stand taken, therefore, was that unless there was specific provision in the Act itself providing for automatic adjustment of excess rent paid against the monthly rent itself, no question of such an adjustment against the rent due could arise in favor of the defaulter under the Act nor could such a defaulter seek such a relief or a double protection of invoking the provisions of another law. This view has the high authority of the Constitution Bench in *V. Dhanal Chattier v. Yhsodai Ammal*[16], wherein it was observed :-

> "The tenant becomes liable to be evicted and forfeiture comes into play only if he has incurred the liability to be evicted under the State Rent Act, not otherwise ...one has to look to the provisions of law contained in the four corners of any State Rent Act to find out whether a tenant can be evicted or not. The theory of double protection or additional protection, it seems to us, has been stretched too far and without a proper and due consideration of all its ramification."

The aforesaid view has been followed in *Pradesh Kumar Bajpai v. Binod Behari Sarkar*[17] - Under reported Judgments (SC) at page 435] with the following (paragraph 13) :-

> "We are satisfied that once the requirements of Rent Act are satisfied, the tenant cannot claim the double protection of invoking the provisions of the Transfer of Property Act or the terms of the contract."

To the same effect are the observation of *Dinesh Prasad Mandal v. The State of*

Bihar and others[18],

21. There is a long line of precedent in the field of rent legislation supporting the stand of the appellant and rejection the concept of any automatic adjustment of the alleged excess rent paid against the rent due. In Nune Panduranga Rao, minor by next friend *Nune Viuaiah v. Diuala Gopala Rao and another*[19], Subba Rao, J., (as he then was) whilst construing the somewhat similar provisions of Section 7(2) of the Madras Buildings (Lease and Rent) Control Act had held as under :-

> "Under the express provisions of this section if the tenant has not paid or tendered the rent due by him within the time prescribed therein, he is liable to be evicted. The section does not compel a landlord to adjust the excess amounts in his hands towards any arrears of rent if the said amounts were not paid by the tenant towards the rent of any particular

> month. It is true that on the date when a tenant authorises the landlord to adjust the amounts with him towards the rent of any particular month or months the amount will be deemed to have been paid on that date towards rent. But till that adjustment is made "and the amount is so appropriated, any amounts in excess of the rent due with the landlord will only be payments made in suspense. The fact that such excess came into the hands of the landlord by reason of the Rent Controller's order fixing the fair rent does not really affect the question. I am therefore of opinion that the amount not paid towards rent of any particular month and the amount not agreed to be adjusted towards any rent of a particular month is not payment of rent within the meaning of Section 7(2) of the Act."

In holding so, reliance was placed on an earlier judgment of Rajmannar, C.J., and Balakrishna Aiyar, J., in Nauaneethammal in Re, 65 Madras Law Weekly 1176. Within this jurisdiction and expressly with regard to the present Act, an identical view has been first taken in *Ragaunandan Prasad v. Deonarain Singh and others*[20], That view received affirmance by the Division Bench in *M/s. Biswanath Balkrishna v. Smt. Rampeyari Devi and other*[21], However, on fact some distinction without making any distinction to the ratio must be noticed. This was a case in which the agreed rent of Rs. 75/- was reduced by they Controller to a fair rent of Rs. 20/-. This case thus came squarely within the ambit of Section 8(2). The Division Bench, even though the law specifically provided for adjustment, held that there was no automatic adjustment with the following observation :-

> "It was not open to the appellant not to pay rent for more than two months (as he had already become defaulter) and then claim adjustment for the "first time in the written statement when the suit was filed for eviction on that ground and that is what has been done by him. In these circumstances, the Court of appeal below was, therefore, justified in holding that the appellant could not claim adjustment and, therefore, its finding that the appellant had defaulted in paying rent for the period beginning from Magh Badi I Sambat 2024 to Chait Sudi 15th Sambat 2025 is correct."

