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* IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment Reserved on: July 18, 2012
Judgment Pronounced on: August 06, 2012

+ RFA(OS) 107/2009 & C.M.No. 472/2010 (X.OBJ)
UNION OF INDIA & ANR. Appellants
Represented by: Rajesh Katyal, Advocate.

versus

SATISH KUMAR MEHTA Respondent
Represented by: Mr.Paravin Bahadur with Ms.Mallik
Joshi, Advocates.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE MANMOHAN SINGH

PRADEEP NANDRAJOG, J.

1. The respondent is the perpetual lessee of a plot of land bearing Municipal No.182, Jor Bagh, New Delhi on the terms contained in the perpetual lease deed dated October 19, 1966. The lessor is the President of India acting through the Land & Development Office. The perpetual lease obliges the respondent to construct a residential building on the plot and use the same for a residential purpose. The respondent constructed a residential building and used it for residential purpose.

2. The problems of the respondent commenced, when in August 1971 he let out the first floor of the property to M/s. Consilium Pvt. Ltd. at a rent of ₹1,100/- per month; expressly recording in the lease-deed that the first floor would be used only for the purposes of residence by a Director of the Company.

3. On September 13, 1978, L&DO issued a notice alleging breach of the perpetual lease on account of the first floor being used for a commercial purpose, and informing the respondent that L&DO intends to re-enter the property. It not being indicated in the notice as to what was the commercial activity being carried out, and the respondent, seeing a director of the company reside on the first floor, could only write back stating that there was no misuse as alleged and that a director of M/s. Consilium Pvt. Ltd. was residing on the first floor.

4. L&DO kept quiet. The matter rested till L&DO wrote to the respondent on June 08, 1983 that it had re-entered the property since the misuse had continued.

5. This led respondent to file Suit No.632/1983 in the Court of the learned Senior Sub Judge Delhi, praying that L&DO be restrained from re-entering the property. Respondent alleged that there was no misuse. In the written statement filed by L&DO, it was disclosed, for the first time, to the respondent that the misuse was in the form of the tenant partly using the first floor for office purposes; the written statement filed did not deny that the predominant use of the first floor was residential. The suit was ultimately disposed of recording statement by learned counsel for L&DO that it would not dispossess the respondent from the property without following due process of law. And what does that mean? Neither counsel could throw light on, for the reason, as per L&DO it had already followed the due process of law by issuing a notice to the respondent before passing the order of re-entry, and as per the respondent he had received a show-cause notice which was vague and did not list the alleged misuse and

that his response was not considered; and further the appellants had kept quiet for over 5 years and had passed the order dated June 08, 1983 which once again did not list out the alleged misuse.

6. For the reason, in the written statement filed, L&DO made it known to the respondent that the director of its tenant company was partly using the first floor as an office, the respondent got in touch with his tenant which admitted its director using one room for office purposes and offered to pay the misuse charges if the same were made known. Between 1985 till the suit was disposed of in the year 1992, at least 10 letters were written by the respondent to L&DO praying that misuse charges be calculated and made known so that the breach could be remedied by paying the misuse charges. L&DO simply kept quiet.

7. The respondent sued for eviction of the tenant in the year 1990, invoking Section 14(1)(k) of the Delhi Rent Control Act 1958, alleging violation of the term of the tenancy by misusing the same. The proverbial delays in Courts kept the matter pending, till the tenant vacated the first floor on February 16, 2002; but under a compromise.

8. For the period the first floor remained with the tenant rent received by the respondent was only ₹4,41,264/-.

9. Between the years 1992, when Suit No.632/1983 was disposed of, and till the year 1990 when the respondent sued for eviction of his tenant, as noted above, at least 10 letters were written by the respondent to L&DO to calculate and raise a demand on account of misuse charges so as to regularize the

misuse, to which there was no response. In the year 1990, after having sued for ejectment of the tenant, the respondent continued to write, and wrote 8 more letters till the year 2002 requesting repeatedly to let him know the misuse charges to be paid to regularize the misuse so that the tenant, who was willing to pay the same, could pay the same. Even these letters were not replied to.

10. When the tenant vacated, the respondent wrote a letter, Ex.P-4 dated July 29, 2002 intimating appellants that the tenant had vacated and had agreed to pay the misuse charges, which should be intimated so that the tenant could pay the same. This letter was responded to by L&DO as per letter dated December 17, 2003, Ex.DW-1/10, demanding misuse charges in sum of ₹ 48,57,924/- for the period July 15, 1977 to July 30, 2002, and the demand would reveal that ₹42,11,604/- were the stated charges for the entire first floor being misused for most of the period and some portion for a small period and the remainder towards some minor breaches alleged here and there.

