
(2018) 02 GAU CK 0041
In the Gauhati High Court
Case No : CRP 256 of 2012

DARSHAN SINGH and ORS

APPELLANT

Vs

PARAG GOGOI

RESPONDENT

Date of Decision : 19-02-2018

Acts Referred:

[Code of Civil Procedure, 1908](#), [Section 115](#),
[Section 151](#), [Order 41Rule31](#)
- Revision - Saving of Inherent powers of Court
[Assam Urban Areas Ren](#)

Citation : (2018) 02 GAU CK 0041

Hon'ble Judges : Kalyan Rai Surana

Bench : Single Bench

Advocate : D. Borgohain, P. Chakraborty

Final Decision : Allowed

Judgement

1. Heard Mr. G.N. Sahewalla, the learned Senior Counsel, assisted by Ms. R. Jain, the learned Counsel for the petitioners as well as Mr. C.

Baruah, the learned Senior Counsel, assisted by Ms. L. Yangzom, the learned Counsel for the respondent.

2. By this revision under Section 115 read with Section 151 of the Civil Procedure Code, the petitioners have assailed the first appellate judgment

and decree dated 28.03.2012 passed by the learned Civil Judge, Dibrugarh in Title Appeal No. 15/2009, by which the judgment and decree

dated 15.05.2009, passed by the learned Munsiff No.1, Dibrugarh in Title Suit No. 152/2006 was set aside and reversed.

3. The petitioners are the plaintiffs in the said suit. It was stated that they were the landlords of the respondent in respect of the suit premises

comprising of 429 square feet in the first floor of the two storied RCC building at

Dibrugarh as described in the Schedule of the plaint and that it was agreed that the respondent would pay monthly rent of Rs.2,150/- for the said tenanted premises. It was projected that the respondent had been irregular in paying monthly rent to the petitioners and from November, 2005 he had stopped paying any rent. It was claimed that the respondent had been allowed to run a ""Beer Bar"" from the tenanted premises. However, it was stated that without their consent, the respondent had started to run a ""Hot Bar"" from the suit premises. Similarly, it was stated that the respondent had also installed air-conditioner without their consent, for the petitioners had also complained before ASEB. Accordingly, on 19.12.2005 and 07.09.2006, they served Advocate's notice to vacate the suit premises and to pay the arrear monthly rents, which was not complied. Moreover, claiming bona fide requirement for the suit premises for the business of petitioner No.5, the suit was filed for ejection of the respondent, for realizing arrear rent and other reliefs.

4. The respondent- defendant contested the suit by filing his written statement. It was stated therein that the suit was filed due to business rivalry between him and petitioner No.3, who was the owner of Gaurab Hotel. The respondent denied that all the petitioners were his landlord, claiming that his landlord was Bhupendra Singh @ Raju Singh (petitioner No.2), who accepted monthly rent from him. He claimed to have come into possession of the suit premises since 31.03.1991 as a tenant under Late Gurbachan Singh, the father of the petitioners, paying monthly rent of Rs.2,150/- per month, as and when asked to pay, sometime in advance for 2-3 months. It was stated that although all the petitioners had inherited the property, but the petitioner No.2 was his landlord, for which there was no fresh agreement. He claimed that although the petitioner No.2 used to collect rent from him, but he discontinued issuing any house rent receipt as was done by his late father. It was stated that there was no specific date for payment of monthly rent and that the rent was paid within each month and sometimes the petitioner No.2 asked him to pay rent for 2-3 months in advance like his father, which was paid and it was further stated pleaded that as monthly rent was irregularly demanded, consequently, monthly rent was irregularly paid, not till October, 2005 but till October, 2006. It was stated that in the month of September, 2005 the petitioner

No.2 asked him to pay rent at the rate of Rs.70/- per day as he needed money for his daily use, which was paid since 01.10.2005 to October, 2006 as such, the respondent claimed that he was not a defaulter. It was also stated that "Beer Bar" was converted to "Hot Bar" on receiving NOC from the petitioner No.2, who became his regular daily customer. It was also claimed that the petitioner No.2 offered to let him an attached room at monthly rent of Rs.900/- per month, for which he paid an advance of Rs.15,000/-, but did not hand him the said small room. It was stated that he had later on come to know that the said room was jointly possessed by all the petitioners and the petitioner No.2 had no right to give the said room on rent to the respondent without consent of other petitioners, who were not in good terms with the respondent. It was stated that he had received notice dated 19.12.2005, only asking him to close down the bar but it did not contain any allegation of default in paying rent. It was stated that the other notice was refused as it was sent by unknown person and that on perusal of the said notice in Court, it was found to be a reminder to the notice dated 19.12.2005 and it also did not contain allegation of default in paying rent. It was further pleaded that Advocate's notice dated 24.08.2006 was suspicious and contradictory to the Advocate's notice dated 19.12.2005 and 07.09.2006 and that no notice can be served by the petitioners except the petitioner No.2, who was the landlord of the suit premises. It was also stated that the landlord of the suit premises was accepting the daily rent at the rate of Rs.70/- per day till the last day of October, 2006 and that the petitioner No.2 had not served any notice of ejectment on him. It was stated that the sum Rs.23,650/- was not due as arrear rent from November, 2005 to September, 2006 as alleged. It was also stated that there was no bar to install air-conditioner facility in the suit premises, but when objection was made, the electricity connection to the air-conditioner was removed, and was reinstalled after getting NOC from the landlord, which would in no way reduce the value of the suit premises or cause damage to the suit premises. It was further stated that there are as many as 16/17 other rented rooms in the same building and that recently one room which was lying vacant was let out to a third party and not kept for the petitioner No.5, who was serving and residing at Delhi and at present the suit premises was not required for bona fide use by the petitioner No.5. It was also stated that the respondent

