

(2012) 07 DEL CK 0310
In the Delhi High Court
Case No : LPA No. 733 of 2011

Union of India

APPELLANT

Vs

Mrs. P.R. Nair (Deceased Through Legal Representative)

RESPONDENT

Date of Decision : 27-07-2012

Acts Referred:

Delhi Rent Control Act, 1958 — Section 14(1)(c), 14(1)(k), 14(11), 14(D)

Citation : (2012) 07 DEL CK 0310

Hon'ble Judges : A.K. Sikri, Acting C.J.;Rajiv Sahai Endlaw, J

Bench : Division Bench

Advocate : A.S. Chandhiok, ASG with Mr. Sachin Datta, Mr. Gurpreet Parwanda, Ms. Monica and Ms. Gayatri Verma, for the Appellant; K.T. Anantharaman, for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Sahai Endlaw, J.—This intra court appeal impugns the judgment dated 21st March, 2011 of the learned Single Judge in WP(C) No. 7858/2005 preferred by the respondent. The respondent, being the perpetual lessee under the appellant L&DO of land underneath property No. 85, Jor Bagh, New Delhi had filed the said writ petition impugning the letters dated 2nd June, 2004, 4th November, 2004 and 4th January, 2005 of the appellant L&DO demanding a sum of Rs. 12,51,621/- from the respondent towards misuse charges and penalty and as a pre condition for converting the lease hold rights in the said land into free hold; the writ petition also sought mandamus directing the appellant L&DO to follow the Instructions/Guidelines/Policies contained in Office Order dated 23/1976 dated 31st March, 1976. The case set out by the respondent in the writ petition was as under:

- i) that in the year 1970 the respondent had let out the ground floor of the property to one tenant and the first and barsati floor to another tenant;
- ii) that though the first floor and barsati floor was let out to Mr. Maneck N. Dastur

at a rent of Rs.650 per month for residential purposes but the said Mr. Maneck N. Dastur commenced using the same for his office purpose also;

iii) that when the appellant L&DO in the year 1976 raised a demand approximately of Rs.26,000/- towards misuse charges, Mr. Dastur agreed to pay the same and in fact paid the same;

iii) that Mr. Dastur at about the same time, taking advantage of the good faith of the respondent also got certain other documents signed from the respondent including blank papers and which the respondent subsequently learnt were to the effect that the respondent had permitted the said Mr. Dastur to use the premises for office purposes;

iv) that the respondent had even face a prosecution for such misuse of the premises by Mr. Dastur;

v) that upon the appellant L&DO demanding a further sum of Rs.47,740/- towards misuse charges and Mr. Dastur not agreeing to pay the same, the respondent in or about the year 1981 initiated proceedings u/s 14(1)(c),(d),(k) and (h) of the Delhi Rent Control Act, 1958 for eviction of the said Mr. Dastur;

vi) that the Court of the Rent Controller however vide judgment dated 3rd March, 1987 held the premises to have been let out by the respondent for residence cum office purpose and thus dismissed the petition for eviction save on the ground u/s 14 (1) (k) of the Act and for which a notice u/s 14(11) of the Rent Act was issued to the appellant L&DO;

vii) that the appellant L&DO in response thereto intimated approximately Rs.5.26 lacs to be then due towards misuse charges;

viii) that though the respondent preferred an appeal against the order of dismissal of the eviction petition but the same was dismissed; viii. that the proceedings u/s 14(1)(k) and 14(11) of the Rent Act lingered on;

viii) that upon the amendment w.e.f.1st December, 1988 of the Rent Act, the respondent also filed a petition for eviction of the said Mr. Dastur u/s 14(D)) of the Act i.e. on the ground of her own requirement of the premises;

ix) that Mr. Dastur died on 15th June, 1998 and his legal heirs `compromised" the matter with the respondent and agreed to vacate the premises and the respondent on 24th August, 1999 accordingly withdrew both the eviction proceedings aforesaid;

x) that the respondent in June, 2003 applied for conversion of the lease hold rights in the land into free hold and paid the requisite conversion charges of Rs.2,90,171/-;

xi) the appellant L&DO intimated to the respondent that before conversion, the respondent will have to pay all outstanding misuse charges;

xii) that the respondent represented to the appellant L&DO for applying the

Office Order dated 31st March, 1976 (supra) and levy token penalty at 1% of the misuse charges only;

xiii) that the appellant however vide letter dated 2nd June, 2004 rejected the request for levy of token penalty and vide letter dated 9th July, 2004 demanded a sum of Rs.12,51,621/- after adjusting the sum of Rs.2,90,171/- already paid and ultimately rejected the conversion application vide letter dated 4th November, 2004.

