

(1981) 03 DEL CK 0027

In the Delhi High Court

Case No : Second Appeal No. 139 of 1973

B.P.N. Shrivastava

APPELLANT

Vs

Poori Bai

RESPONDENT

Date of Decision : 27-03-1981

Acts Referred:

Citation : AIR 1981 Delhi 344 : (1981) 20 DLT 28 : (1981) 2 DRJ 179 : (1981) ILR Delhi 1089 : (1981) RLR 317

Hon'ble Judges : Leila Seth, J

Bench : Single Bench

Advocate : M.C. Anand, J.K. Seth and Sheba Gupta, for the Appellant;

Judgement

Leila Seth, J.

(1) This landlady-tenant litigation has had a chequered history.

(2) Smt. Poori Bai, the respondent-landlady, filed an application for eviction of the appellant-tenant Mr. B. P. N. Shrivastava from the first floor of premises No. D-34, Ajay Enclave, Subhash Nagar, New Delhi. The application was made under clause (a) of sub-section (1) of Section 14 of the Delhi Rent Control Act, 1958 (to be referred to in brief as "the Act").

(3) In the said application it was asserted that a notice of demand had been served by registered post on 30th June, 1970. It was also stated that the notice of termination of tenancy had been so served on 3rd August, 1970. This application u/s 14(i)(a) of the Act was filed on 14th September, 1970.

(4) A written statement dated 7th October, 1970 was filed by the tenant. It was contended therein, inter alia, that as the landlady had cut off the water and electricity supply to the demised premises with effect from 20th May, 1970 and locked the door leading to the premises, the obligation to pay rent or arrears was suspended : It was also asserted that the tenant had received a notice of demand for payment of arrears only on 11th August, 1970 and as such no valid

notice had been served; the period

(5) A dispute with regard to the agreed rate of rent was also raised. As such the Rent Controller passed an order u/s 15(3)/15(I) of the Act, on 3rd November, 1970, directing the tenant to deposit arrears of rent at the rate of Rs. 175.00 per month with effect from 10th January, 1970 up to date within one month of the order. He further directed the deposit of future rent at the rate of Rs. 175.00 per month, month by month by the 15th of each succeeding month.

(6) It is an admitted fact that the tenancy month was from the 10th of the month to the 9th of the next month according to the British calendar month. On 28th November, 1970 the tenant deposited the arrears of rent for the period 10th January, 1970 to 9th November, 1970. Thereafter, the tenant deposited the rent month by month admittedly within time. However, no rent was deposited for the period 10th January, 1972 to 9th February, 1972. Subsequently, the tenant deposited rent for the period 10th February, 1972 to 9th March, 1972 on 13th March, 1972 and for 10th March, 1972 to 9th April, 1972 on 15th April, 1972 and for 10th April, 1972 to 9th May, 1972 on 15th May, 1972.

(7) On 16th May, 1972, the Rent Controller held that as the relationship of landlord and tenant had not been denied and it was not in dispute that the tenant was in arrears of rent and, in fact, a valid notice of demand had been served, the tenant was not entitled to the benefit of section 14(1) as he had failed to comply with the order passed u/s 15(3) of the Act. He accordingly ordered the tenant to deliver possession of the premises to the landlady.

(8) Before reaching his decision, he referred, inter alia, to the notice of demand Exhibit A6 which is dated 21st June, 1970. He also referred to the acknowledgment due receipt pertaining to this notice which is dated 30th June, 1970 (Exhibit A-7). He also referred to another notice dated 13th July, 1970, referred to in the petition, as the notice of termination of tenancy exhibit A8 and the acknowledgment due thereto which is Exhibit A 9 and dated 3rd August, 1970. It was only after recording these facts that he came to the conclusion that a valid notice of demand had been served.

(9) With regard to the order passed u/s 15(3) of the Act, he noticed that there had been no payment of rent for the period 10th January, 1972 to 9th February, 1972 by 24th February, 1972; and even if the subsequent deposit made on 13th March, 1972 be treated as a payment for that period it was out of time, and so too would be the other payments thereafter. That is why there was noncompliance of the order u/s 15(3) of the Act.

(10) The tenant appealed and the Rent Control Tribunal dismissed his appeal with costs.

(11) Thereafter the tenant filed an appeal in this Court u/s 39 of the Act. His main contention was that on a correct interpretation of the word "month" in section 15 of the Act there had been no default u/s 15 and as such his appeal

must be allowed. He urged that "by the 15th of each succeeding month" was meant the British Calendar month and not the tenancy month and as the payments had been made on 15th March, 1972, 15th April, 1972 and 15th May, 1972 respectively, there had been a compliance with the order of 3rd November, 1970. He relied on a decision of this Court in Smt. Prakash Wati v. Shri Babu Ram, S.A.O. No. 30 of 1972 decided on 21st April, 1972.