was running his Bar by appointing his Manager and employees and that does not mean sub-letting the suit premises to his Manager and employees

as alleged. Hence, it was prayed to dismiss the suit.

5. On the basis of pleadings, the following issues for trial were framed by the learned trial court; viz.,

- i. Whether there is cause of action for the suit?
- ii. Whether the plaintiff No. 2 is the landlord or the plaintiffs jointly are the landlords of the suit premises?
- iii. Whether the defendant is a defaulter in payment of rent?
- iv. Whether the defendant has violated the terms and conditions of the lease?
- v. Whether the suit premise is bona fide required for the personal use and business of the plaintiff Bhagat Singh?
- vi. To what relief or reliefs the parties are entitled to?

6. In support of their respective stand, the petitioners had examined the petitioner No.1, namely, Sri Bhupendra Singh as PW-1 and exhibited the

following documents, viz., (i) Advocate's notice dated 19.12.2005 (Ext.1), (ii) Acknowledgement card (Ext.2), Notice dated 24.08.2006 (Ext.3),

Returned envelope (Ext.4 & 5), Lease Agreement dated 11.03.1991 (Ext.6). The respondent examined himself as DW-1 and had exhibited

Challans depositing monthly rent as Ext.D(1) to Ext.D(26).

7. In respect of issue No.1, it was held that there was cause of action for the suit and the said issue was decided in favour of the petitioners/

plaintiffs and in affirmative. In respect of issue No.2, although the suit property had devolved on the petitioners by way of inheritance from their

father, Late Gurbachan Singh, but by relying on the definition of landlord as provided in Section 2(c) of the Assam Urban Areas Rent Control Act,

1972 as the respondent No.2 was collecting rent, it was held that the petitioner No.2 was the landlord although other petitioners were the co-

owners of the land and suit premises.

8. In respect of issue No.3, the learned trial court had held that as the respondent did not take any steps to call for diary of the respondent No.2 to

prove payment of rent on daily basis at the rate of Rs.70/- per day, the said plea of the respondent was not acceptable. However, it was held that

the rent was legally deposited by the respondent in Court. The learned trial court

accepted the plea of the respondent that the petitioners did not allege non-payment of rent since November, 2005 in their notice dated 19.12.2005 (Ext.1) and, as such, it was held that the respondent was not a defaulter in paying rent for use and occupation of the suit premises. Hence, issue No.3 was decided in the negative and against the petitioners. In respect of issue No.4, appreciating the evidence on record, the learned trial court was of the view that as the respondent did not produce the copy of N.O.C. from the petitioner No.2 for starting the "Hot Bar" in place of "Beer Bar", it was held that the "Hot Bar" was opened without obtaining N.O.C. or consent of the petitioners, as such, the said issue was decided in favour of the petitioners. In respect of issue No.5, the learned trial Court was of the view that though the suit premises was stated to be required for petitioner No.5, but the said petitioner No.5 did not lead any evidence to substantiate that he intended to come to Dibrugarh to do business, and moreover as the space available in the building was let out to new tenants, it was held that the petitioners had failed to prove the bona fide requirement of the suit premises and accordingly, the issue was decided in the negative and against the petitioners. Hence, the suit was decreed in favour of the petitioners for evicting the respondent and holding the petitioners to be entitled to withdraw rent deposited in Court.

9. The said judgment and decree dated 15.09.2009 was challenged in T.A. No. 15/2009, inter-alia, on the ground that the issue of default in payment of rent and bona fide requirement of the suit premises was wrongly decided. At the outset, it is required to be mentioned that the learned first appellate court did not formulate any points of determination for deciding the appeal. Instead, the learned appellate court had revisited the issues as framed by the learned trial court.

10. On issue No.1 as framed by the learned trial court, the learned lower appellate court had appreciated the pleadings and evidence on record and held that as the respondent is not a defaulter, there was no cause of action for the suit. It was observed by the learned first appellate court that as per the terms and conditions of the agreement for tenancy (Ext.6) from 15.03.1991 for a period of 11 months ending 14.02.1992, the appellant was carrying on business of ""Restaurant cum open Beer Bar"", which was subject to renewal after expiry and that it was provided that the renewal

would be made three weeks prior to expiry and the deed shows that the agreement was renewed upto 14.02.1993 with enhancement of monthly rent from Rs.2,000/- to Rs.2,500/- and cash deposit of Rs.10,000/- made earlier would remain as earnest money deposit and that the agreement contained a clause that in default of payment of stipulated rent, a compensation of Rs.75/- would be charged. It was held that the rent was legally deposited in Court and the finding by the learned trial court on issue No.3 was upheld. The learned first appellate court upheld the issues No.4 and 5 as decided by the learned trial court.