11. The parties exchanged letters Ex.D-5, Ex.P-8 and Ex.DW-1/11, with the respondent praying that the demand be corrected as per the policy of L&DO i.e. ignoring 500 sq.ft. (which was permitted office use in a residential building) to charge for only such area misuse which exceeded 500 sq.ft., in any case the demand be rectified inasmuch as the entire first floor was not being used as an office, and the L&DO sticking to its demand.

12. The stalemate compelled the respondent to file a suit praying for a permanent injunction to restrain L&DO from

enforcing the demand in sum of ₹48,57,924/- and alternatively to declare that only such area misuse as exceeded 500 sq.ft. was liable to be charged as the misused area in terms of office order No.7/1983 dated March 22, 1983; it was prayed in the alternative that the demand should be restricted as per office order No.23/1976 dated March 31, 1976 i.e. ₹1,17,838/-. It was pleaded that the first floor area let out was 1771 sq.ft. of which only a part was used by the director of his tenant for professional work, and for which respondent highlighted that the director concerned Shri M.L.Bhardwaj was a journalist and was using a part of the first floor as an office i.e. writing. Since the respondent has pithily summarized the challenge to the demand in paragraph 31 of the plaint, we note the same. It reads as under:-

“31. In view of what is stated in the preceding paragraphs the controversy in this suit centres around the following seven points which are enumerated as under:-

- i. The actual area under misuse.
- ii. What are the charges for that actual area under misuse?
- iii. Whether as per office order No.7/93 dated March 22, 1983 an area of upto 500 sq. ft. is permissible to be used for professionals like journalists for professional work. If yes, are misuse charges payable or misuser charges to be paid for an area over and above 500 sq. ft. only?
- iv. Whether in terms of office order No.23/76 dated March 31, 1976 only 1% of the misuse charges in respect of actual area under misuse is payable in case the lessee files a suit for eviction against the defaulting tenant and is successful in evicting such a tenant, and as such the plaintiff is entitled to get benefit of office order No.23/76 dated March 31, 1976.

v. Additionally, in case where the charges on account of change in use are found to be more than the income of the lessee from the leased premises, the charges are liable to be suitably reduced according to the situation of the case in consultation with Ministry of Works & Housing and Finance.

vii. Whether interest is payable by the Plaintiff because of lapse of time, on account of L&DO not replying to Plaintiff's letters for information of amount payable which he wanted to pay.

viii. Whether in terms of office order No.7/83 dated March 22, 1983 of the L&DO the amount of ₹55,866/- as claimed by the defendant as admitted charges for unauthorized area 57 sq. ft. at ground floor and 194 sq. ft. on ground floor is payable or not?"

13. In the joint written statement filed, the appellants i.e. the Union of India and L&DO, justified the sum of ₹48,57,924/- demanded by them towards misuse charges from the respondent vide letters dated February 17, 2003 Ex.DW-1/10 and February 20, 2004, Ex.DW-1/11. On the issue of applicability of the Office Orders Nos.23/76 and 7/83 dated March 31, 1976 and March 22, 1983, it was pleaded that the said office orders, as clarified by Office Order No.8/99 dated April 06, 1999, do not apply in case of ex-leases and for this reason it was pleaded that they have no application in the case of the appellant for the reason the respondent was an ex-lessee on the date when he filed the eviction petition against his tenant as also on the date of issuance of the Office Order No.7/83.

14. Relevant would it be to note that the averments made by the respondent in the plaint that he had written about 18 letters to the appellants between the years 1985 to 2002 in respect of misuse of the first floor of the suit property were not

specifically denied by the appellants in their written statement.

15. On the pleadings of the parties, following 12 issues were settled by the learned Single Judge:-

“1. Whether the suit is not maintainable because of non-issuance of a Section 80 CPC Notice? (OPD)

2. Whether the demand made by the Defendants towards the misuse charges, interest & penalty is bad in law and facts? (OPP)

3. Whether the Plaintiff is entitled to the benefit of circular No.23/76 dated 31st March, 1976? If so to what extent? (OPP)