(12) As I felt that this question required consideration by a larger bench, by my order dated 20th October, 1978, I directed the appeal to be laid before the Hon'ble Chief Justice for directions. Thereafter, the Division Bench heard the counsel and by its judgment and order dated 29th September, 1980 decided that the word "month" referred to the tenancy month and not to the British Calendar month. It was a reference to a period of time which must elapse between the making of the order and the payment or deposit of the money. It could not have reference to the expiry of any particular month especially as rent is not recoverable or due for a part of a tenancy month.

(13) As a result of the decision on this question, the appeal has now been listed before me for hearing and disposal.

(14) Having lost the first round, Mr. M.C. Anand, learned counsel for the appellant, now contends that the order u/s 15(3) read with section 15(1) has been complied with as no rent was required to be deposited for the period 10th January, 1972 to 9th February, 1972 as annual repairs had been carried out. He submits that the tenant had done so after notice to the landlady under the provisions of section 44 of the Act.

(15) This point had been also raised before the Rent Controller. But the Rent Controller held that there was no justification for non-deposit of rent from 10th January, 1972 to 9th February, 1972. He also noticed that no application had been moved by the tenant to get the order u/s 15(3) read with section 15(1) modified or set aside nor was there anything on record to indicate that any notice as required u/s 44 of the Act had been given or any repairs carried out. The Rent Controller further, held that even assuming a notice had been given and repairs carried out, there was non-compliance of the order u/s 15, as no permission had been taken from the court for deducting this amount.

(16) It has, Therefore, to be seen whether the tenant was entitled of his own accord to deduct a month's rent for the purpose of repairs u/s 44 of the Act. As already noticed, the Rent Controller has found that there was nothing on record to show either that a notice had been given to the landlady u/s 44 and/or any repairs carried out. Mr. M.C. Anand, however, contends that had his defense been struck out u/s 15(7) he would have had an opportunity to bring this material on record. The striking out of his defense was mandatory and he has been prejudiced by it not being so struck out.

(17) To say the least, this is a most unusual submission for a tenant to complain of being prejudiced because his defense has not been struck out. Though in the

past there had been differences as to whether it was mandatory to strike out the defense in case of non-compliance with an order u/s 15(1), the petition is now clear as a result of the decision of the Supreme Court in Hem Chand Vs. The Delhi Cloth and General Mills Co. Ltd. and Another, . The Supreme Court has held that section 15(7) confers a discretion on the Rent Controller either to strike out the defense or not depending upon the circumstances of the case. In the context of section 15(7), the word "may" therein cannot be constructed as "shall".

(18) In any case, it is not clear to me as to how the tenant could have benefited by his defense being struck out. There is no doubt about the fact that no material was brought on the record to indicate that the provisions of Section 44 were attracted. But even assuming there was, it would appear to me that an order u/s 15(3) read with section 15(1) has to be strictly complied with and cannot be unilaterally changed by the tenant.

(19) As such, it would appear to me that if a tenant wants to avail of the benefit of section 44 after an order u/s 15(1) has been passed, he must move the Rent Controller for modification of his order u/s 15(3) read with section 15(1). He cannot unilaterally take a decision to exercise a right u/s 44 when there is an order of the court requiring him to pay rent month by month by the 15th of the succeeding month.

(20) The observations of S.N. Andley, J. (as he then was) in the case of the Chamber of Colours & Chemicals Ltd. v. Shri Trilok Chand Jain, 1978 R.L.R. 343 while dealing with a case of tenanted premises having been destroyed by fire are pertinent. The learned Judge opined that where tenancy premises are wholly destroyed or rendered substantially and permanently unfit by fire, the right of the lessee u/s 108(e) of the Transfer of Property Act is to exercise his option and treat the lease as being void. In such a case the lessee cannot continue to hold on to the premises or say that the lease continues but he will not pay the rent. There cannot be any unilateral suspension of rent. The tenant continues to be liable for the whole of the rent until he obtains an order from the Court or agreement from the landlord for reduction of the proportionate part of the rent.

(21) In Kishan Chand v. Ramesh Chander and others, 1969 R.C.J. 839, this Court held that where a part of premises are surrendered at the instance of the tenant, it is his duty to apply to the Rent Controller for proportionate reduction of rent. He cannot unilaterally suspend payment of rent. He continues to be liable for the whole of the rent until he obtains an order of the Court or agreement of the landlord for reduction of a proportionate part of the rent.

(22) In Munshi Lal v. Thahur Prem Chand, 1979 R.C J. 496, Deshpande, J., as he then was, held that the correct principle of interpreting section 14(2) is that the tenant is allowed by section 14(2) a special statutory benefit of defeating the landlord's petition for eviction by fully complying with the order u/s 15(3) read with section 15(1). As such the order must be strictly construed. This means compliance not only of that order for payment of arrears of rent but also with

regard to future payment of rent month by month.