2. At this stage it is apposite to reproduce the Office Order dated 31st March, 1976 (supra):

No. 24(11)/76-CDN

GOVERNMENT OF INDIA

MINISTRY OF WORKS AND HOUSING

LAND & DEVELOPMENT OFFICE

NIRMAN BHAWAN: NEW DELHI

Dated: the 31st March, 1976

OFFICE ORDER No. 23/1976

Subject: Breaches (charges for changes of use / unauthorized construction etc.)
- procedure to deal with.

1. DETERMINATION OF DATE FOR RECOVERY OF CHARGES ETC.

(i) Whenever a breach is noticed, a Show Cause Notice in the prescribed proforma will be issued to the lessee asking him to remove / remedy the breaches within 30 days from the date of receipt of the notice. The period of notice can however, be extended to 60 days if the lessee gives certain reasons to the satisfaction of the lessor.

(ii) Where, however, lessee neither removes the breaches, nor sends any communication to the satisfaction of the lessor after receipt of notice expeditious action will be taken to re-enter upon the property.

(iii) A minimum period of 10 days for taking over possession as mentioned in the communication of re-entry will however, be given. After re-entry action under P.P.E. Act will be initiated immediately thereafter against the ex-lessee and the defaulting tenants in the Court of Estate Officer.

2. RECOVERY OF CHARGES FOR THE BREACHES

In cases where the lessee expresses his willingness to pay the charges for breaches on his own no separate Show Cause Notice will be issued but the charges for the breaches will be intimated in the proforma enclosed.

3. FORMULA FOR CALCULATION OF CHARGES FOR CHANGE OF USE

The formula for calculation of charges for change of use upto 14.7.68 is as follows:-

Misuse Area Meters

Present Commercial rates for land for the purpose for which the property is misused.

The rate on the date of last transaction for purpose for which the land was leased out.

Size of the plot in X5?% square yards square.

The formula for calculation of charges for change of use with effect from 15.7.1968 is as under:-

Misuse Area 5?% Meters

Present Commercial rates for the land for the purpose for which the property is misused.

Minus The rate on the date of last transaction for purpose for which the land was leased out.

X Size of the plot in square yards Square.

NOTE: The misuse charges will be directly related to the actual misused area in relation to a fixed denominator determined according to the Municipal Bye Laws.

In cases where the whole of the premises is misused the misused area will be taken as the total built area or in other words the plinth area of the building including thickness of all the walls garages & servant quarters. In cases of misuse in a part of the premises the area will be taken into account according to actual measurement which will be according to actual area misused. Such misused area will be assessable and verifiable from the building plan as sanctioned by the Local Municipal Body.

No inspection of the premises occupied by Foreign Mission will be carried out nor any misuse / damage charges will be levied in cases of residential buildings owned / hired by Foreign Missions.

Any addition, alteration or unauthorized construction in such buildings made by such Foreign Mission for the convenience of their staff will also not be objected to on condition that the lessee will either remove the breaches in question immediately on vacation of his premises by the Foreign Mission or agree to pay the damages right from the beginning. As undertaking to this effect will be obtained from the lessee in the enclosed proforma before accepting the ground rent.

4. DATE OF DETERMINATION FOR COMMENCEMENT AND VACATION OF BREACHES:

The date of commencement of unauthorized construction will be taken as two years prior to the date of inspection if no municipal record showing the correct date of unauthorized construction is available. Similarly the date of commencement of misuse will also be taken as two years prior the date of commencement of misuse.

If any lessee / ex-lessee disputes the date of commencement of breaches as determined in accordance with the aforesaid decision he will be called upon to produce evidence to establish that the date of commencement of breach is different and subsequent to the date taken by this office.

5. In cases of rehabilitation properties the date of commencement of breaches will in no case be taken prior to the date of receipt of the file on transfer from the office of Regional Settlement Commissioner.

6. Any communication from the lessee that the breach will be removed at future date will be disregarded. However, on receipt of an intimation that the breach has been removed, the premises will be got inspected as soon as reasonably possible thereafter, and if the breach is found removed at the time of such inspection the charges for the breaches will be leviable upto the date of such removal as had earlier been intimated by the lessee unless it is proved beyond a reasonable doubt that the breach was removed at a subsequent date.