Now once it is held as above, under, Section 8 of the Act itself the position under the general law would militate even more strongly against any theory of automatic adjustment. Equally if there can be no automatic adjustment even under Section 8(2) of the Act, there cannot possibly be one under the wholly general provisions of Section 4 which does not envisage any actual payment of excess rent or its subsequent apportionment. Recently the point has been reiterated by the Division Bench in *Jaganath Tewari v. Dr. Gopal Prasad*[22],

22. Now it remains to advert to *Ramjit Singh v. Shanti Devi*, which is the corner stone of the case of the respondent tenants and on which basis reliance was placed by her Counsel Mr. Chatterjee as also the first Appellate Court. There is no gainsaying the fact that observations therein directly assists the stand taken on her behalf. However, it is manifest that Counsel for the parties were surely remiss in not bringing to the notice of the Bench the earlier Division Bench Judgment in *M/s. Bishwanath Balkishna v. Smt. Rampeyari Devi and others, AIR 1979 Patna 159 (supra)*

which had taken a directly contrary view and was in a way binding on the Bench. The judgment has thus been rendered in conflict with the earlier precedent. With the deepest deference, I am of the view that the rational for distinguishing AIR 1976 Patna 195 which was noticed is also not tenable. Reference to the somewhat brief discussion of this point in Ramjit Singh's case is otherwise indicative of the fact the matter does not seem to have been adequately canvassed and debated before the Bench. The categorical prohibitory nature of Section 4 and the desirability of a strict construction thereof and equally the patent illegality of agreement to enhance the rent in contravention of the same seems to have gone unnoticed. The attention of the Bench was not drawn as pointedly it deserved to sub-sections (2) and (3) of Section 8, and in the light in which the same has been discussed in the earlier part of this Judgment. The Full Bench authority of this Court in 1978 BLJ 24 and its full impact was neither referred to nor considered. The larger principles of general law with regard to apportionment did come up for consideration nor was the right of the creditor to apportion was adverted to. The fact that the landlord may not be even aware that there is any such illegal excess rent in his hand and consequently how to apportion it seems to have equally gone unconsidered. The provisions of Section 56 to 61 of the Contract Act embodying the hallowed principles of the common law in contracts were equally not brought to the notice of the Bench. It deserves recalling that apportionment requires a positive act and exercise of volition and it is not always easy to envisage it as either automatic or mechanical. That the remedy under the rent law must be sought in the specific statute and the absence of any particular provision authorising automatic adjustment was also not noticed. Even on the point of the rule in *pari delicto,* the issue does not seem to have been canvassed at its full length as it should have been before the Bench. With the greatest respect and deference, therefore, it must be held that *Ramjit Singh v. Shati Devi*[23] does not lay down the law correctly and hereby overruled.

23. In fairness to Mr. Chatterjee, one must also notice his contention that the Act must be construed in favour of the tenant since this legislation is purposefully directed to the protection of tenants. It is unnecessary to extend the compliment of an extensive
refutation of this off repeated argument, which stands conclusively rebutted by the binding precedent in *Kewal Singh v. Mt. Lajwanti*[24]*,* Therein it was observed :

> "Before discussing the relevant provisions of the Act it may be necessary to observe that the Rent Control Act is a piece of social legislation and is meant mainly to protect the tenants from frivolous evictions. At the same time, in order to do justice to the landlords and to avoid placing such restrictions on their right to evict the tenant so as to destroy their legal right to property certain salutary provisions have been made by the legislature which give relief to the landlord. In the absence of such a legislation a landlord has a common law right to evict the tenant either on the determination of the tenancy by efflux of time or for default in payment of rent or other grounds after giving notice under the Transfer of property Act. This broad right has been curtailed by the Rent Control Legislation with a view to give protection to the tenants having regard to their genuine and dire needs. While the Rent Control legislation has given a number of facilities to the tenants is should not be construed so as to destroy the limited relief which it seeks to give to the landlord also."

