IN THE HIGH COURT AT CALCUTTA
(CIVIL APPELLATE JURISDICTION)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

S.A. 123 of 2022

SHRI SHIB NATH SAHA
VS.
SMT. KANCHANA MUKHOPADHYAY

For the Appellant	: Mr. Probal Kumar Mukherjee, Sr. Adv. Mr. Ashim Kr. Chatterjee, Adv. Mr. Saumyajit Ghosal, Adv.
For the Respondent	: Mr. Aniruddha Chatterjee, Adv. Mr. Rupak Ghosh, Adv. Mr. Chayan Gupta, Adv. Mr. Kaushik De, Adv. Ms. Mohini Majumder, Adv.
Hearing concluded on	: 21st September, 2023
Judgement on	: 6th October, 2023

Siddhartha Roy Chowdhury, J.:

1. This second appeal challenges the judgement and decree passed by learned 4th Bench of City Civil Court in Title Appeal No. 8 of 2018, reversing thereby the judgement and decree passed by learned Judge, II Bench, Presidency Small Causes Court in Ejectment Suit No. 516 of 2016.

2. For the sake of convenience, the parties will be referred to as they were arrayed in suit before the learned Trial Court.

3. Briefly stated, Kanchana Mukherjee filed the suit for eviction and recovery of possession against the defendant Shib Nath Saha contending, *inter alia,* that the defendant was inducted as a monthly tenant in respect

of suit property by the father of the plaintiff at a rental of Rs. 590/- payable according to English Calendar month with a provision to enhance the rent at the rate of Rs. 30/- after expiry of each year and an agreement was executed on 2nd August, 1999 between Hara Prasad Mookerji since deceased and the defendant to that effect. It was further agreed that the defendant would pay 10% of the increased municipal tax or any other imposition of tax in addition to the rent fixed as aforesaid.

4. It is further contended that the defendant is defaulter in payment of rent from December, 2007 as well as failed to pay the proportionate share in municipal tax in terms of agreement dated 2nd August, 1999. At the time of induction of the defendant in the suit property as tenant the municipal tax was Rs. 308/- and defendant was not required to pay the proportionate share of municipal tax. Subsequently, the Kolkata Municipal Corporation enhanced the Municipal Tax from Rs. 308/- to Rs. 12,191/- per quarter. Father of the plaintiff by letter dated 21st February, 2004 demanded the proportionate share of municipal tax from the defendant amounting to Rs. 16,632/- for 14 quarters from October, 2000 to March, 2004 followed by another letter dated 18th April, 2005. But the defendant did not pay heed to such request. The plaintiff however, received the rent though in part up to the month of November, 2007 as the defendant promised to clear the arrears of municipal tax.

5. The notice terminating the tenancy was duly received by the defendant but the defendant failed to act in terms of the requisition of notice. By a notice dated 19th March, 2015 under Section 6 (4) of the West Bengal Premises Tenancy Act, 1997 the tenancy was terminated on the expiry of month of April, 2015.

6. It is further contended that the predecessor-in-interest of the plaintiff filed a suit for eviction of the defendant being Ejectment Suit No. 118 of 2008 and the suit was decreed on contest on 25th April, 2013. The said decree was challenged by the defendant in Title Appeal No. 46 of 2013 and the appeal was accepted by learned 7th Judge of City Civil Court, Calcutta on the ground that notice determining the tenancy was bad in law.

7. The defendant contested this suit by filing written statement denying all material allegations made in the plaint. According to the defendant, he has deposited rent till December, 2007 to the plaintiff, from January, 2008 up to June, 2010, he deposited the rent with the Rent Controller and after institution of suit, rent is being deposited in Court. The defendant prays for dismissal of the suit.

8. Based on the pleadings of the parties learned Trial Court framed issues and answered the issues against the plaintiff. Consequently, the suit was dismissed. However, learned First Appellate Court was pleased to reserve the judgement and decree passed by learned Trial Court in appeal.

9. Aggrieved by the judgement passed by learned First Appellate Court, the defendant preferred this second appeal which was admitted on the following questions of law :-

1. Whether rent includes the tenant's share of municipal tax as an occupier of the premises on a reading of Section 5(1) and 5 (8) of the West Bengal Premises Tenancy Act, 1997?