(23) It would, Therefore, appear to me that where an order for deposit of rent has been made u/s 15(3) read with section 15(1) of the Act, the tenant cannot unilaterally suspend the payment or deposit of rent as ordered by the Rent Controller, and should he do so he undoubtedly commits a breach of the order. In any case, as above noticed, in the facts of this case, section 44 was not at all attracted as neither the notice to the landlady nor the carrying out of repairs has been established. It would, Therefore, appear that the tenant had no justification in not complying with the order u/s 15(3) read with section 15(1)

(24) The next submission made on behalf of the appellant is that the filing of the petition u/s 14(1)(a) of the Act was premature as the period of two months had not elapsed after the service of the notice of demand. The contention is that the notice of demand Exhibit A 6 dated 21st June, 1979 which was served on 30th June, 1970, had been waived by the issuance of a subsequent notice dated 13th July, 1970, Exhibit A8, which was served only on 3rd August, 1970. As the petition was filed on 16th September, 1970, a period of two months had not elapsed from the date of service of the subsequent notice. Counsel based his submission on an analogy of Section 113 of the Transfer of Property Act and its illustrations which read :

(A)A, the Lesser, gives B, the lessee, notice to quit the property leased. The notice expires. B tenders, and A accepts, rent which has become due in respect of the property since the expiration of the notice, The notice is waived. "(b) A, the Lesser, gives B, the lessee, notice to quit the property leased, The notice expires, and B remains in possession. A gives to B as lessee a second notice to quit. The first notice is waived."

(25) It is relevant to note in these illustrations that the lessee remains in possession after the notice to quit expires and the Lesser voluntarily either accepts rent or gives a fresh notice to quit, thereby indicating his intention to waive the earlier notice.

(26) This court dealing with the question of waiver u/s 113 of the Transfer of Property Act in Raj Krishen Jain Vs. Master Hoshair Singh, . held that it is not as if the effect of acceptance of rent or the giving of a second notice to quit is to waive the first notice to quit always and invariably. Such conduct is normally good evidence of the landlord's intention to waive the notice to quit. However, in suitable cases, the landlord can show that despite such conduct he did not intend to waive the notice to quit. In each case the question to be considered is whether such conduct by itself gives rise to the presumption of waiver or whether such conduct is accompanied by other acts which prevent the raising of the presumption of fact about the waiver of the notice to quit.

(27) The question of waiver of the first notice of demand has not been raised earlier, nor is there any finding of fact on this point. In the application for eviction u/s 14(1)(a) it has been asserted in paragraph 18(a) and 18(b) that a notice of

demand had been served on 30th June, 1970. It would, Therefore, appear, that the landlady had an effective cause of action on 1st September, 1970. Since the tenant had been granted the statutory period of two month to pay the arrears, the landlady could have proceeded with the matter. Since at that time it was also considered to be necessary to give a notice of termination of the tenancy before filing a petition, this is what the subsequent notice is. But, in view of the decision of the Supreme Court in *V. Dhanapal Chettiar Vs. Yesodai Ammal*, , this is no longer necessary. But this cannot have the effect of waiving the notice of demand.

(28) It is also pertinent to note that the order u/s 15(3) read with Section 15(1) for payment of the arrears of rent had initially been complied with by the tenant and he had not raised the question of waiver. In fact, it is clear from the facts of the case that Exhibit A6 was the notice of demand and Exhibit A8 the notice of termination, though non-payment of rent is also mentioned therein.

(29) The decision in the case of *Prabhati v. Budho Devi*, 1974 R.C.R. 334 relied on by the appellant's counsel is clearly distinguishable. What the learned Judge has observed therein is that the cause of action for an application for ejectment on the ground of non-payment of rent is not merely nonpayment of any rent but non-payment by the tenant of such arrears of rent in respect of which a notice of demand has been served on the tenant and a period of two months has expired from the date on which each notice has been served on the tenant. There is no doubt that this is the correct position at law. But the reason that the court held therein that there was no cause of action described in the application was that there was no averment in the application that the rent which was claimed to be in arrears ever formed the subject matter of a notice of demand. In fact, no notice was even mentioned in the application and the one that was enclosed with the application demanded rent for a period for which rent had been already paid according to the record. As already noticed above, the facts here are clearly different and the notice served on 30th June, 1970 was both mentioned in the application and proved. The application was only filed on 16th September, 1970 after the period of two months had elapsed. As such, it is clear that the mandatory provision contained in Section 14(1)(a) has been complied with and the petition was neither premature nor without jurisdiction.

(30) In the result, for the reasons outlined above, the appeal is dismissed with costs.