7. In cases where the charges on account of change in use are found, beyond any doubt, to be more than the income of the lessee from the leased premises the charges will be reduced suitably according to the circumstances of each case in consultation with Ministry of Works and Housing and Finance. While doing so, the reasons for the inability on the part of the lessee to increase the income from the leased premises will, no doubt, have to be fully considered.

8. In case where the lessee / ex-lessee files suit for eviction against defaulting tenants on receipt of our notice for misuse and are successful in evicting such tenants one percent of the charges will be recovered as token penalty in consultation with the Ministry of Works & Housing and Finance.

9. In cases where the lessee admits existence of breach of terms of lease in his property though it is subsequently removed after the expiry of the notice period, but before the exercise of the re-entry, payment of misuse charges / addl. Charges etc., for the breaches remained in existence be insisted upon a condition for the grant of permission for sale / transfer / mutation / mortgage etc.

10. In all letters granting permission for temporary change of use on the following para will be added:-

It may please be clearly noted that this permission for regularization is without prejudice to the rights of Delhi Development Authority, under the Delhi Development Authority Act, 1957" or the rights of the Local Body to take action for change of purpose.

11. 10% PENALTY

(i) Non-re-entered area: 10% penalty in addition to the addition charges for change of use will be charged upto the date of request for compromise plus 30 days thereafter. 10% penalty will now however, be charged on the damages for unauthorized construction.

(ii) Re-entered sites:-

10% penalty both in addition to the additional charges for change of use and damages for unauthorized construction will be charged upto the date of withdrawal of re-entry plus 30 days thereafter.

(U.N. Bhuyan) M

Dy. Land & Development Officer

3. The appellant L&DO contested the writ petition filing a counter affidavit stating:

i. that the land underneath the property was leased out for construction of a double storey residential building for a private dwelling unit for one or two families in all with a barsati on the second storey;

ii. that the respondent however in violation of the perpetual lease condition rented out the first and the barsati floor for residence cum office purpose;

iii. that even while renting out the premises the respondent intimated the appellant L&DO that she was prepared to pay the charges for misuse;

iv. that the property was inspected on 14th December, 1971 and the first floor of the property was found being misused as office of M/s Maneck N. Dastur; Consultant Air Conditioner;

v. that the property was accordingly re-entered on 16th November, 1973 for misuser and unauthorized construction;

vi. that the re-entry was however withdrawn on 28th February, 1977 on payment of temporary regularization charges;

vii. that the property was again inspected from time to time and the misuse was found to be continuing;

viii. that though the appellant L&DO had informed the Court of the Rent Controller of the misuse charges on payment whereof the misuse could be temporarily regularized but the respondent did not choose to pursue those proceedings and on the contrary the compromised/settled with the tenant; ix. that the representation of the respondent for applying the Office Order dated 31st March, 1976 to her was considered but no merit was found therein;

x. that for misuse, besides misuse charges, 10% penalty is also payable; the Office Order aforesaid though provides for reduction of penalty from 10% to 1% in some cases, does not provide for reduction of misuse charges; the respondent

was confusing the reduction provided for penalty as applicable to misuse charges also;

xi. that the respondent was not even entitled to reduction in penalty because she went to the Court to evict the tenant, Mr. Dastur after a lapse of approximately ten years after the issue of breach notice and is thus bound to pay the misuse charges as well as penalty;

xii. that the penalty of 1% is over and above the misuse charges;

xiii. that there is no provision for waiver/reduction of misuse charges;

xiv. that the respondent was not entitled to any concession also for the reason that she did not pursue 14(1)(k) and 14(11) Rent Act proceedings and chose to settle with her tenant;

xv. that the respondent is not entitled to any concession also for the reason that she had earlier paid and agreed to pay the misuse charges;

xvi. that the misuse charges are to be recovered uniformly without any discrimination;

4. The respondent filed a rejoinder to the aforesaid counter affidavit reiterating that the documents evidencing her consent to misuse had been fraudulently obtained by Mr. Dastur from her.