2. Whether the reference to rent in Section 6 (1) (b) of the said Act only refers to rent in Section 5 (1) of the said Act?
3. Whether the learned judge of the first appellate court substantially erred in facts and law in passing a decree of eviction of the appellant after the appellant made a deposit under Section 7 (4) of the said Act in compliance with orders passed under Section 7 (1) of the said Act?
4. Whether the judgment and decree of the first appellate court was otherwise erroneous in facts and law and ought to be set aside?

10. Mr. Probal Kumar Mukherjee, learned Senior Counsel representing the appellant submits that the suit was dismissed by learned Trial Court and learned Trial Court returned the issue with the specific finding that the defendant was not a defaulter. Learned First Appellate Court however, refused to accept such finding of learned Trial Court and reversed the judgement in appeal but committed grave error in not extending the protection of Section 7 (4) of the West Bengal Premises Tenancy Act, 1997 (hereinafter referred to as the said Act). Mr. Mukherjee further submits that after entering into appearance, in consonance with the statutory mandate as laid down under Section 7(1) of the West Bengal Premises Tenancy Act, the defendant deposited the admitted arrears of rent for the month of December, 2007 and for the month of July, 2010 up to December, 2015 at the rate of Rs. 830/- per month together with 10% statutory interest. Thereafter, the defendant filed an application under

Section 7(2) of the said Act stating, *inter alia,* that the defendant though had paid the rent for the month of December, 2007 but no receipt was granted. Thereafter, he tendered the rent for the month of January, 2008 by money order which was refused by the plaintiff and he started depositing the rent with the Rent Controller at Kolkata and after filing of the suit he has started depositing the rent in the Court.

11. The plaintiff in his written objection to such petition both under Section 7(1) and (2) of the West Bengal Premises Tenancy Act did not deny the contention of the defendant made in the application as to the deposit of rent. Drawing the attention of the Court to the judgement passed by learned Trial Court particularly issue no. 5, Mr. Mukherjee submits that learned Trial Court returned the issue no. 5 and additional issue no. 2 with the clear finding that defendant was not a defaulter in payment of rent. Learned Appellate Court, however, did not agree to such view of learned Trial Court.

12. According to Mr. Mukherjee, in view of the legislative mandate as laid down under Sub-Section 4 of Section 7 of the West Bengal Premises Tenancy Act, 1997, when the defendant as tenant has made a deposit as required under Sub-Section 1 or Sub-Section 2, no order for delivery of possession of the premises to the landlord could have been passed by the learned First Appellate Court on the ground of default. Even if tax is considered as part of rent, since it was the first default, if the finding of learned First Appellate Court is assumed to be correct then also the defendant deserved the statutory benefit of Sub-Section 4 of Section 7 of the West Bengal Premises Tenancy Act, 1997. But learned First Appellate Court committed error in not protecting the defendant.

13. The respondent is represented by Mr. Aniruddha Chatterjee, Mr. Rupak Ghosh and Mr. Chayan Gupta. Mr. Ghosh and Mr. Gupta refuting the submission of Mr. Mukherjee, learned Senior Counsel, submit that the defendant had the obligation to pay the municipal tax towards occupier's share. It is part of rent. Admittedly such tax was not paid. Hence, there was no compliance of Section 7(1) of the West Bengal Premises Tenancy Act, 1997. Section 7 (2) of the West Bengal Premises Tenancy Act enunciates that only upon compliance of Sub-Section 1 the tenant could file an application under Sub-Section 2 of Section 7 of the West Bengal Premises Act, 1997, raising the dispute as to the rate of rent payable. The content of the application under Section 7 (2) of the Act is not inconformity with the statute. The defendant never called upon the learned Trial Court to adjudicate the dispute as to the quantum of rent. This application shows lack of bonafide. To buttress his point Mr. Ghosh relies upon the judgement in ***HINDUSTHAN INDUSTRIAL COMPANY VS. CHANDI PROSAD MORE*** reported in **79 CWN 101**, wherein Hon'ble Division Bench held :-

> *"8. This Court in the case of Gurwantrai v. Satyanarayan Jhunjhun wala, 75 C.W.N. 372 had considered the true elements which go to make an application under section 17 (2) of the Act. It was laid down that such an application must have three elements namely:-*
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> *a) that there must be a dispute raised as to the amount of rent payable;*
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> *b) that the tenant must, for the purposes of this section, make deposit of all the admitted arrears within the statutory period;*

c) that the said deposits, if any, must be made along with an application praying for determination of the amount of rent payable.