4. Whether the Plaintiff is entitled to the benefit of circular No.7/83 dated 22nd March, 1983? If so to what extent?

5. What was the actual area of alleged misuse on the first floor of the property no.182, Jor Bagh, New Delhi? (OPD)

6. Whether the Defendants are estopped from raising the demand after the lapse of so many years? (OPP)

7. Whether the Plaintiff is not liable to pay any charges for the unauthorized area 57 Sq. ft. on ground floor and 194 Sq. ft. on the ground floor in view of office order no.7/83 dated 22nd March, 1983? (OPP)

8. Whether the Plaintiff is entitled to have the breaches regularized & entitled to have re-entry withdrawn on the payment of ₹1,17,565/-? (OPP)

9. Whether the suit is not maintainable under Order 2 Rule 2 CPC? (OPD)

10. Whether the suit is barred by time? (OPD)

11. Whether the Plaintiff is entitled to the Decree of Permanent & Mandatory Injunctions and Declarations as claimed in the suit? (OPD)

12. Relief?”

16. In the year 2005, the respondent filed I.A. No.6955/2005 under Order XI Rule 12 and 14 CPC requiring the appellants to produce the documents which were in their possession, including the letter dated July 21, 1987 written by M.L.Bhardwaj, the Director of M/s Consolium Pvt. Ltd, to the appellant No.1 and letters dated October 24, 1992, Ex.P-3, July 29, 2002 P-4 and November 21, 2002 P-5 written by the respondent to the appellant No.2. In response thereto, the copies of said letters were produced by the appellants and were exhibited as proved documents.

17. Before proceeding further, we note the relevant portion of the letter dated July 21, 1987, Ex.P-2, written by Sh.M.L. Bhardwaj, the Director of M/s Consolium Pvt. Ltd, to the appellant No.1. It reads:-

“.....The premises at Jor Bagh (first floor) is primarily for my residence as well as to serve as a study....

The total carpet area of our premises is about 2,000 sq. ft. out of which a small portion is being used for journalist purposes. Not more than three or four persons assist me in this work during certain hours during the day. My contention is that not more than 500 sq. ft. of carpet area is used for professional work or to assist me in professional work and that this much area of a residence of a professional journalist is permissible for use for such purpose, according to Government policy in this regard.

I believe the Land & Development Office contends that 615 sq. ft. of my residence is being used for professional work, that is 115 sq. ft. in excess of the permissible limit. I am prepared to adopt this contention and request you either to condone this excess use of area or, the Land & Development Office can penalize me by levying misuse charges for 115 sq. ft. (615 sq. ft.minus500 sq. ft.) area which is stated to be above the permissible limit. In this

connection I enclose copies of Land & Development Office's registered notice to my landlord in 1983, and his letter of June 8, 1987, addressed to L. & D.O. for reference and necessary action." (*Emphasis Supplied*)

18. We also note the letter dated October 24, 1992, Ex.P-3, written by the respondent to appellant No.2. It reads as under:-

"I am the lessee of the aforesaid plot of land. The premises constructed thereon and existing on the first floor is under the tenancy of M/s Consilium Pvt. Ltd. The premises were let out for residential purposes. The misuse, if any, is without my consent. You have exercised right of re-entry over the said plot on account of the aforesaid alleged misuse.

That I have initiated proceedings against the tenant for misuser of the premises against the terms of lease granted to me by the Govt. of India. The said proceedings are at present pending in the court of Shri P.D. Gupta, Addl. Rent Controller, Delhi.

That the alleged misuser is condonable. I am prepared to get the aforesaid breach condoned on payment of necessary regularization charges.

Please be kind enough to intimate the terms and conditions on which you are prepared to regularize the said misuse as early as possible." (*Emphasis Supplied*)

19. We also note the letter dated July 29, 2002, Ex.P-4, written by the respondent to appellant No.2. It reads as under:-

"This is to once again remind you that I have sent several letters, requesting you to advise me of the terms and conditions and the amount that is required to be paid if any, to regularize the alleged misuse of the First Floor premises by the tenant, M/s Consilium Private Ltd., so that suitable steps can be taken to settle this problem, but regrettably

I have not received any reply from you.

