

PETITIONER:  
NAND LAL AGARWAL

Vs.

RESPONDENT:  
GANESH PRASAD SAH & ORS.

DATE OF JUDGMENT 09/08/1988

BENCH:  
NATRAJAN, S. (J)  
BENCH:  
NATRAJAN, S. (J)  
PATHAK, R.S. (CJ)

CITATION:  
1988 AIR 1821                      1988 SCR Supl. (2) 303  
1988 SCC (4) 215                JT 1988 (3) 402  
1988 SCALE (2) 387

ACT:

Bihar Buildings (Lease, Rent and Eviction) Control Act, 1977: Sections 4, 7 and 8 -Eviction of tenant Sought by Landlord for default in payment of rent-Amount in excess of rent paid by tenant without approval of Rent Controller-Whether tenant entitled[led to adjustment towards rent arrears without exercising option for such adjustment.

HEADNOTE:

A suit filed by the respondent-landlord for eviction of the appellant-tenant from the leased premises on grounds of (i) bona fide requirement, (ii) default in payment of rent for five months, and (iii) wrongful use of leased premises, was decreed by the trial court and the appellate court on first two grounds.

Rejecting the contention of the appellant-tenant that a sum of Rs.180 out of the advance of Rs.300 paid to the respondent and the excess amount of rent at Rs.70 p.m. as against the contractual rent of Rs.60 p.m., collected by the respondent-landlord in contravention of sections 4 and 7 of the Bihar Buildings (Lease, Rent and Eviction).Control Act, 1977, ought to have been appreciated by the respondent landlord towards rent arrears, both the courts concurrently held that there was no proof that the appellant-tenant had paid the advance and that although increase in rent from Rs. 60 to Rs. 70 p.m. on the basis of providing additional amenities was not permissible under the Act. the appellant could not take advantage of the situation as he had failed to exercise his option under s. 8(2) of the Act to seek adjustment of the excess payment of rent arrears.

The High Court sustained the decree on the ground of default in payment of rent. Affirming the finding of the courts below, it observed that the appellant's prayer for adjustment could be sustained only if he had exercised his right of option under s. 8(2) of the Act. Assailing the view of the High Court the appellant-tenant filed the appeal in this Court.

Dismissing the appeal, this Court,

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HELD; 1. Without the tenant calling upon the landlord to

adjust the excess payments towards the arrears of rent, he cannot seek such a right in the suit filed by the tenant by way of defence in the suit for eviction. [308B]

2.1 Under sub-section (2) of Section 8 of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1977 if any rent has been collected in excess of the fair rent determined for a building, then the tenant is entitled to a refund of the excess amounts paid by him, unless he opts for a different course of action viz., the adjustment of the excess payment towards rent, past or future. [307G]

2.2 Though s. 8(2) deals with payment of excess rent for buildings for which fair rent has been determined or re-determined by the Controller, the same principle, in the absence of a different prescription under the Act, has to govern the buildings for which the rent is payable in accordance with the terms of the contract between the parties. [307H, 308A]

2.3 Therefore, even if the rent for the building leased out to the appellant had not been determined by the but had been fixed by the parties themselves, the right to seek adjustment of the excess payments made by the appellant has to be in accordance with the principle set out in s. 8(2). [308B]

The High Court had, therefore, not erred in any manner in refusing to countenance the appellant's plea regarding the adjustment of the excess payment made by him towards arrears of rent, without his having opted for such adjustment and calling upon the respondent to make such adjustments. [309E]

Sarwan kumar Onkar Nath v. Shri Subhas kumar Agarwalla, AIR 1987 SC 2302 and Smt Draupadi and Ors. v. Gorakhnath Gupta and Ors. [1988] Suppl. SCC 571 distinguished.

Budhwanti and Anr. v. Gulub Chand Prasad [1987] 2 SCC 153 and Mohd Salimuddin v. Misri Lal, [1986] 2 SCC 378 referred to.

#### JUDGMENT:

CIVIL. APPELLATE JURISDICTION: Civil Appeal No. 977 of 1986.

From the Judgment and Order dated 30.7.1985 of the Patna High Court in Appeal from Appellate Decree No. 96 of 1982.

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M.P. Jha for the Appellant.

S.N. Jha for the Respondents.

The Judgment of the Court was delivered by

NATARAJAN, J. This appeal by special leave is directed against a judgment of the High Court of Patna in Second Appeal No.96/82 confirming the decree for eviction passed by the lower Courts against the appellant herein. The limited question for consideration in the appeal is whether the Subordinate Courts and the High Court have committed an error of law in holding that the appellant had rendered himself liable for eviction for; non-payment of rent for the period 1-2-75 to 30-6-1975 in spite of the courts holding that the appellant had paid excess rent of Rs.10 per month for a period of 33 months.