The third element above referred to was considered to be an integral and essential part of the section and it was held that unless the said element is present the application cannot be considered to be an application under section 17 (2)....."

14. It is further submitted that learned Trial Court did not consider the fact that municipal tax is part of rent and decided the petition under Section 7(1) and (2) erroneously. For such erroneous finding of the learned Trial Court the plaintiff should not be penalised and defendant cannot be allowed to reap the benefit of error.

15. It is further contended that adjudication of an application under Section 7(1) or (2) is merely tentative and does absolve the learned Trial Court of its duty to return the final adjudication on the issue of default upon considering the evidence. Learned Trial Court committed error in not deciding the issue of default in favour of the plaintiff. To buttress his point Mr. Ghosh places his reliance upon the decision in the case of ***RAMPRASAD BAJAJ & ORS. VS. DEVELOPMENT BUILDERS (P) LTD. & ORS.*** reported in **(1991) 1 CHN 443** wherein it is held :-

"16. So the Court has to decide the dispute involved in the proceeding under s. 17 (2) or s. 17(3) of the Act independent of determination of the issue in the suit. Such a decision is only tentative as is done in the interlocutory proceeding, viz., injuction. The observation of P.N. Mookherjee, J. In Aloka's case (supra) is very pertinent. His Lordship observed that it may be that the Court at that stage of s. 17 (3) application will decide the above question which forms a material issue in the suit itself only prima facie and for the purposes of the said proceedings,

leaving it open for a final decision at the time of hearing of the suit. This finding was quoted with approval by my Lords A.M. Bhattacharya and Ajit Kumar Nayak in Nandagopal Das's case (supra). It was found that such a finding itself would not form the basis of final decision in the suit. These decisions indicate the course to be followed in dealing with an application under s. 17(2) or s. 17(3) of the Act. In short, the Court has to resolve all disputes necessary for disposal of an application under s. 17(2) or s, 17(3) of the Act. Such a decision is for the purpose of disposal of those applications only and they alone cannot form the foundation of the final decision in the suit."

16. In ***NANDA GOPAL DAS VS. RABINDRA NATH DE & ANR.*** reported in **(1987) 1 CHN 362** this Hon'ble Court held :-

"3. It is now well settled that even if the defence of the tenant defendant against delivery of possession has been struck out, the plaintiff-landlord does not get a walkover, so to say, in the contest and a decree for ejectment does not thereafter become a matter of easy insouciance but still remains a matter of anxious advertence by the Court to the question as to whether any ground of ejectment is made out by the plaintiff on the evidence on record. The tenant, notwithstanding that his defence has been struck out, is nevertheless entitled to urge at the final hearing of the suit that on the basis of the evidence adduced by the plaintiff landlord, no decree for eviction can be passed in the suit. As held by a learned single Judge of this Court in Maharam v. Dinanath (77 CWN 202 at 206) the sinking out of the defence against I delivery of possession would not necessarily imply that the relevant ground of ejectment has been made out, but the Court must still thereafter be satisfied that on evidence before it a ground for ejectment has been established."

17. In ***SRI DILIP MUKHERJEE*** reported in **(1995) 1 CHN 395** Co-ordinate Bench held :-

> *"10. The learned Counsel for the defendant petitioner has assiduously claimed that there is no default, since the petitioner has squared up all the payments within the time stipulated by the statute. But I am not unmindful that the petitioner defendant can harvest the desired relief even at the stage of hearing the issue under s. 17(3) of the West Bengal Premises Tenancy Act, 1956. It is the statutory duty of the Court to find out from the record or from the documents as to whether the deposit as contemplated by the statute in respect of payment of rent had been actually made. If the answer is found in the affirmative, a Court of law would be extremely slow to strike out the defence of the defendant's against delivery of possession from the suit premises, for which, no application is called for. That stage is yet to be over where the petitioner could put in the document to dislodge the findings of the learned Court below about the default found to have been committed since May, 1989 to April, 1994 totalling to a sum of Rs. 3,600/-. It is suggestive, therefore, that the petitioner is crying before he is hurt. It looms large that the matters covering within the fold of Ss. 17(1) and 17(2A) were disposed of without any issue, which in my view cannot operate at any rate a res judicata. It is, thus, statutory obligation of the Court during the trial to find out the default, if any. There is no slender material on record that the learned Court below in passing the order overstepped the limits of jurisdiction. The findings relating to s. 17(2) applications are tentative but not conclusive."*