11. The learned Senior Counsel appearing for the petitioners has submitted that the issues were incorrectly decided by the learned courts below. It is submitted that notwithstanding adverse finding on various issues by the learned trial court, there was no necessity for the petitioners to file any cross appeal before the first appellate court as he was not aggrieved by the decree. Therefore, as against the findings against them, the petitioners had a right to advance their submissions on issues decided adversely against them. Apart from pressing all the grounds taken in the appeal, the learned Senior Counsel for the petitioners had strenuously pressed for evicting the respondent on the ground that he was a defaulter during the pendency of the suit and placed reliance on the affidavit filed by the petitioners on 20.02.2014 in connection with this revision. In support of his argument, the learned Senior Counsel for the petitioners had relied on the following case citations:-

- a. Abdul Matin Choudhury & Ors. Vs. Nilayananda Dutta Banik, 1997 (II) GLT 590.
- b. Sobha Biswas & Ors. Vs. Ranjit Lodh, 2006 (1) GLT 479.
- c. R.C. Tamrakar & Anr. Vs. Nidi Lekha, (2001) 8 SCC 431.
- d. Sait Nagjee Purushotham & Co. Ltd. Vs. Vimalabai Prabhulal & Ors., (2005) 8 SCC 252.

12. Per contra, the learned Senior Counsel for the respondent had argued in support of the judgment passed by the learned first appellate court. It was submitted that the issue of bona fide requirement of the suit premises by the landlords and the issue of the respondent being a defaulter were both decided against the petitioners herein. However, the petitioners had not preferred any appeal against the said finding of fact. Hence, the said two issues cannot be re-opened up at the revisional stage before this Court as

the said findings had attained finality. It was also submitted that there was no due date for payment of rent as the rent was collected by the petitioners at their will and accordingly, the respondent had to pay such rent only as and when demanded. It was also submitted that rent was paid for 2 to 3 months together on several occasions, which was the usual practice and therefore, unless the court could arrive at a finding as to the due date when rent fell due, the respondent could not be evicted because of the bar under Section 5(4) of the Assam Urban Areas Rent Control Act. It was also submitted that the rooms which fell vacant in the building during the pendency of the suit were let out to others, which defeated the bona fide requirement of the suit premises. It is also submitted that it is well settled that the bona fide requirement must not only be present when the suit was filed, but it was required that such need would continue till the appellate as well as revisional stage of the ejectment proceeding. It was submitted that the suit was decreed only on the basis of issue No.5, which was rightly not found sustainable by the learned first appellate court and that the said finding was based on strong legal foundation and, as such, the revision was liable to be dismissed. As regards the plea raised in this revision by filing affidavit that the respondent had become defaulter during the pendency of this revision, it is submitted that firstly, the plea of defaulter was based on pleadings made in the plaint and the learned courts below had concurrently held that the respondent was not a defaulter and, as such, it is further submitted that without the fact of subsequent default being proved in accordance with law, such a plea ought not to be allowed to be raised for the first time and that too at this revisional stage.

13. Based on the materials on record, the following points of determination arise for determination before this Court:-

- a. Whether in view of non-compliance of the provisions of Order XLI Rule 31 CPC, the first appellate judgment was sustainable or not? If the appellate judgment is not sustainable, what can be done by this revisional court under the circumstances of this case?
- b. Whether the decision by both the learned courts on various issues is vitiated by perversity and/or jurisdictional error?
- c. Whether this Court can take notice of the subsequent default of payment of rent by the respondent so as to decree the suit on the

strength of subsequent default?

d. Whether the petitioners are entitled to any relief?

14. Point of determination No.(a) relating to Non compliance of the provisions of Order XLI Rule 31 CPC:

a. The provisions of Order XLI Rule 31 CPC mandate that the appellate judgment shall state the points of determination and also the

decision thereon. If any authority is required on the same, a recent judgment by the Hon"ble Supreme Court in the case of C.

Venkata Swamy Vs. H.N. Shivanna (Dead) by LRs & Anr., (2018) 1 SCC 604 as well as the case of Simanta Jyoti Baruah Vs.

Chairman, ASEB, decided by this Court and reported in 2017 (1) GLT 294 may be referred to.

b. In the present case in hand, the learned First Appellate Court had not formulated any points of determination. Hence, following the

two authorities cited above, this Court is of the unhesitant opinion that the learned first appellate Court has committed grave

jurisdictional error of not formulating points of determination while passing his judgment. The same is in total disregard to the said

provisions of Order XLI Rule 31 CPC.

c. This leads to the second part of the point for determination No. (a), as to what should this Court do under the facts of this case.

d. In this case, the suit was filed 12 years back in the year 2006. The connected appeal was filed about 9 years back in the year

2009. Therefore, if the case is send back for fresh decision by the learned first appellate court merely because the said learned court

had committed jurisdictional error by not following the provisions of Order XLI Rule 31 CPC, the parties to this case would suffer

further prolongation of their 12 year old litigation. Hence, without the intention of creating any precedent on the matter, under the facts

unique to this case, this Court deems it fit to decide the matter in this revision, instead of remanding the appeal back to the learned

first appellate court. However, as indicated above, this endeavour by this Court shall not be treated as a precedent.