In view of the aforesaid authoritative enunciation, the plea for a slanted approach to the

construction of rent laws must be rejected. The same view has been taken by a Full Bench in *Harnam Singh v. Surjit Singh*[25],

24. Because of the uphill task of meeting the legal challenge raised on behalf of the appellant, Mr. Chatterjee on behalf of the respondents attempted to skirt the main issue by seeking to defend the judgement on a ground which he purported to make out as pure question of law. It was sought to be argued that the respondent-tenants were not defaulters at all because they had sought to tender the rent to Ram Prakash Gupta, one of the many sons of the original landlord Babu Lal. He sought a reopening of this issue of facts that there was actually no default. This argument is hardly permissible in the present context. The Trial Court came to a categoric finding of fact that the amount was sought to be tendered to a wrong person and the same was ineffectual in law and resort was not made to the provisions of Section 13 in the situation. What is, however, significant is that before the first Appellate Court the aforesaid finding of the Trial Court on this point was not assailed and, therefore, achieved finality. The whole appeal in the first Appellate Court was contested on the assumption that the alleged tender was not valid and the only thing pressed was that even if no tender had been made, the default stood automatically adjusted against the excess payments of rent made earlier from the year 1947. It was on these premises alone that the appeal was pressed and contested, as is more than manifest from the judgment, and on the ground of personal necessity. The concluded finding of fact of the non-tender of rent and consequent default, therefore cannot be permitted to be reopened in second appeal.

25. To conclude on this aspect, the answer to the question posed at the outset must be rendered in the negative and it is held that the excess rent paid by the tenant in
pursuance of a mutually illegal enhancement there of by the parties does not get
automatically adjusted against all the subsequent default in the payment of the monthly rent under the Act.

26. Now, applying the above, the basic finding of the first Appellate Court on this point must inevitably be reversed and that of the Trial Court restored to the effect that the respondent-tenant stood established as defaulters within the meaning of the Act in the present case.

27. Though the appellant is entitled to succeed on the aforesaid finding, yet it appears to me that the first Appellate Court's reversal of the Trial Court's positive finding on the personal necessity is equality untenable. Learned Counsel for the appellate forcefully contended that the need of the two unemployed sons of the joint Hindu family for the expansion of the family business or setting up a business of their own was a genuine need, which could not be pointlessly by-passed on consideration wholly extraneous to the Act or for reasons of patent errors of record.

28. Herein also the contention of the learned Counsel for the appellant must succeed. The Trial Court on a full consideration of the evidence concluded as follows :

> "From the insightful survey of the evidence, both oral and documentary, I am of opinion that plaintiff has personal necessity of the house to employ two of his family members in business. This issue is answered in the affirmative in favor of the plaintiff and against the defendants."

In reversing the aforesaid considered finding, the first Appellate Court seems to have slipped into four glaringly patent errors of record, misreading of evidence and of law. The whole assessment herein by the first Appellate Court seems to be warped by its incorrect assumption that there was no denial of the fact that the respondent-tenant were refugees from West Pakistan and they have no house of their own in the town of Gaya. It is plain that the tenancy here started admittedly in its inceptions far back as the year 1932. This obviously was more than 15 years prior to the partition of India in 1947 and the influx of refugees from West Pakistan. The Appellate Court apparently slipped into a patent error and misreading of evidence in this context which slanted its approach altogether the issue. Apparently jaundiced by this factual mistake the first Appellate Court proceeded to balance the need and requirement of the landlord against the inconvenience caused to the tenant and come to the conclusion that the later would cause greater hardship. This approach is one which is unwarranted by the provisions of the Act. Section11(c) specifically lays down as one of the grounds for eviction where the buildings is reasonably and in good faith required by the landlord for his own occupation. Unlike some other rent statutes the Bihar Act does not envisage any comparative public benefit or disadvantage by extending or diminishing the accommodation or any comparative advantage or disadvantage of the landlord or the tenant. The being so, reliance by *Mr. Chatterjee on Mst. Begum and others v. Ahdul Adad Khan (dead) by L.R.'s and others*[26], is hardly well conceived and again slips into the fallacy in which the Appellate Court had landed itself. In the said case
their Lordships were construing the particular provisions of Section 11(1)(h) of the Jammu and Kashmir Houses and Shops Rent Control Act of 1966. The explanation to the said provision is in the terms following :-

> "Explanation.- The Court in determining the reasonableness of requirement for purposes of building or re-building shall have regard to the comparative public benefit or disadvantage by extending or diminishing accommodation, and in determining reasonableness of requirement for occupation shall have regard to the comparative advantage or disadvantage of the landlord or the person for whose benefit the house or shop is held and of the tenant."