18. Mr. Ghosh submits that the tenant had the obligation to comply with the provision of Section 7 (1) and Section 7(2) not either of the two. It is further submitted by Mr. Ghosh that the language couched in Section 7 (4) of the West Bengal Premises Tenancy Act should be read treating the word 'or' as is appearing in the statute, as 'and' though 'or' is disjunctive and 'and' is conjunctive. In support of his contention Mr. Ghosh places

his reliance upon the decision in ***CABLE CORPORATION OF INDIA LIMITED VS. ADDITIONAL COMMISSIONER OF LABOUR & ORS.*** reported in **(2008) 7 SCC 680** wherein Hon'ble Apex Court held :-

> *"11. The word "or" is normally disjunctive and "and" is normally conjunctive. But at times they are read as vice versa to give effect to the manifest intention of the legislature as disclosed from the context. As stated by Scrutton, L.J.:*
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> > *"You do sometimes read 'or' as 'and' in a statute. But you do not do it unless you are obliged because 'or' does not generally mean 'and' and 'and' does not generally mean 'or'. And as pointed out by Lord Halsbury the reading of 'or' as 'and' is not to be resorted to, 'unless some other part of the same statute or the clear intention of it required that to be done'. But if the literal reading of the words produces an unintelligible or absurd result 'and' may be read for 'or' and 'or' for 'and' even though the result of so modifying the words is less favourable to the subject provided that the intention of the legislature is otherwise quite clear. Conversely if reading of 'and' as 'or' produces grammatical distortion and makes no sense of the portion following 'and', 'or' cannot be read in place of 'and'. The alternatives joined by 'or' need not always be mutually exclusive."*

19. Section 7(4) of West Bengal Premises Tenancy Act, 1997 says :-

> *"(4) If the tenant makes deposit or payment as required by subsection (1) or sub-section (2), no order for delivery of possession of the premises to the landlord on the ground of default in payment of rent by the tenant, shall be made by the Controller, but he may allow such cost as he may deem fit to the landlord: Provided that the tenant shall not be entitled to any relief under this sub-section if, having obtained such relief once in respect of the premises, he again makes default in payment of*

rent for four months within a period of twelve months or for three successive rental periods where rent is not payable monthly."

20. Sub-Section 4 of Section 7 enunciates that if the tenant makes a deposit or payment as required by Sub-Section 1 or Sub-Section 2, no order for delivery of possession of the premises to the landlord on the ground of default in payment of rent by the tenant shall be made.

21. Section 7(1) of the West Bengal Premises Tenancy Act says :-

"1) (a) On a proceeding being instituted by the landlord for eviction on any of the grounds referred to in section 6, the tenant shall, subject to the provisions of sub-section (2) of this section, pay to the landlord or deposit with the Controller all arrears of rent, calculated at the rate at which it was last paid and up to the end of the month previous to that in which the payment is made together with interest at the rate of ten per cent per annum. (b) Such payment or deposit shall be made within one month of the service of summons on the tenant or, where he appears in the proceeding without the summons being served upon him, within one month of his appearance. (c) The tenant shall thereafter continue to pay to the landlord or deposit with the Controller month by month by the 15th of each succeeding month, a sum equivalent to the rent at that rate."

22. Upon plain reading of the statute it appears that Sub-Section 1 of Section 7 has saddled the tenant with the obligation to pay all arrears of rent at the rate of which it was last paid, either to landlord or to deposit the amount to the Court within 30 days from the date of receipt of summon or if no such summon is served, from the date of appearance together with interest @ 10%. Thereafter, the tenant shall keep on depositing the rent within 15th day of each succeeding month. That is

pre-condition to invoke the provision of Sub-Section 2 of Section 7 if there is any dispute as to rate of rent.