The facts are not in dispute and are briefly as under. The appellant was running a grocery shop in the leased premises and was paying an agreed rent of Rs.60 per month to the respondent. The respondent terminated the tenancy and filed a suit for eviction of the appellant on three grounds, viz. (1) bona-fide requirement of the premises for opening a

shop (2) default in payment of rent for five months; and (3) wrongful conversion of the leased premises from a residential house to grocery shop. The Trial Court and the Appellate Court decreed the suit for eviction on the first two grounds but not on the third ground. The High Court sustained the decree for eviction on the second ground and deemed it unnecessary to go into the merits of the other ground on which eviction was ordered.

As regards the non-payment of rent for the period 1-2-1975 to 30-6-1975, the appellant conceded that he paid the rent only on 30-7-75 but nevertheless contended that he had paid an advance of Rs. 300 and out of the said advance a balance of Rs. 180 was available or appropriation towards the rent arrears, and secondly, the respondent had collected a sum of Rs 70 every month towards rent as against the contractual rent of Rs.60 for a period of 33 months and the excess collection was in contravention of Sections 4 and 7 of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1977 (for short the Act) and as such it ought to have been appropriated by the respondent towards the rent arrears. The Trial Court and the Appellate Court concurrently held that there was no proof the appellant had paid an advance of Rs.300 and hence the question of

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appropriating the balance in the advance- amount towards arrears of rent did not at all arise. Regarding the second plea pertaining to the excess payment of Rs.10 every month for a period of 33 months and the adjustment of the excess payment towards the rent arrears, the Courts held that the increase of the rent from Rs.60 to Rs.70 per month on the basis of the respondent providing additional amenities was not permissible under the Act but nevertheless, the appellant cannot take advantage of the situation because he had failed to exercise his option to seek adjustment of the excess payment towards the rent arrears. The High Court, as already stated, affirmed this finding of the Courts below and has observed that the appellant's prayer for adjustment of the excess payment can be sustained only if he had exercised his right of option under Section 8(2) as the Section lays down that any payment made in excess of the fair rent fixed for a building has to be refunded to the person whom it was paid or at the option of such person it can be adjusted towards the arrears of option (emphasis supplied). The view taken by the High Court is assailed by that: appellant in this appeal.

It was urged by the learned counsel for the appellant that since the courts have found that the respondent was not entitled to receive excess payment of Rs. 10 per month towards the amenities provided by him without the approval of the Rent Controller, he was bound to adjust the excess payments towards the arrears of rent and therefore he was not entitled to seek the appellant's eviction merely because the appellant had failed to exercise his option under Section 8(2) of the Act for the appropriation of the excess payment towards the arrears of rent. It was further urged that so long as the excess payment had not been refunded, the respondent cannot seek eviction of the appellant on the ground of arrears of rent. Mr. M.P. Jha sought to draw support for his arguments from the decision in Sarwan Kumar Onkar Nath v. Shri Subhas Kumar Agarwalla, AIR 1987 SC: paid as advance rent for two months should have been adjusted towards the rent for the months of September and October 1972 without reference to his delayed payment of the rent in January 1973 was accepted by this Court and the judgment of the High Court taking a contrary view was set

aside. This Court observed that since the sum of Rs. 140 had been specifically given by way of advance rent for two months, the landlord should have adjusted the amount towards the arrears even in the absence of a specific request from the tenant in that behalf. Learned counsel for the appellant also placed before us another judgment of this Court in Civil Appeal No. 1276 of 1988 dated 30th March 1988 Smt. Draupadi and Ors. v. Gorakhnath Gupta and Ors., where the  
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tenant's plea for adjustment of excess amounts lying in the hands of the landlord towards the rent of excess amount lying in the hands of the landlord towards the rent due for two months viz. February and March 1966 was sustained and the tenant's appeal was allowed.

Controverting the arguments of the appellant's counsel, Mr S.N. Jha, learned counsel for the respondent submitted that this was not a case where the appellant had paid any rent in advance but a case here the appellant had been provided some amenities and in return therefor he had agreed to pay an additional sum of Rs.10 per month. Such being the case, the addition payment of Rs. 10 was really not an excess payment of rent in the strict sense of the term but only a payment made without due permission being obtained from the Controller. It was also urged that as the additional payment of Rs.10 was made as per a mutual agreement reached between the parties, this would be a case where the parties were 'in pari delicto' and in that resultant situation, one of the parties cannot seek the Court's aid to score an advantage over the other. To strengthen his contention, the respondent's counsel relied upon the decision of a Full Bench of the Patna High Court in Gulab Chand prasad v. Budhwanti und Anr., AIR 1985 Patna 327 and the dismissal of the appeal arising therefrom by this Court in Budhwanti and And. v. Gulab Chand prasad. [1987] 2 SCC 153.