5. The learned Single Judge in the impugned judgment has recorded that the respondent had given up her plea questioning the entitlement of the appellant L&DO to levy and collect misuse charges and the plea of the appellant L&DO having not raised a demand for misuse charges earlier and had confined the claim in the writ petition to a direction for consideration of her case in accordance with the Office Order dated 31st March, 1976 (supra). In view of the aforesaid submission of the respondent and believing the statement of the counsel for the respondent that the income from the said first and barsati floor was Rs.650/- p.m. i.e. Rs. 7800/- per annum and the respondent under the Rent Act could not increase the rent, the learned Single Judge has disposed of the writ petition with a direction to the appellant L&DO to give benefit of para 7 of the Office Order dated 31st March, 1976 (supra) to the respondent and to re-work the amount payable by the respondent and upon payment thereof by the respondent, convert the lease hold rights into free hold.

6. Before us, the counsels have addressed arguments on two aspects. Firstly, as to whether para 8 of the Office Order dated 31st March, 1976 providing for recovery, even in the case of misuse, of 1% of the charges as token penalty applies only to the penalty provided for in para 11 of the said Office Order or to the misuse charges with which the said Office Order deals and secondly, whether the learned Single Judge is right in directing the appellant L&DO to apply para 7 of the said Office Order qua the respondent.

7. Before we advert to the discussion on the aforesaid aspect, mention may be

made of judgment dated 28th February, 2012 of a Division Bench of this Court in Union of India Vs. Jor Bagh Association (Regd.) 2012 (188) DLT 25inter alia holding:

(a) that the damages on account of misuse by a lessee having a lease-hold tenure in a property can be recovered by the lessor if the lease, has a condition regulating the use thereof under pain of the lease being determined for breach; the same would be recoverable if the lessee prays that the breach be condoned and the lessor is prepared to do so but upon being recompensed for the breach. This power is inherent in the lessor and need not flow from the lease;

(b) that the Office Order dated 31st March, 1976 is not the source of the power of the lessor to assess and recover damages on account of misuse - the same only brings transparency by guiding the manner in which the damages have to be assessed;

(c) procedural fairness in the levy and demand of damages on account of misuse would have to be observed by the lessor on the subject of levy and demand of damages on account of misuse;

(d) a demand towards damages on account of misuse, if barred by limitation for the purposes of recovery thereof, would not denude the lessor of the power to demand the same as a condition to convert a lease-hold tenure into free-hold tenure;

(e) that where the lessee is not at fault and it is the tenant of the lessee who commits the offending act and the lessee takes resort to all means which he can possibly resort to - to either evict the tenant or to compel the tenant to remedy the breach, it would be unjust on the part of the State, as the lessor, to penalize the lessee, for the same would violate the jurisprudential norm that no person can be penalized for no fault of his and that constructive liability cannot be fastened except when a law expressly so fastens.

8. We will first take the aspect, whether para 8 of the Office Order dated 31st March, 1976 providing for recovery of only 1%, is applicable to misuse charges or only to penalty. The appellant in this regard has alongwith its counter affidavit filed before the learned Single Judge, also filed extract of Chapter 18 of the L&DO Manual titled "Breaches (the Change of purposes or Unauthorized Construction)". The same is nearly identical to the Office Order dated 31st March, 1976 save that therein the provision for recovery of only 1% is mentioned after both "misuse charges" as well as "penalty".

9. We are unable to accept the contention of the learned ASG that the "rule" of 1% is applicable only to the levy of penalty and not to misuse charges, though we may notice that a learned Single Judge of this Court in Satish Kumar Mehta v. U.O.I. 168(2010) DLT 316 has held so. Though in the L&DO Manual as aforesaid, the said "rule" is mentioned after the formula for levying misuse charges as well as penalty but in the Office Order, the said "rule" precedes the provision

regarding penalty. Ordinarily when the said "rule" is placed even before providing for levying of penalty, it cannot relate to penalty. Even otherwise, the language of the 1% "rule" does not restrict the applicability thereof to penalty charges only or exclude the applicability thereof to misuse charges. The expression used is "1% of the charges". Merely because the "rule" further proceeds to use the expression "token penalty", would not imply that the same is applicable qua penalty only. Further, at best, the language used is faulty and ambiguous. The same having been framed by the L&DO, it is the L&DO and not the lessee which ought to suffer for such ambiguity. We accordingly hold that where the lessee / ex lessee files suit for eviction against the tenant misusing the premises and is successful in evicting such tenant, the liability for misuse charges would be only 1% of the misuse charges otherwise payable in accordance with the formula laid down in the Office Order aforesaid.