23. Therefore, the tenant is not necessarily required to file any application under Section 7(1) of the Act, but he is to deposit admitted arrear of rent or to pay the same to the landlord with interest. If there is any dispute as to rate of rent etc. he is to file petition under Section 7(2) of the West Bengal Premises Tenancy Act, 1997.

24. When language of the statute is clear and unambiguous, it requires no interpretation, as suggested by Mr. Ghosh.

25. Mr. Aniruddha Chatterjee, learned Counsel for the respondent contended that eviction decree can be passed in an appeal on the ground of default in payment of municipal tax which is part of rent and to buttress his point Mr. Chatterjee relies upon the judgement of Hon'ble Apex Court in the case of ***POPAT AND KOTECHA PROPERTY & ORS. VS. ASHIM KUMAR DEY*** reported in **(2018) 9 SCC 149** and draws the attention to paragraph 13 in particular wherein it is held :-

> *"13. For the aforesaid reasons, we allow this appeal and set aside the order of the High Court affirming the order of the learned trial court. The application filed by the landlord for eviction of the respondent tenant is allowed."*

Mr. Chatterjee argues that Hon'ble Apex Court held that tax is part of rent and ordered eviction of the tenant, who did not pay such tax. The appellant is a defaulter as he did not pay occupier's share in tax. Therefore, he is liable to be evicted, as ordered by learned First Appellate Court.

26. To answer the substantial questions of law formulated at the time of admission of this second appeal, it is expedient to find out the answer to the first substantial question of law :-

1. Whether rent includes the tenant's share of municipal tax as an occupier of the premises on a reading of Section 5(1) and 5(8) of the West Bengal Premises Tenancy Act, 1997?

27. From the attending facts of the case it is admitted that Sri Hara Prasad Mookerji, the original owner inducted the defendant as tenant in respect of the suit property. On 2nd August, 1999, the parties entered into an agreement in writing. It was agreed that monthly rent would be Rs. 590/- payable according to English Calendar month and there would be a hike of Rs. 30/- after expiry of each year. The tenant would pay 10% of the enhanced municipal tax to the landlord.

28. The suit was filed in year 2016, after the West Bengal Premises Tenancy Act, 1997 came into force.

29. Section 5 of the West Bengal Premises Tenancy Act, 1997 speaks of obligation of the tenant. Sub-Section 1 of Section 5 says that every tenant shall pay rent to the landlord or his authorised agent within the prescribed period. Sub-Section 8 of Section 5 imposes obligation upon the tenant to pay his share of municipal tax as occupier. Upon plain reading of aforesaid provisions it appears that the tenant has two obligations which are distinct and separate, his contractual obligation is to pay rent and statutory obligation is to pay the share of municipal tax. Had it been the intention of legislatures to include tax as a components of rent, tax component would have been brought within the ambit of Sub-

Section 1 of Section 5 of the West Bengal Premises Tenancy Act, 1997. Therefore, the tax amount due and payable cannot be termed as 'rent'.

30. Section 231 of the Kolkata Municipal Corporation Act, 1980 (hereafter referred as 'KMC Act') says :-

> *"231. Mode of recovery:- If any person primarily liable to pay any 1 [property tax] on any land or building and is entitled to recover any sum from an occupier of such land or building, he shall have, for recovery thereof, the same rights and remedies as if such sum were rent payable to him by the person from whom he is entitled to recover such sum."*

31. The aforesaid provision if read with Sub-Section 8 of Section 5 of the West Bengal Premises Tenancy Act, 1997, it would appear that Section 231 of the KMC Act only prescribes the mode of recovery of tax due and payable by tenant as arrears of rent. It would be figment of imagination to hold that liability to pay tax by tenant is part of rent in absence of any agreement to the effect that rent would be inclusive of municipal tax.

32. It goes without saying that a tenant has obligation to pay the share of municipal tax and Section 231 of the KMC Act, 1980 creates a fiction that arrears of tax is to be recovered by the landlord as if such arrears of tax liability were rent payable to him by the tenant.