On a careful consideration of the contentions of the parties, we are clearly of the view that the pleas of the appellant have no merit in them. It is no doubt true that it has been held by the Trial Court and the Appellate Court that the increase of rent by Rs. 10 per month by way of return for the additional amenities provided by the respondent was not permissible under the Act because Section 4 does not permit any increase being made in the rent except in accordance with the provisions of the Act. In spite of this finding, the Question for consideration would be whether the respondent has to necessarily adjust the excess payments towards arrears of rent and desist from filing a suit for eviction of the appellant for non-payment of rent. It is in that context the legislative prescription contained in sub-section 2 of Section 8 of the Act assumes significance. The sub-section inter-alia provides that if any rent has been collected in excess of the fair rent determined for a building, then the tenant is entitled to a refund of the excess amounts paid by him unless he opts for a different course of action viz. the adjustment of the excess payment towards rent, past or future. Though Section 8(2) deals with payment of excess rent for buildings for which the fair rent has been determined or re-determined  
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by the Controller, the same principle, in the absence of a different prescription under the Act, has to govern the buildings for which the rent is payable in accordance with the terms of the contract between the parties. It therefore follows that even if the rent for the building leased out to the appellant had not been determined by the Controller but

had been fixed by the parties themselves, the right to seek adjustment of the excess payments made by the appellant has to be in accordance with the principle set out in Section 8(2). Viewed in that light the logical conclusion will have to be that without the appellant calling upon the respondent to adjust the excess payments towards the arrears of rent, he cannot seek such a right in the suit filed by the respondent by way of defence in the suit for eviction. The High Court has not therefore committed any error in holding that without the appellant exercising his option and calling upon the respondent to adjust the excess payments towards arrears of rent he cannot seek an automatic adjustment of the excess payments made by him and contend that he was not liable to be evicted for non-payment of rent.

We do not think the Judgment in Sarwan Kumar Onkar Nath's case (supra) can be of any assistance to the appellant in this case. Manifestly that was a case where the tenant had paid two months rent in advance and as such the advance payment could always be adjusted towards rent by the landlord whenever the tenant committed default in payment of rent. Notwithstanding this position the landlord in that case took the stand that without a specific direction to him by the tenant to adjust the advance payment towards the rent arrears he was not bound to make such adjustment. It was in that context this Court set aside the judgment of the High Court and allowed the tenant's appeal and held that inasmuch as the tenant had paid the rent for two months in advance the landlord could not put forth a plea that the tenant had failed to give him specific directions for adjustment of the advance towards arrears of rent and in the absence of such direction he was entitled to seek the eviction of the tenant. The judgment was confined to the facts of the case as made clear by the following sentence in the judgment. "On the facts and in the circumstance of the case we are satisfied that the appellant was not in arrears of two months rent." The judgment does not lay down any general principle that in whatever circumstances the excess payment has been made and whatever be the period of default the landlord was bound to adjust the excess payment towards arrears of rent and exonerate the tenant of the default committed by him in payment of rent. Even that decision in Civil Appeal No. 1276/88 will stand confined to the facts of that case and it does not lay down a ratio of general application to all cases in which a tenant seeks adjustment of excess payments towards his rent arrears.

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Learned counsel for the respondent submitted that there is another perspective to the appellant's case and viewed from that angle also the appellant has to fail in his contention. The argument was that since the appellant had been as much a party as the respondent to the contravention of Section 4 of the Act by agreeing to pay an extra amount of Rs.10 per month in return for the amenities provided in the premises, the doctrine of "in pari delicto" was attracted and hence the appellant cannot claim any indulgence on the ground he is a tenant and subjected to exploitation by the landlord. There is neither justice nor grace, it was urged, in the appellant pleading for an advantageous treatment for himself in the eviction proceedings instituted by the respondent. The learned counsel referred to the observation in Mohd. Salimuddin v. Misri Lal, [1986] 2 SCC 378 in the following terms:

"The doctrine ("in pari delicto") is attracted only when none of the parties is a victim of such exploitation and

both parties have voluntarily and by their free will joined hands to flout the law for their mutual gain."

We do not think it necessary to go into this aspect of the matter because of our view that the High Court had not erred in any manner in refusing to countenance the appellant's Plea regarding the adjustment of the excess payment made by him towards arrears c,f rent without his having opted for such adjustment and calling upon the respondent to make such adjustments. For the same reason it is also not necessary for us to advert to the decision of the Patna High Court in Gulab Chand PRASAD, (supra) and the decision of this Court in the appeal arising therefrom in Budhwanti and Anr. v. Gulab Chand Prasad. (supra).

In the result the appeal fails and is accordingly dismissed. Therewith, however, be no order as to costs.  
N.P.V. Appeal dismissed.