15. On point of determination No. (b) as to whether decision by both the learned courts on various issues are vitiated by perversity and/or

jurisdictional error:

a. Having held that in respect of point of determination No. (a) that the learned first appellate court had failed to comply with the

requirements of Order XLI Rule 31 CPC, this Court has revisited the various issues as decided by both the learned Courts below.

b. On issue No.(1) whether there was any cause of action for the suit:

i. The learned trial court had held that the respondent was not a defaulter. Hence, according to the learned first appellate court, there

was no cause of action for the suit. This Court does not find the said view sustainable because while the petitioners alleged that the

respondent was a defaulter, the respondent took a stand in his defence. Therefore, there was a cause of action for the suit.

ii. The issue of whether the respondent was a defaulter was a separate and distinct issue. According to this Court, an issue may be

decided either in favour of the plaintiff or against the plaintiff, but that does not necessarily mean that there was no cause of action for

the suit, merely because the issue raised by the plaintiff was not decided in his favour.

iii. Hence, the learned first appellate court is found to have committed jurisdictional error in holding that as the learned trial court had

held that the respondent was not a defaulter, there was no cause of action for the suit.

iv. Hence, the said finding on issue No.1 by the learned first appellate court is set aside and the decision on the said issue by the

learned trial court is upheld and restored.

c. On issue No.(2) whether the petitioner No.2 is the landlord of the respondent:

i. In this regard, it would be pertinent to mention herein that in respect of issue No.2, there is already a finding by the learned trial

court that the petitioner No.2, namely, Sri Bhupendra Singh was the landlord of the respondent. The petitioners, having not preferred

any appeal in respect of the said finding, the decision on issue No.2 as decided by the learned trial court is sustained.

ii. The learned first appellate court has appreciated the said decision of the learned trial court perfunctorily, mechanically and without

due care as expected from the first appellate court, which is considered to be the

last court of facts. In internal page-6 of its

judgment, the learned first appellate court has recorded that the learned trial court has held that Darshan Singh (i.e. petitioner- plaintiff

No.1) was the landlord. This grave error has led to inference by this Court that the learned first appellate court had neither correctly

read nor correctly appreciated the pleadings in the written statement and evidence of the respondent or the judgment passed by the

learned trial court. This is found to vitiate the first appellate judgment by perversity.

iii. Hence, on issue No.2, the finding recorded by the learned first appellate court is set aside and the finding recorded by the learned

trial court to the effect that the petitioner- plaintiff No.2 was the landlord of the respondent is restored.

d. On relevancy of agreement dated 15.03.1991 (Ext.6):

i. On a perusal of the agreement (Ext.6), it does not contain any endorsement to the effect that the said agreement was renewed after

14.02.1992. Therefore, the finding recorded by the learned first appellate court that the ""agreement shows that it was renewed upto

14.2.93 with enhancement to Rs.2500/- and cash amount deposit made earlier of Rs.10,000/- as advance, shall remain as earnest

money was deposited"" is not found from reading the contents of the said agreement (Ext.6). Hence, the above quoted finding must be

held to be perverse on the ground that the learned first appellate court has misread and misconstrued the said documentary evidence

by reading in it something which is not at all contained therein.

ii. Moreover, the said agreement was between Sardar Gurbachan Singh as landlord and Parag Gogoi as tenant. It is nobody's case

that despite death of Late Sardar Gurbachan Singh, the respondent and the petitioner No.2, who had become his landlord had

continued their relationship on the same terms and conditions as contained in Ext.6. In fact, it is surprising to note that neither the

petitioners in the plaint, nor the respondent in his written statement have pleaded when Sardar Gurbachan Singh died and since when

the petitioner No.2 started to collect monthly rent from the respondent. It is also not available that since which month the respondent

was to pay monthly rent at the rate of Rs.2,150/-.

iii. Hence, when as per the respondent, the arrangement between him and his landlord, i.e. petitioner No.2 was for payment of daily

rent, the earlier agreement dated 15.03.1991 (Ext.6) with the father of petitioner No.2 loses all relevance and/or enforceability to

the facts of the present case and the new arrangement would amount to only an oral agreement.

iv. Moreover, the finding by the learned first appellate court is that the agreement dated 15.03.1991 (Ext.6) stood extended beyond

14.02.1993, which makes such an agreement for a period of more than one year to be compulsorily registered under the provisions

of Section 17(1)(d) of the Registration Act, 1908, and the effect of nonregistration is provided in Section 49(c) of the Registration

Act, 1908.

v. The agreement (Ext.6) relates to grant of right over property, oral evidence contrary to the contents of the document would stand

excluded by dint of the provisions of Section 92 of the Evidence Act, 1872.