Just for your ready reference, these letters were posted to you by courier/regd. post on the following dates:

- | | | |
|-----|-------------------|------------|
| 1. | First letter | 22-01-1985 |
| 2. | Second Reminder | 24-10-1992 |
| 3. | Third Reminder | 25-01-1993 |
| 4. | Fourth Reminder | 01-03-1993 |
| 5. | Fifth Reminder | 29-11-1999 |
| 6. | Sixth Reminder | 14-12-1999 |
| 7. | Seventh Reminder | 03-01-2000 |
| 8. | Eighth Reminder | 27-01-2000 |
| 9. | Ninth Reminder | 09-11-2000 |
| 10. | Tenth Reminder | 19-12-2001 |
| 11. | Eleventh Reminder | 23.01.2002 |

By this letter, I am once again asking you to let me know the amount of misuse charges if any to solve this problem, immediately. As I have stated in earlier letters, your inaction to reply has caused a heavy loss to me in terms of both opportunity cost and money, for which you will be responsible on a continuing basis. Hence I would again emphasize upon you the urgency to reply and give me the required information of extra charges if any for alleged misuse by the tenant. Also, for your information the concerned tenant (M/s Consilium Private Ltd.) vacated the above stated premises in compliance with a court order on 16th February, 2002." (Emphasis Supplied)

20. In support of his case, the respondent examined himself as PW-1. In his examination-in-chief, the respondent deposed on the lines of the plaint filed by him. Be it noted

here that no suggestion was given to the respondent during cross-examination that he had not written 18 letters to the appellant No.2 between the years 1985 to 2002.

21. On behalf of the appellants, Sh.A.K.Agarwal, Deputy Land and Development Officer was examined as DW-1, who deposed in sync with the written statement. Additionally thereto, he deposed that the appellant No.2 had conducted the inspection of the suit property on August 05, 1977, September 22, 1987, November 02, 1984 and June 16, 2003; and put in a tabular form, he disclosed as under:-

The details of the area misused during different period in the suit property are as under:

S.No.	PERIOD	FLOOR	AREA
1.	07.12.1970 to 02.07.1971	Ground Floor	1037 sq. ft.
2.	03.07.1971 to 10.06.1975	Ground Floor	1562 sq. ft.
3.	11.06.1975 to 04.08.1977	Ground Floor	1472 sq. ft.
4.	01.08.1971 to 28.07.1981	First Floor	1771 sq. ft.
5.	29.07.1981 to 23.04.1986	First Floor	772 sq. ft.
6.	24.04.1986 to 21.09.1987	First Floor	629 sq. ft.
7.	22.09.1987 to 01.11.1994	First Floor	618 sq. ft.
8.	02.11.1994 to 15.06.2003	First Floor	1771 sq. ft.

22. On being cross-examined:-

Q- Are you aware of this fact that the plaintiff right from 1985 wrote 18 letters to intimate him about terms and conditions and the amount that was required to be

paid to regularize the alleged misuser of the first floor of the premises, if any, by M/sConsilium Pvt. Ltd., what you have to say?

23. He answered:-

Ans. Numbers of letters written by the plaintiff to department is not known without the details nothing can be said about the same.

24. Vide impugned judgment and decree dated September 23, 2009, the learned Single Judge has held that the inspection reports produced by the appellants establish a part of the property being misused; but not correctly as there were inconsistencies in the inspection reports. On misuse charges leviable, it has been held that a cumulative reading of clause-8 of the Office Order dated March 31, 1976 and the Office Order dated April 06, 1999 require misuse charges to be a token amount of only 1% of what was otherwise recoverable since the respondent had sued for ejectment of the tenant who was the actual culprit, but has simultaneously held that the respondent was not entitled to the benefit of clause-7 of the Office Order dated March 31, 1976 because said clause came to the benefit of only such landlord who could show the inability to increase the rental income. The learned Single Judge held that such misuse charges as pertained to the ground floor were payable. In a nutshell, the learned Single Judge held that the respondent was liable to pay ₹10,31,630/- plus ₹10,316/- as misuse charges for the first floor and ₹55,866/- for the ground floor as also the sums demanded as per letter dated September 17, 2003 written by the appellants. Noting that the respondent had deposited ₹10 lakhs in the Court which was invested in a fixed deposit the suit has been

disposed of requiring appellant to re-work out the demand and give adjustment of ₹10 lakhs permitted to be received by the appellants from this Court together with interest accrued thereon.

25. Whereas appellants desire more and pray that the full demand be restored, by way of the cross-objections filed, the respondent prays that the demand may be set aside in its entirety.

26. With respect to the reasoning of the learned Single Judge we need to note the relevant clauses of the perpetual lease-deed dated October 19, 1965 under which the respondent holds the perpetual lease-hold rights. They read as under:-

"III. The Lessee for himself, his heirs, executors, administrators and assigns covenants with the Lessor in manner following (that is to say)-

....