33. Rent has not been defined in the West Bengal Premises Tenancy Act, 1997. Dictionary meaning of rent is to pay for the use of another's property *(Black's Dictionary 11th Edition)*. Hon'ble Apex Court in ***PUSPA SEN GUPTA VS. SUSMA GHOSE*** reported in **(1990) 2 SCC 651** held :-

> *"3. Although the expression 'rent' has not been defined, there are indications in the present Act to suggest that the word 'rent' includes not only what is strictly understood as rent, but*

also payment in respect of amenities or services provided by the landlord under the terms of the tenancy. The Act deals with the fixation and revision of fair rent and sub-section (3) of section 8, takes into account furniture if supplied or fittings affixed in the tenement for the use of the tenant, indicating that an agreement between the landlord and the tenant in respect of the additional amenities comes within the scope of the Act. Similarly the provisions of section 34 refer to the maintenance of any essential supply or service (including supply of electricity) and section 35 deals with emergency measures to be taken in respect of matters including additional services. These provisions give a clear indication that the Act contemplates that a tenancy which carries with it certain amenities to be provided or services to be maintained by the landlord is within the purview of the Act. If the Act is not so interpreted, an astute landlord may successfully circumvent the provisions of the Act by imposing on the tenant onerous conditions with reference to supply of amenities as binding terms of the tenancy....."

34. Dictionary meaning of tax is a charge, usu. monetary, imposed by the government on person, entities transactions or property to yield public revenue.

While meaning of amenity and service are given as :-

"AMENITY. Something tangible or intangible that increases the enjoyment of real property, such as location, view, landscaping, security or access to recreational facilities."

"SERVICE is an intangible commodity in the form of human effort, such as labour, skill or advice."

(Black's Dictionary, 11th Edition)

Therefore, by no stretch of imagination tax can be considered as either amenity or services provided by the landlord. Unlike rent tax is not a contractual obligation rather it is statutory obligation of tenant to pay occupier's share in view of Sub-Section 8 of Section 5 of the West Bengal Premises Tenancy Act, 1997.

35. Hon'ble Apex Court in ***CALCUTTA GUJARATI EDUCATION SOCIETY VS. CALCUTTA MUNICIPAL CORPORATION*** reported in **(2003) 10 SCC 553** held :-

> *"46. The provisions of the Tenancy Act merely enable the landlord to make a demand of arrears of rent and in default of the payment of the same, sue the tenant for recovery of rent or eviction on the ground of non-payment of rent despite demand. The tenant can get protection against eviction on the ground of arrears of rent only if he makes requisite deposit of the arrears in the manner laid down in the provisions of the Tenancy Act. A provision to fictionally treat "tax" as "rent" is necessitated because in the absence of such a fiction in Section 231 of the Act, the landlord would be compelled to pay the whole amount of tax which is recoverable from him under the Act and would be left to an expensive and cumbersome remedy of filing a civil suit for recovery of such tax paid on behalf of the tenant, sub-tenant or occupant. Such a fiction is required to be incorporated under Section 231 of the Act because a private party cannot recover tax. If a lessor is obliged to pay a portion of tax leviable on the tenant, the landlord can recover the same not as "tax" but only as part of "rent". The fiction created by the legislation in Section 231 to treat "tax" as "rent" has to be taken to its logical conclusion. The Act under consideration and the Tenancy Act, both are State legislations. No question arises of legislative incompetence. There does not appear any inter se conflict between the two Acts. Both have to be read and applied*

harmoniously to achieve the legislative intent in the two enactments. The contention based on Section 231 of the Act, therefore, also does not commend to us and is rejected."