10. Paras 7 and 8 of the Office Order supra providing concession to lessees, who though guilty of misuse are not at fault, are a manifestation of the principle "that no person can be penalized for no fault of his and that constructive liability cannot be fastened except when the law expressly so fastens" noticed by the Division Bench of this Court in Jor Bagh Association (Regd) (supra). Seen in the said light, it becomes clear as daylight that the "rule" of 1% would apply to misuse charges; restricting the same to penalty would be a violation of the said principle.

11. That brings us to the next question as to whether the respondent is entitled to the benefit of either para 7 or para 8 of the Office Order aforesaid. The learned Single Judge in this regard has held that since the respondent did file the proceedings for eviction against the tenant misusing the premises and further since that tenant ultimately vacated the premises, the respondent is entitled to the benefit of the 1% "rule" contained in para 8. It was further held that since the respondent owing to the applicability of the Rent Act could not have got the rent increased, she is also entitled to the benefit of para 7 of the Office Order.

12. However what the learned Single Judge does not appear to have noticed is that the petition for eviction filed by the respondent u/s 14(1) (c) of the Rent Act i.e. on the ground of the tenant, Mr. Dastur having misused the premises in contravention of the agreement with the respondent, was dismissed and the appeal there against was also dismissed. The said judgment has now attained finality. Though the copies of the said judgments have not been placed before us but such dismissal must have followed on a finding that the use of the premises by Mr. Dastur for non residential purposes was with the consent of the respondent. Once that finding has attained finality between the respondent and her tenant, in our opinion the learned Single Judge was not justified in holding the tenant to be in default and in finding the respondent to be entitled to the benefit of 1% rule in para 8 or the benefit of para 7 of the Office Order. It, having been established in the proceedings between the respondent and her tenant that the tenant was not at default and was not liable to be evicted u/s 14(1)(c) of the

Act, the respondent cannot be heard in these proceedings to contend otherwise.

13. There is merit also in the plea of the appellant that the respondent did not file the proceedings for eviction immediately after receipt of notice of misuse and rather was satisfied with the tenant paying the misuse charges. Merit is also found in the plea of the appellant that the respondent cannot be said to be successful in evicting her tenant. It seems that the respondent, even after ground of Section 14(1)(k) was established and proceedings u/s 14(11) begun, dragged her feet. Ultimately the respondent entered into a compromise. The respondent then was fully aware of the claim of the appellant L&DO of misuse charges. A copy of the compromise application filed in those proceedings shows that the terms of the settlement arrived at between the respondent and her tenant were also not disclosed. All that was disclosed was that the tenant as per the compromise agreed to vacate the premises and owning where to the respondent withdrew the petitions for eviction. The respondent then did not insist upon the tenant paying the misuse charges. The Respondent either as part of compromise, took the liability for misuse charges on herself or, it is well nigh possible may have recovered the same from the tenant and for this reason only gave an absolute discharge to the tenant. Though para 7 of the Office Order does not expressly provide for the same to be applicable only where the lessee has taken steps for eviction against the tenant but it will be incongruous to interpret the same in a manner where the lessee by keeping the rent lower than the misuse charges, allow the tenant to misuse, without becoming liable for prescribed misuse charges. Thus para 7 of the Office Order cannot be applied to a case where the misuse by the tenant of the lessee is with the consent of the lessee, as has been found in the proceedings between the respondent and her tenant in the present case. The said paragraph 7 also is a facet of jurisprudential norm that no person can be penalized for no fault of his/her; however, when the lessee himself/herself / itself allows the premises to be used for a purpose other than that permitted in the perpetual lease, the lessee cannot be said to be not at fault and cannot get the benefit of para 7 of the Office Order. It cannot be lose sight of that the privity of the appellant L&DO is with the respondent and if the respondent has freed her tenant, the respondent would still remain liable to the appellant. We therefore do not find the respondent entitled to the benefit of neither of paras 7 or 8 of the Office Order aforesaid.

14. We, in the circumstances, do not feel the need to decide whether the income of the lessee from the lease premises referred to in para 7 (supra) of the Office Order refers to the income of the entire lease premises or income only of the part thereof which was being misused. We are therefore unable to agree with the direction given by the learned Single Judge, to give the benefit of paras 7 & 8 of the Office Order dated 31st March, 1976 to the respondent. Axiomatically the appeal is allowed and the judgment dated 21st March, 2011 of the learned Single Judge is set aside and the writ petition preferred by the respondent is dismissed. No order as to costs.