vi. Therefore, for all above reasons, the finding by the learned trial court that the agreement (Ext.6) was extended upto 14.02.1993 is

not sustainable in the absence of such clause in the Agreement (Ext.6).

e. On issue No. (3) whether the respondent- defendant was a defaulter:

i. Both the courts below have concurrently held that the respondent No.3 was not a defaulter in paying rent to the landlord.

ii. It is mentioned in clause 5 of the said agreement that in default of paying rent, and till the tenant is evicted, he would be liable to pay

compensation at the rate of Rs.75/- per diem. Therefore, if the petitioner No.2 had agreed to the mode of receiving rent at the rate of

Rs.70/- per day from the respondent, it amounts to a new contract between the said parties, having no bearing with the previous

written agreement with Late Sardar Gurbachan Singh. Hence, if as per the case projected by the respondent, the new arrangement

was payment of daily rent of Rs.70/- per diem there is no difficulty in holding that the daily rent fell due on daily i.e. day- to- day

basis.

iii. This fact is tested by perusing rent deposit challans marked as Ext.D-1 to Ext.D- 26 by the respondent. Exhibits marked as Ext.D-

1 to Ext.D-12 are rent deposit treasury challans for the months of November, 2006 to October, 2007. In all these challans, it is

mentioned that deposit of Rs.2,100/- was made as ""house rent"" for the respective months. But in Ext.D-13, the respondent had

mentioned therein that deposit of Rs.490/- was made towards ""Arrear house rent for one day of each month of Dec 06, Jan 07,

March 07, May 07, July 07, Aug 07, Oct 07 at the rate of Rs.70/- per day for the commercial room of R.C.C. building 1st Floor at

Mancotta Road, Opp. Saligram Petrol Pump occupied by Sri Parag Gogoi to be paid to Sri Raju Singh."" The effect of such deposit

would be that (i) rent for February, containing 28 days would be Rs.1,960/-, rent for February containing 29 days would be

Rs.2,030/- (ii) for months containing 30 days, rent would be Rs.2,100/-, and (iii) for months containing 31 days, the rent would be

Rs.2,170/-. Thereafter, by Ext.D-14, Ext.D-19, Ext.D-21, Ext.D-22, Ext.D-25, the respondent had deposited a sum of Rs.2,100/-

towards house rent for the months of Nov'07, April'08, Jun'08, Jun'08, Sept'08. A sum of Rs.2,030/- was deposited vide Ext.D-

17 towards house rent for Feb'08. A sum of Rs.2,170/- vide Ext.D-15, Ext.D-16, Ext.D-18, Ext.D-20, Ext.D-23, Ext.D-24,

Ext.D-26 for the Dec'07, Jan'08, Mar'08, May'08, Jul'08, Aug'08, Oct'08. Be that as it may, if the arrangement to pay rent is

daily i.e. day- to- day basis, it would not be right to convert such rent to monthly rent based on number of days that a month may

have.

iv. In these aforesaid background, the provisions of Section 5(4) of the Assam Urban Areas Rent Control Act, 1972 is required to

be quoted below:-

5. Bar against passing and execution of decree and orders for ejection:

.....

(4) Where the landlord refuses to accept the lawful rent offered by his tenant, the tenant may, within a fortnight of its becoming due,

deposit in Court the amount of such rent together with process fees for service of

notice upon the landlord, and on receiving such deposit, the Court shall cause a notice of the receipt of such deposit to be served on the landlord, and the amount of the deposit may thereafter be withdrawn by the landlord on application made by him to the Court in that behalf. A tenant who has made such deposit shall not be treated as a defaulter under clause (e) of the proviso to sub-section (1) of this section.

v. Upon reading the evidence of PW-1, namely, Bhupendra Singh, in paragraph 10 thereof, he has categorically stated that ""The

Defendant was irregular in payment of the monthly rent. The Defendant was paying Rs.70/- per day towards the monthly rent but he

did not pay me any rent after November, 2005 making himself defaulter in respect of the payment of the rent."" However, the learned

trial court had arrived at a finding that the respondent did not take any steps to call for diary of the respondent No.2 to prove

payment of rent on daily basis at the rate of Rs.70/- per day, the said plea of the respondent was not acceptable. This finding is

perverse and contrary to the admission by the PW-1 in his evidence- on- affidavit that the respondent was paying rent at the rate of

Rs.70/- per day. The said finding is found to be hit by the provisions of Section 58 of the Evidence Act, 1872 which prescribes that

admitted facts need not be proved, as such, there was no requirement for the respondent to prove that he was paying rent at the rate

of Rs.70/- per day.

vi. Upon reading the above quoted provisions of Sec.5(4) of the 1972 Act, it is apparent that the said section does not make any

distinction as to whether the rent due is payable daily, monthly or yearly. The said Section prescribes that if the landlord refuses to

accept the lawful rent offered by his tenant, the tenant may, within a fortnight of its falling due, deposit in Court the amount of such

rent together with process fee for service of notice on the landlord, and on receiving such deposit, the court shall cause a notice of the

receipt of such deposit to be served on the landlord. Hence, as it is the pleaded case of the respondent that he was paying daily rent

of Rs.70/- per day, therefore, as per law, the respondent was required to offer

rent daily to his landlord, i.e. the Petitioner No.2, as such, there is no escape for the respondent to comply with the provisions contained in the aforesaid Section 5(4) of 1972 Act.