(7) The Lessee will not without such consent as aforesaid carry on or permit to be carried on the said premises any trade or business whatsoever or use the same or permit the same to be used for any purpose other than that of a double storey residential building for a private dwelling house for one or two families in all or to do or suffer to be done thereon any act or thing whatsoever which in the opinion of the Lessor or such officer as may be authorize in this behalf may be an annoyance or disturbance to the President of India or his tenants in New Capital of Delhi.

VI No forfeiture or re-entry shall be effected except as herein provided without the permission of the Lessor or such officer as may be authorized by him in this behalf and he shall not permit such forfeiture or re-entry until the Lessor has served on the Lessee a

notice in writing -

(a) specifying the particular breach complained of,

(b) if the breach is capable of remedy, requiring the Lessee to remedy the breach,

and the Lessee fails within a reasonable time from the date of service of the notice to remedy the breach if it is capable of remedy; and in the event of forfeiture or re-entry the Lessor or such officer as may be authorized by him in this behalf may in his discretion relieve against forfeiture on such terms and conditions as he thinks proper."

27. We also need to note Clauses 7 and 8 of the Office Order No.23/1976 dated March 31, 1976. They read as under:-

"DATE OF DETERMINATION FOR COMMENCEMENT AND VACATION OF BREACHES

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

28. We further need to note the relevant portion of the Office Order No.7/83 dated March 22, 1983. It reads as under:-

"As various office orders have been issued on the subject mentioned above, it has therefore been felt that a consolidated list of breaches to be condoned to issue. A complete list of condonable breaches is

therefore circulated to all concerned for guidance and necessary action.

LIST

1. Enclosing of verandahs.

30. a) Rooms being used for professional work by the occupants as Doctor, Hakims, and Vaid, lawyers, Architects, Engineers, Chartered Accountants, Business Consultants, and Journalists when it is committed by the occupants of whole or the major part of the residential premises and the portion being used for professional work does not exceed 30% of the covered area or 500 sq. ft. whichever is less. These are effective from 17.6.1982."

29. Still further, we need to note the relevant portion of the Office Order No.24(278)/99-CDN dated April 06, 2009. It reads as under:-

"With reference to Clause 8 of the Office Order No.23/76 dated 31.3.1976 certain clarifications were sought from the Ministry of Urban Affairs & Employment.

2. Ministry of Urban Affairs & Employment in consultation with Finance Division & M/O Law has decided that "if any lessee, after receipt of our misuse notice files a suit for eviction against the defaulting tenants and succeeds in evicting such tenants, the lessee shall be liable to pay the misuse charges, irrespective of the fact that he/she got the tenant evicted through the Court. However, in such cases the penal charges shall be reduced to 1% instead of usual 100%."

30. With reference to clauses 7 and 8 of the Office Order No.23/1976 dated March 31, 1976, it is apparent that where the lessee sues to evict a defaulting tenant on receipt of a notice for misuse and successfully evicts the tenant, a token penalty of only 1% of the misuse charges otherwise recoverable can be levied. In any case, as per clause 7, the

penalty cannot be more than the income derived from the premises by the lessee. Now, at the relevant time the property in question was governed by the Delhi Rent Control Act, 1958 and the respondent could not increase the rent. Under no circumstances the penalty could be more than the rent received by the respondent. As noted above, the total rent realized by the respondent from the tenant was ₹4,41,264/-, and thus under no circumstances could the misuse charges, by way of penalty, be the amount determined by the learned Single Judge.

31. The impugned judgment and decree is liable to be set aside on aforesaid reasoning.

32. But, since during the pendency of the suit and the appeal, much case law has developed on the subject of procedural fairness in raising demands pertaining to misuse charges, learned counsel for the parties fought the appellate battle with respect to four decisions of this Court, which we shall be soon noticing hereinafter, but would now note the relevant backdrop facts on which the applicability of said four decisions has to be decided.

33. In August 1971, the respondent let out the first floor of the suit property to M/s. Consilium Pvt. Ltd. for the purposes of residence of its Director. On September 30, 1978, the appellant No.2 issued a notice to the respondent informing him that M/s Consilium Pvt. Ltd. is using the first floor of the suit property for a commercial purpose, but did not specify what was the commercial purpose. The respondent, who used to see Sh.M.L.Bhardwaj reside on the first floor had no clue as to what was in the mind of L&DO when it alleged that the first floor was

being used for a commercial purpose. A common man would not understand the distinction between an incidental use and a dominant use. Whereas the respondent contends that he replied to the said notice but the appellants did not correspond any further in said regards the appellants contend that they issued several notices to the respondent requiring him to ensure that his tenant M/s Consilium Pvt. Ltd. stop misusing the suit property but the respondent did not pay any heed to the said notices; but no such notices have been proved by the appellants at the trial except a notice/order dated August 09, 1983. Thus, it has to be taken that except for the notice dated September 30, 1978, no notices were issued.