36. In ***EIH LIMITED VS. NADIA A VIRJI*** reported in **2022 SCC OnLine SC 947** Hon'ble Apex Court held :-

"26. Thus, as observed and held by this Court in the case of Calcutta Gujarati Education Society (supra), the amount of tax due and payable by the tenant under Section 230 of the Act 1980 r/w Section 5(8) of the Act 1997 can be recovered as arrears of rent (Section 231 of the Act 1980) and for that purpose, namely, for the purpose of recovery the tax apportioned on the tenant would be treated as 'rent' and would be recoverable as such. The aforesaid judgment cannot be read holding that the tax apportioned on the tenant be treated as 'part of the rent', as contended by Shri Rana Mukherjee, learned Senior Advocate appearing on behalf of the landlord. Merely because the obligation to pay half of the property tax and surcharge would be upon the tenant as per section 230 of the Act 1980 and the tenant is obliged to pay his share of municipal tax as an occupier of the premises under Section 5(8) of the Act 1997 and merely because for the purpose of recovery of the tax due from the tenant, such tax apportioned can be recovered as rent, such tax apportioned (half of the amount of the property tax and surcharge) cannot become part of the rent of the premises which is tenanted. For that purpose, the terms and conditions mentioned in the tenancy agreement/lease agreement are required to be considered. For example, if in the tenancy agreement if it is provided that the tenant shall pay 'X' amount which shall include the taxes, the tax component can be said to be 'part of the rent'. However, if under the agreement and/or even under Section 230 of the Act 1980 r/w Section 5(8) of the Act 1997, the tenant is liable to pay tax separately or half of the amount of tax now statutorily liable to be paid, the same can be

recovered as arrears of rent because such 'tax' is to be treated as 'rent' for the purpose of recovery. However, the same cannot be said to be 'part of the rent'. Therefore, reliance placed upon the decision of this Court in the case of Calcutta Gujarati Education Society (supra) by learned counsel appearing on behalf of the landlord is on a misreading of the said decision. As observed hereinabove, the said decision cannot be read to mean that the tax apportioned can be said to be part of the rent as sought to be contended by Shri Rana Mukherjee, learned Senior Advocate appearing on behalf of the landlord.

27. Now so far as reliance being placed upon the subsequent decision of this Court in the case of Popat and Kotecha Property (supra) is concerned, at the outset, it is required to be noted that in the said decision, para 45 of the decision in the case of Calcutta Gujarati Education Society (supra) has been considered and not para 46, reproduced hereinabove. Even on facts, the said decision is not applicable. In the said decision, under the agreement the parties agreed that the rent would include all municipal taxes payable and that as and when such taxes are enhanced rent should be proportionately raised. In the present case, under the tenancy agreement, the rent payable would be Rs. 10,000/- per month which does not include the municipal taxes payable. The liability to pay the taxes under the agreement would be over and above the amount of rent, i.e., Rs. 10,000/- per month. Therefore, on facts, the decision of this Court in the case of Popat and Kotecha Property (supra) is not applicable to the facts of the case on hand."

37. *Popat and Kotecha Property (supra)* has been distinguished in *EIH Limited (supra)* by the Hon'ble Supreme Court. Moreover in *Popat and Kotecha Property (supra),* order passed in C.O. 3880 of 2007 was challenged and Hon'ble Apex Court was pleased to hold :-

> *"13. For the aforesaid reasons, we allow this appeal and set aside the order of the High Court affirming the order of the learned trial court. The application filed by the landlord for eviction of the respondent tenant is allowed."*

The order appears to have been passed under Article 142 of the Constitution of India.

38. Thus in my humble opinion since tax cannot be considered either as an amenity or service provided by the landlord and it is not inclusive of rent, in absence of any agreement in writing by and between the parties, a tenant cannot be held to be a defaulter in payment of rent, if he fails to pay his share of municipal tax, which a landlord is entitled to recover as arrears of rent, but cannot seek his eviction, if the tenant complies with the provision of Sub-Section 1 or 2 of Section 7 of the West Bengal Premises Tenancy Act, 1997. This answers the substantial questions of law.

39. Learned First Appellate Court committed grave error in holding that the appellant-tenant was liable to be evicted on the ground of default for his failure to pay the share in municipal tax, though learned First Appellate Court was in agreement with the learned Trial Court that the rent for the suit premises was paid by the defendant.

40. Therefore, I am of the view that the judgement of learned First Appellate Court suffers from serious infirmity and should be set aside, which I accordingly do. The appeal is accepted and allowed. Consequently, the judgement passed by learned First Appellate Court is set aside and judgement of learned Trial Court is restored.

41. Let a copy of this judgement along with lower Court record be sent down to the learned Trial Court immediately.

42. Urgent photostat certified copy of this judgement, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(SIDDHARTHA ROY CHOWDHURY, J.)