Therefore, as the case projected by the respondent is that rent was payable daily, which is supplemented by the deposit of rent vide Ext.D-1 to Ext.D-26, the above quoted provision of Sec.5(4) of 1972 Act would require daily offer of rent and on refusal of the respondent No.2 to accept the lawful rent tendered to him, would entitle the respondent to deposit such lawful rent in court within a fortnight of its falling due. Hence, the learned courts below are found to have failed to appreciate the effect of Section 5(4) of the Assam Urban Areas Rent Control Act, 1972 under the facts of this case and erroneously interpreted the facts to assume that the rent could be deposited on English calendar month basis in court, which is not borne by pleadings of the respondent to the effect that rent was being collected by the petitioner No.2 daily at the rate of Rs.70/- per day (i.e. diem) and that he had paid such daily rent to the petitioner No.2. Hence, the finding by both the learned courts below by holding that the respondent was not a defaulter, is found to be contrary to the pleadings made in the written statement of the respondent and by misconstruing the provisions of Section 5(4) of the 1972 Act as quoted above. Hence, the concurrent finding that the respondent was not a defaulter is found to be perverse.

vii. The pleaded case of the respondent in his written statement is that the petitioner No.2 was not only his landlord, but he was also his daily customer in his "hot bar", as such, it is not the pleaded case of the respondent that his relationship with the petitioner No.2 is strained for which he could not offer daily rent on each day, fearing any risk. Thus, the respondent had failed to discharge his burden under the provisions of Section 5(4) of the Assam Urban Areas Rent Control Act, 1972 to offer rent on each due date of such daily rent falling due, and on failure of his landlord i.e. petitioner No.2 to accept such lawfully tendered rent, such rent was deposited in court. Thus, in the absence of any agreement to club daily rent to constitute monthly rent and pay it on monthly basis, the rent which is

admittedly payable daily cannot be clubbed on monthly basis for the purpose of depositing such rent in court. Such a misconstruction

of law cannot be allowed to prevail, because in a hypothetical case, on the same logic/ ratio, the courts may not be able to find any

infirmity even if rent for several months or years are clubbed together and deposited in court.

viii. This Court, in the case of Abdul Matin Choudhury (supra), in very categorical terms had laid down that the learned judge in order

to decide the question of default must find out the following things (i) When the rent becomes due according to contract or according

to the conduct of the parties. (ii) Whether a valid tender was made by the tenant and whether there was a refusal of the rent by the

landlord to enable the tenant to make the deposit under Section 5(4) of the Act. (iii) Whether the deposit was made in accordance

with law with the process fee as well as written notice. All these three principles were omitted by the learned courts below, which

amounts to jurisdictional error. The pleadings and evidence, which has been discussed above, shows that (i) the rent became due

daily as per conduct admitted by the respondent, and (ii) there was no valid deposit because since rent was not offered daily, there

was no occasion for the petitioner No.2 to refuse such rent from the respondent, and (iii) no effort was made by the respondent to

call for the records of Misc. (N.J.) Cases, to prove valid deposit of rent together with depositing process fee and written-up notices.

Both the Courts below have failed to exercise jurisdiction by failing to appreciate the writings contained in rent deposit challans at

Ext.D-1 to D- 26, otherwise they would have questioned how rent for the months of November, 2006 to October, 2007 could have

been deposited vide Ext.D-1 to Ext.D-12 at the rate of Rs.2,100/- per month and then by Ext.D-13, arrear house rent for one day of

each month of Dec '06, Jan '07, March '07, May '07, July '07, Aug '07, Oct '07 at the rate of Rs.70/- per day, which proves that

incorrect rent was deposited by the respondent in Court for the months of Dec '06, Jan '07, March '07, May '07, July '07, Aug

'07, Oct '07.

ix. This Court is aware of the trite law that ordinarily revisional court is not entitled to re-appreciate the evidence and substitute its

own conclusion over the conclusion of the appellate authority. If one requires any authority on the same, the Constitution Bench case

of Hindustan Petroleum Corporation Ltd. Vs. Dilbahar Singh, (2014) 9 SCC 78 may be referred to. However, in the present case in

hand, the finding that the respondent was not a defaulter, as recorded by both the learned courts below are found to be wholly

perverse, and manifestly unjust, as such, by following the case of Lachhman Dass Vs. Santokh Singh, (1995) 4 SCC 201, wherein it

has been held that revisional powers can be invoked when the appellate judgment suffers from material impropriety, perversity and

illegality. Hence, it is for the purpose of preventing incorrect construction of the provisions and purport of Section 5(4) of 1972 Act,

and to cure the perversity, that this Court had been compelled to revisit pleadings and evidence on record, which is otherwise

impermissible for a revisional court, because in the opinion of this Court the legal error committed by both the courts below is found

to be of such nature which touches on the jurisdiction of both the Courts below.