Herein, it is admitted position that no such provision either expressly or even impliedly exists in the present Act which we are called upon to construe. On the other hand, the explanation of the Jammu and Kashmir Act in terms expressly mandates the Court to determine the comparative advantage public benefit or diminishing accommodation and further have regard to comparative to the landlord or the tenant. Any such retirement, however, is conspicuous by its absence in our Act and, therefore, these considerations are totally alien to the present statute and cannot be imported in its arena by a strained process of interpretation in the absence of any statutory provisions therefore. The observation in Bega begum's case which rested expressly on the foundation of Section 11(1)(h) and the explanation there to of Jammu and Kashmir statute has no applicability in the present case and the first Appellate Court floundered into a field wholly unwarranted by the Act by its attempted balancing of the established requirements of the landlord

with the supposed hardship to the tenant.

29. Yet again the Court proceeded to observe that the admitted position is that the disputed property is a fractional portion of the massive building in which the respondent (appellant of this) appeal landlord was having his business. Learned Counsel for the appellant was right in submitting that there was not a title of evidence with regard to any massiveness of accommodation beyond the minimal needs of the plaintiff in the building of the appellant or any grave disproportion to the area in occupation held by the respondent-tenants. Our attention was drawn to the total absence of any such stand either in the written statement or in the evidence and the observation of the first Appellate Court that the same was admitted position in any case was wholly without foundation.

30. Lastly, the first Appellate Court seems to have merely labelled the established requirement of the landlord as being only its desire and on that ground bushed away the finding of the Trial Court. It is well established that once the *bonafide* requirement or need has been established, it is not for the Court to probe further in the matter and try to weigh and balance it according to its own pre-conceived notion or through its own peculiar social philosophy. Its effect has been recently dealt with in some detail by S.B. Sanyal, J., in *Kedarnath Bohra and another v. Md. Safiulla and another*[27], and it suffices to observe that I am entirely in agreement with the ratio and conclusion arrived at therein.

31. For all reasons aforesaid, the finding of the first Appellate Court on the point of personal necessity is vitiated and is hereby set aside and that of the Trial Court restored.

32. In the result, this appeal is hereby allowed with the costs throughout and the judgment and decree of the first Appellate Court is set aside and that of the Trial Court decreeing the suit of the plaintiff is hereby restored.

Lalit Mohan Sharma, J.

33. I have gone through the judgment of the Hon'ble Chief Justice and I concur in the decision on all the points except on the application of the rule of in *pari delicto* to the case, on which question I reserve my opinion, I agree that the appeal should be allowed and the suit should be decreed with costs throughout.

S.K. Choudhuri, J.

34. I agree.

Appeal allowed.

Cases Referred.

[1](Second Appeal No. 257 of 1977, decided on 17th August, 1979)
[2] AIR 1979 Pat 159
[3]132 E.R. 1257
[4]110 E.R. 90
[5] AIR 1954 Cutch 7

[6] AIR 1956 Bom 426
[7]1956 BLJR 636
[8]1 Crow 342
[9] AIR 1951 Pat 463
[10](1974) 2 SC 533
[11]1956 BLJR 442
[12]1956 BLJR 732
[13] AIR 1983 Pat 53
[14] AIR 1968 SC 534
[15]1978 BLJ 24
[16]1979(2) RCR 352 : AIR 1980 SC 1214
[17](dead) by L Rs. (1980 Vol. XII
[18]1984 PLJ 1002
[19] AIR 1952 Mad 827
[20] AIR 1976 Pat 195
[21] AIR 1979 Pat159
[22] AIR 1983 Pat 50
[23](Second Appeal No. 257 of 1977) decided on 16th August, 1979
[24] AIR 1980 SC 161
[25] AIR 1984 Pun and Har126
[26] AIR 1979, SC 272
[27] AIR 1984 Pat 172