34. On August 09, 1983 appellant No.2 sent the notice/order informing the respondent that the property had been re-entered. The same was challenged by the respondent by way of Suit No.632/1983 which was disposed of on September 18, 1992, requiring the appellants to follow the due process of law. When the suit was pending adjudication, on July 21, 1987, Mr.M.L.Bhardwaj, the Director of M/s Consilium Pvt. Ltd., wrote a letter to the appellant No.1 expressing his willingness to pay misuse charges in respect of 115 sq.ft. area out of the total area of the first floor of the suit property. The factum of the appellants receiving aforesaid letter dated July 21, 1987 stands admitted inasmuch as the appellants had produced a copy of the said letter upon the respondent filing an application under Order XI Rule 12 and 14 CPC for production of documents. The appellants did not respond to the letter dated July 21, 1987 written by Mr.M.L.Bhardwaj. In the year 1990, the respondent filed a petition seeking eviction of M/s Consilium Pvt. Ltd. on the ground that it has committed

a breach of the terms of lease. The matter kept on dragging and finally in February 2002, a settlement was arrived between the parties and M/s Consilium Pvt. Ltd. vacated the first floor of the suit property. 18 letters were written by the respondent when the tenant was still occupying the property praying to the appellants that the misuse charges be calculated and demand raised since the tenant was willing to pay the same and regularize the breach. The appellants maintained a supine silence, and this was to the prejudice of the respondent, because if the demand was raised, the tenant would have paid. After the respondent and the tenant entered into a settlement before the Rent Controller and the tenant agreed to vacate the premises, on July 29, 2002, the respondent yet again wrote a letter to the appellant No.2 seeking details of the misuse charges in respect of the first floor of the suit property and expressing his willingness to pay the same. On the receipt of letter dated July 29, 2002, the appellant No.2 woke up from its slumber and issued notice dated December 17, 2003 to the respondent demanding a sum of ₹42,11,607/- towards misuse charges in respect of the suit property for the period July 15, 1977 to July 30, 2002.

35. Is there a procedural unreasonableness in the action of the appellants? Time for us to discuss the four decisions of this Court.

36. In the decision reported as 2008 (106) DRJ 69 (DB) *Hari Prakash EDN Welfare Society v DDA & Anr.*, the appellant society secured allotment of a plot in Vasant Kunj. Pursuant to said allotment, a perpetual lease-deed was executed in favour of the appellant. After obtaining requisite permissions, the

appellant raised construction for running a nursery school on the said plot of land. By a show cause notice the society was accused of using the land for an unauthorized purpose. The notice alleged that the premises in question was being used for purposes of running a girls hostel and institute of vocational studies. It was contended by the society that on receipt of above show cause notice the society sent a reply to DDA denying the allegations of misuse and prayed that a joint inspection be carried out. DDA did not respond and straightway determined the lease. Holding in favour of the society and highlighting that reply filed to show cause notices need to be considered, a Division Bench of this Court, in para 16 of the decision held:-

“16. The second aspect of the case pertains to the non-consideration of the reply by the respondent-DDA which is admitted in the instant case. Since, however, the reply was, in our opinion, within the stipulated period the said non-consideration would render the order of cancellation unsustainable. We say so because the cancellation of a validly concluded perpetual lease is bound to visit the lessee with serious civil consequences particularly when the lessee has acted upon the lease altered its position and made investments by way of construction of super-structures as in the instant case.”

37. In the decision reported as 2007 VII AD (Delhi) 313 Prof Ram Prakash v DDA, a writ petition was filed before a learned Single Judge of this Court seeking quashing of a demand raised by the DDA in the sum of ₹1,78,85,011/- towards misuse charges in respect of the plot at 7, Community Centre, East of Kailash, New Delhi. The demand was raised when on the death of a co-owner, mutation in the name of the legal heirs was prayed for. Record of DDA showed that on August 08, 1993,