x. It is once again reiterated at the cost of repetition that this exercise by this revisional Court is not intended to be cited as a

precedent for any subsequent case.

f. On issue No.(4) whether the respondent had violated the terms of the lease:

i. In this connection, the learned trial court had proceeded on the premise that as per previous agreement not in force, the respondent

had come into possession of suit premises for opening "restaurant cum beer bar". As already held above, the said agreement is

irrelevant because the original landlord being dead, the petitioner No.2 is the landlord for the respondent.

ii. The petitioner No.2, who had examined himself as PW-1 did not deny that he had never given any NOC to the respondent to

open "Hot bar". He also did not deny the statement made in written statement by the respondent that he was a regular customer of

the respondent.

iii. Therefore, when the suit premises was taken for opening a bar, it is not

change of user if the business of "hot bar" is started

therein. Moreso, when the arrangement for tenancy between the petitioner No.2 and the respondent was oral and in absence of any

proof of what were the terms and conditions of the oral agreement by the petitioners, it cannot be inferred that there was a

prohibition to change the nature of bar from "beer bar" to "hot bar" as alleged. Similarly, installation of air-conditioner cannot be said

to have caused violation of terms of agreement, when none of the terms of the agreement was proved by the petitioners.

iv. Hence, the finding by the learned first appellate court is not liable to be interfered with.

g. On issue No.(5) whether the premises was bona fide required for the personal use and business of the petitioner-

plaintiff, Bhagat Singh:

i. In this regard, as the petitioner No.5, namely, Bhagat Singh did not give any evidence to prove his bona fide requirement.

ii. The respondent had stated in his written statement that there was a vacant room in the building in January, 2007 that was let out to

others after filing the suit. However, in his evidence, the petitioner No.2 (PW-1) did not deny such statement. In his cross examination

on 06.09.2008, PW-1 had admitted that Charlie Outlaw (shop) had been opened about one year back (i.e. in year 2007) by a new

tenant after institution of the suit.

iii. PW-1 had further admitted that they had Pradip Hotel, which was let out to a tenant four month's back. He further admitted that

he was running Suravi Hotel, which was also let out to a tenant.

iv. Thus, the cases of R.C. Tamrakar (supra) and Sait Nagjee (supra) cited by the learned Senior Counsel is of no help to the

petitioners, because it is not the case of the petitioners that the space let out after institution of the suit was not convenient for the

petitioner No.5 to do his business therefrom. Moreover, no evidence was led to show what nature of business was envisaged to be

carried out by petitioner No.5. Under the circumstances, the non- appearance of petitioner No.5 as witness to prove his necessity for

the suit premises must be viewed in the negative and against the petitioners

because the bona fide requirement of the petitioners in respect of the suit premises was successfully demolished by the respondent while cross-examining the PW-1.

v. Hence, it is held that the learned courts below had rightly decided the said issue in the negative and against the petitioners. The said finding is upheld.

h. Point of determination No. (c) of whether this Court can take notice of the subsequent default of payment of rent by

the respondent so as to decree the suit on the strength of subsequent default:

i. This issue is connected and/or related with issue No.(3) already discussed above.

ii. The petitioners have filed an affidavit on 20.02.2014, by which they have raised a plea in this revision that the respondent had not

discharged his liability to pay rent during the pendency of this revision.

iii. Marked as Annexure-V to the said affidavit is a copy of rent deposit petition, being petition No. 1790/10 dated 15.12.2010,

registered as Misc. (N.J.) Case No. 1572/10. In para-2 of the said petition, it had been mentioned that since 1st day of November,

2006 the petitioner No.2 herein had refused to accept the monthly rent claiming higher rent and the petitioner has been depositing the

rent for the said room in the court to be paid to the said respondent since the said month and that the respondent had deposited the

rent for the month of December, 2010 amounting to Rs.2170/- only in Court to be paid to the petitioner No.2. By order dated

22.02.2010, the learned Court of Munsiff No.1, Dibrugarh had recorded that the respondent herein was absent and that rent challan

had not been filed and hence, the Misc. N.J. Case No. 1577/2010 was dismissed. The petitioners have filed copy of petition No.

878/13 dated 15.06.2013, registered as Misc. (N.J.) Case No. 973/13, for depositing monthly rent of Rs.2,170/- for the month of

May, 2013 in Court. The said petition was also dismissed by order dated 03.07.2013, passed by the learned Court of Munsiff No.1,

Dibrugarh for not submitting rent deposit challan.

iv. In the case of Abdul Matin Choudhury (supra), this Court has, in no uncertain terms held that ""If at any point of time, the landlord

by prudent manner can bring to the notice of the court even during the pendency of the proceeding that the tenant has failed to

discharge his liabilities a right shall spring up in favour of the landlord to get the decree for ejectment on any of the grounds as

incorporated in the Assam Urban Areas Rent Control Act, 1972." Similarly, in the case of Sobha Biswas (supra), the Division Bench

of this Court had affirmed the decision rendered in the case of Abdul Matin Choudhury (supra) and, as such, it is a trite law that at

any stage, if default on part of the tenant is brought to the notice of the Court the court would have the power to decide the matter,

and that there would not be any need for the landlord to file successive suits during the pendency of the eviction proceeding.