DDA had issued a notice alleging misuse of the basement to the petitioner, which notice was replied to by the petitioner on August 10, 1993 in which he took a stand that the basement was being used for a storage purpose in a commercial building and there was no misuse. Thereafter on August 12, 1983, the tenant of the basement wrote a letter to DDA, in respect of the alleged misuse of the basement, and even he too denied any misuse. The aforesaid replies were not considered by DDA. No order was passed with respect to the show cause notice. Thereafter, on June 28, 1990, DDA issued another notice to the petitioner to show cause as to why the lease should not be cancelled on account of misuse of the basement and the mezzanine floor. The notice was replied to by the petitioner on July 25, 1990 denying any misuse in the basement and the mezzanine floor. No order was passed by DDA after considering the reply filed by the petitioner. On September 03, 1990 and then on February 11, 1990, DDA wrote to the petitioner to stop the breach of the conditions of the lease within 15 days failing which it was intimated that the lease would be terminated. The petitioner responded vide reply dated November 05, 1990. He denied any misuse. DDA did not pass any order with reference to the reply sent, and instead on May 08, 1991 issued a show cause notice to the petitioner; only with respect to the mezzanine floor, alleging misuse thereof. Petitioner responded thereto vide reply dated May 21, 1991. No order was passed considering the reply in which petitioner had denied any misuse of the mezzanine floor. On September 18, 1991, DDA wrote to the petitioner that he should stop the misuse of the mezzanine floor within 15 days, which letter was replied to by the petitioner on November 13,

1991. On December 31, 1991, DDA wrote yet another letter to the petitioner asking him to stop misuse of the mezzanine floor but did not take any further steps on the issue of the misuse of the mezzanine floor thereafter. On September 16, 1992, the DDA issued a fourth show cause notice to the petitioner in respect of unauthorized construction of 2 rooms on the terrace, which notice was replied to by the petitioner on September 30, 1992 in which he stated that his tenant had raised the unauthorized construction and he would be taking action. Nothing was done by DDA in said regards thereafter till August 11, 1994, when a fifth show cause notice was issued referring to certain unauthorized constructions and encroachments, to which the petitioner replied on September 09, 1994. On November 28, 1994 and January 11, 1995, show cause notices were issued to the petitioner asking him to remedy the breaches. DDA did not follow up on the issue of the misuse of the terrace thereafter till February 17, 2004 when the petitioner applied for mutation of the property in favour of the legal heirs and DDA raised the demand. Holding that the action of DDA in demanding a sum of ₹1,78,85,011/- suffers from unreasonableness, a learned Single Judge of this Court quashed the demand and in paras 27, 28 and 31 of the decision observed as under:-

“27. The narration of facts shows that there is no material on record to support the demand of misuse charges for the misuse of the basement from 8.8.1983 till 5.2.2003. Also, the misuse charges for this period is also barred by laches since the DDA gave up this issue after its inspection of 31.12.1990. It sought to revive the claim belatedly only after the petitioner applied for mutation. As regards the mezzanine floor again the DDA does not appear to have followed up its demand after 31.12.1991.

Further, nowhere in the lease-deed is there any mention of 'architectural control' which requires the usage to be restricted to storage. It is also not known if the DDA considered the explanation contained in the letter dated 1.12.1991 written by M/s. Ferro Alloy Forging and Green Land confirming that they have vacated the mezzanine with effect from 1.12.1991. Therefore there is no question of the misuse having continued beyond that date. Importantly, there is no determination of the misuse by a conscious decision of the DDA in respect of the mezzanine floor.

28. The position as regards the terrace was no different. In to the show cause notice dated 16.9.1992 regarding unauthorised construction on the terrace, the petitioner replied on 30.9.1992 stating that the tenant M/s. Sobhagya Advertising Service had "unauthorisedly occupied the terrace and raised construction thereon." The matter had been reported to the MCD and a case had also been filed against the tenants. The DDA does not appear to have taken any immediate action on this reply. A further show cause notice was issued on 11.8.1994 alleging misuse of the basement and the mezzanine floor for an office and that three rooms were unauthorisedly constructed on the terrace. On 9.9.1994 the petitioner wrote to the DDA stating that he had referred the matter to the concerned tenants. Two final show cause notices dated 28.11.1994 and 11.1.1995 were sent repeating the same allegations as in the earlier show cause notices without informing the petitioner of the DDA's response to his earlier replies.

xxx xxx

31. This Court is unable to accept the submissions of the DDA that there is no limitation whatsoever for recovering misuse charges. That would render the power to recover misuse charges arbitrary and unreasonable. The petitioner is right in contending that even where a penalty in terms of Section 29(2) DD Act, has to be recovered within a reasonable time, it is inconceivable that there would be no

limitation whatsoever for recovering misuse charges. Also, this Court is not prepared to accept the argument advanced by the DDA that by repeatedly issuing show cause notices to the lessee, without taking any follow up action on such alleged misuse for several years, the DDA was in fact being lenient. By not adjudicating on these show cause notices and by merely repeating the same charges in the subsequent show cause notices, the DDA cannot expect to give itself a endless period of limitation for adjudicating on the alleged misuse. Significantly, in none of the show cause notices or 'final' notices has the lessee been informed that the DDA is proposing to levy and collect misuse charges. There is therefore no mention of the likely amount of such misuse charges. The petitioner is right in contending that till 2004 he was never informed that he was even required to pay misuse charges. The exercise of the power by the DDA to levy and collect misuse charges in the instant case can by no means be said to be reasonable. (Emphasis Supplied)

38. We note that the decision aforesaid pronounced by a learned Single Judge of this Court was upheld by the Division Bench as also the Supreme Court by a reasoned decision.

39. In the third decision, reported as 2007 VII AD (Delhi) 189 Rattan Kaur v DDA, a demand towards misuse charges raised after 18 years was quashed on the reasoning:-

“25. As regards the answer to question (ii), the only period of misuse which the DDA has been able to establish from the record is 11.10.1974 to February 1979 and no further. The admitted position is that the demand for misuse charges for this period is was sought to be raised for the first time on 26.09.1997. In the view of this Court, it would be unreasonable and arbitrary for the DDA to seek to levy such misuse charges after a gap of 18 years after such misuser stopped. It is actually a stale claim which DDA had itself had given a quiet burial

to. The demand was sought to be revived only because the petitioner filed an application for conversion on 5.5.1995. Even thereafter for than 2 years no demand was raised. The Court sees no reason why the conduct of the DDA in the present case should be condoned and it should be permitted to collect misuse charges after a gap of 18 years. All such powers have to be exercised within a reasonable time if they have to be held to be sustainable in law. A delay of 18 years certainly cannot be termed reasonable.

26. The Court fails to appreciate the argument advanced that the DDA is, in not levying misuse charges for over 18 years; being actually lenient with the petitioner. This can hardly be the answer to the contention of the petitioner that the DDA cannot seek to revive a demand for misuse charges 18 years after the misuse has stopped. The DDA is charged with a statutory duty of ensuring that it takes prompt corrective action after the detection of misuse. Further, the underlying presumption of reasonable exercise of statutory powers in such instance would be that the further corrective action, after the stoppage of misuse, would also be taken within a reasonable time. Just like the DDA cannot seek to prosecute a person for an offence under the Delhi Development Act, 1957 at any length of time, likewise collection of fines and penalties will also have to be done within a reasonable time, if no outer limit for such recovery is specifically mentioned. In other words, there cannot be an open-ended time for recovery of misuse charges....”

40. In a recent decision by a Division Bench dated February 28, 2012 in LPA No.415/2005 titled 'Union of India & Anr v Jor Bagh Association Registered & Ors.' a Division Bench of this Court of which, one of us namely Pradeep Nandrajog J. was a member, observed as under:-

“Suffice would it be to state 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 norms that no person can be penalized for no fault of his and that constructive liability cannot be fasten except when a law expressly so fastens.”

41. With respect to late quantification of the demand towards misuse charges, we may only clarify that a validly made demand, in time, would not disentitle the lessor to recover the misuse charges or make payment of misuse charges a condition for some favour to be granted by the lessor, but it would be not only procedurally unreasonable but even substantively unreasonable to raise back-dated demands with retrospective effect and especially where the demand is on account of a wrong by a tenant who has left the tenanted premises and is no longer available to recompense the landlord.

42. The net result of the above discussion is that the appeal filed by Union of India is dismissed and the cross-objections filed by the respondents are allowed. The demand is quashed in its entirety and needless to state the sum of ₹10 lakhs together with interest accrued thereon which was received by Union of India, which amount was deposited by the respondent is directed to be refunded by Union of India to the respondent within a period of 8 weeks from today, failing which the amount shall carry interest @10% per annum reckoned from 8 weeks from today till the amount is returned and if within 8 weeks the amount is not refunded, the respondent

would be entitled to seek restitution and for which purpose the present decision would be treated as a decree in favour of the respondent and against the appellants.

43. Parties shall bear their own costs all throughout.

(PRADEEP NANDRAJOG)
JUDGE

(MANMOHAN SINGH)
JUDGE

AUGUST 06, 2012
KA/dk