v. Thus, this Court is constrained to hold that by affidavit filed by the petitioners on 20.02.2014, they have successfully demonstrated

before this Court that the respondent had failed to deposit monthly rent for the months of December, 2010 and May, 2013. For the

said reason, the connected Non- Judicial cases were dismissed and, as such, the respondent is held to be a defaulter in payment of

rent in Court for the said months, notwithstanding that it was the duty of the respondent to offer daily rent to the petitioner No.2. The

said affidavit has remained uncontroverted and unresponded by the respondent, for which the statement of default made by the

petitioners is impliedly admitted by the respondent by the doctrine of non-traverse. Hence, the respondent is found to be liable to be

evicted by decreeing the suit for eviction.

i. On point of determination No. (d) as to whether the petitioners are entitled to any relief:

i. In view of the discussions on the points of determination No. (a) to (c) above, this Court is inclined to record its findings as well as

reliefs to which the petitioners are found entitled to:-

1. In view of the discussions on point of determination No. (c) as aforesaid, the respondent is held to be defaulter for the months of

November, 2010 and May, 2013.

2. In view of the discussions on issue No.(3) contained within point of determination No. (b) as aforesaid, the respondent is held to

be a defaulter in payment of daily rent @ Rs.70/- per day on and from 01.12.2005 onwards till his ejectment, as claimed in

paragraph 18 of the plaint.

3. In view of the discussions on issue No. (2) as contained within point of determination No. (b) as aforesaid, the finding that the

petitioner No.2 was the landlord in respect of the respondent is upheld. Accordingly, the petitioner No.2 would be entitled to recover

the arrear rent on and from 01.12.2005 till the respondent is ejected from the suit premises.

4. In view of the discussions on issue No. (5) as contained within point of determination No. (b) as aforesaid, the finding that the suit

premises was not bona fide required by the petitioners is upheld.

5. In view of the discussions on issue No. (4) as contained within point of determination No. (b) as aforesaid, the finding by the

learned trial court that the respondent had violated the terms and conditions of the lease is not found sustainable and, as such, the said

issue if found to have been correctly decided by the learned first appellate court, which is sustained.

6. In view of the above referred conclusions, the petitioner No.2 is held to be entitled to recover khas possession of the suit premises

morefully described in the Schedule of the plaint.

7. Pursuant to the finding that the respondent is a defaulter in payment of rent to the petitioner No.2 since 01.12.2005, the petitioner

No.2 is found to be entitled to decree for recovery of the such rent with effect on and from 01.12.2005 at the rate of Rs.70/- per day

till recovery of vacant and khas possession of the suit premises by the petitioner No.2.

8. Consequently, liberty is granted to the respondent to claim refund of any rent which had been deposited by him in court in favour

of the petitioner No.2.

16. Before parting with the records, this Court grants the respondent 6 (six) month's time from today to make alternative arrangements and to

vacate the suit premises described in Schedule of the plaint and to deliver khas possession thereof to the petitioner No.2, namely, Sri Bhupendra

Singh, subject to the following conditions:-

i. Within 1 (one) month from today, the respondent would given an undertaking before the learned Trial Court i.e. Court of Munsiff

No.1, at Dibrugarh to the effect that in compliance of the order of this Court, he would vacate the suit premises after expiry of 6 (six)

months from to-day without execution. On vacating, the possession of the suit premises shall be handed over only to the petitioner

No.2 and no one else. Such possession shall be received by the petitioner No.2 for and on behalf of all the petitioners.

ii. For this period of 6 (six) months, the respondent, namely, Parag Gogoi shall continue to pay monthly rent at the rate of Rs.2,170/-

(Rupees Two thousand one hundred seventy only) per month to the respondent No.2, namely, Sri Bhupendra Singh, who would

issue money receipt to the respondent, by keeping one copy of such money receipt for his own record as a proof of having received

such payment. But this payment of money shall not create any new tenancy or any right whatsoever in favour of the respondent, save

and except to enable him to stay in the suit premises upto the period of 6 (six) months from to-day.

iii. The respondent, namely, Sri Parag Gogoi shall not sub-let or part with the possession of the suit premises in favour of any third

party during this period.

iv. If the respondent- tenant, namely, Sri Parag Gogoi fails to give such undertaking as provided in sub-para (1) above, or if he

violates any of the conditions imposed hereby, or violates any of the conditions of the undertaking, or fails to vacate the suit premises

described in Schedule of the plaint within the outer period of 6 (six) months from to-day, any of the petitioners, including the

petitioner No.2 shall be entitled to put the decree in execution.

17. The revision stands allowed on terms as indicated above. Resultantly, the suit stands decreed and the impugned judgment and decree passed

by both the Courts below stands set aside. In case execution by petitioners herein becomes necessary, the learned Court of Munsiff No.1,

Dibrugarh shall draw up the decree as modified by this order, and act in accordance with the same.