

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CM(M) No. 772/2014

%

25th August , 2014

NARAIN DASS P. GODHWANI

.....Petitioner

Through: Mr. A.K.Singhla, Sr. Adv. with Mr.
Pramod Ahuja and Mr. Ritesh Katei,
Advocates.

VERSUS

NENU MAL (NOW DECD.)

REPRESENTED BY HIS LEGAL HEIRS

..... Respondents

Through: Mr. J.C.Mahendroo, Advocate.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **Yes**

VALMIKI J. MEHTA, J (ORAL)

Caveat No. 712/2014

Counsel appears for the caveator. Caveat stands discharged

CM(M) No. 772/2014 & CM No. 13659/2014 (stay)

1. This is a petition filed under Article 227 of the Constitution of India impugning the concurrent judgments of the courts below; of the Rent Controller Tribunal dated 30.5.2014 and the Additional Rent Controller

dated 2.7.2010; by which the eviction petition filed by the respondents (legal heirs of original landlord Nenu Mal) under Section 14(1)(a) of the Delhi Rent Control Act, 1958 (in short 'DRC Act') has been decreed.

2. The facts of the case are that the petitioner was a tenant of the suit/tenanted premises comprising of a basement of approximately 800 sq. ft. in the property no. II-D/41-B, Lajpat Nagar, New Delhi at a rent of Rs. 800/- per month under a rent deed dated 9.4.1987. The rent was subsequently enhanced to Rs.880/- per month w.e.f January, 1996. Sh. Nenu Mal/landlord served a legal notice dated 14.5.1996 to the petitioner/tenant to pay the arrears of rent w.e.f 1.2.1996, but since according to the respondent/landlord the legal notice was not complied with by paying or tendering the rent within a period of two months, the subject eviction petition was filed.

3. It may at this stage be noted that the defence of the petitioner/tenant was struck off vide order dated 6.10.2005 on account of non-compliance of the order to pay *pendente lite* rent under Section 15(1) of the DRC Act passed on 29.7.2004. The petitioner/tenant has therefore led no evidence. Also in this regard it must be noted that there cannot be such cross-examination in a case where defence has been struck off which cross

examination will amount to allowing a tenant to lead evidence on a defence which does not exist on account of defence being struck off.

4. Respondent/landlord examined two witnesses PW1 and PW2 and proved case of non-payment of rent. The rent deed was proved as Ex.AW1/2 showing rent at Rs.800/- per month, the notice by which rent was increased by 10% as permitted by Section 6-A and 8 of the DRC Act is dated 6.1.1996 and was proved as Ex.AW1/16, and the postal receipt and AD card with respect to the notice are exhibited as Ex. AW1/7 and Ex.AW1/8 respectively. The legal demand notice under Section 14(1)(a) of the DRC Act dated 14.5.1996 has been proved and exhibited as Ex.AW1/9 and the postal receipt and UPC with respect thereto have been proved and exhibited as AW1/10 and Ex.AW1/11. Benefit of Section 14(2) of the DRC Act was not given to the petitioner/tenant on account of non-compliance by the petitioner/tenant of the order dated 29.7.2004 passed for payment of *pentente lite* rent under Section 15(1) of the DRC Act.

5. A reading of the impugned judgments shows that the relationship of landlord and tenant was admitted. Service of notice under Section 14(1)(a) of the DRC Act dated 14.5.1996 was proved by the respondent/landlord. There is no evidence led by the petitioner/tenant that

within a period of two months of service of this notice the petitioner/tenant has paid or tendered the arrears of rent from February 1996 at the rate of Rs.880/- per month to the respondent/landlord. The courts below are therefore totally justified in decreeing the eviction petition for non-payment of rent under Section 14(1)(a) of the DRC Act.

6. I may at this initial stage observe that there was a provision of second appeal under Section 39 of the DRC Act, 1958 as per which second appeals could be filed on substantial questions of law but that provision stood repealed by Act 57 of 1988. Once the provision of second appeal is repealed by the legislature, petitions under Article 227 of the Constitution of India cannot be filed as a substitute for a second appeal under a repealed provision of Section 39 of the DRC Act. This I am so stating because if the scope of Section 39 was limited, then after the repeal of that section, petition filed under Article 227 of the Constitution of India has to deal with keeping in mind that the scope of Article 227 of the Constitution of India so as to challenge concurrent judgments of the courts below would be further limited.

7. Learned senior counsel for the petitioner/tenant argued before this Court the following aspects:-

(i) There is no default of non-payment within a period of two months inasmuch as, the respondent/landlord had with him a security deposit amount of Rs.75,000/-, and consequently, the amount towards arrears of rent was liable to be adjusted with respect to the amount available with the landlord as security deposit, and if so done, there is no default for a petition to be filed under Section 14(1)(a) of the DRC Act.

(ii) Petitioner/tenant had deposited the amount under Section 31 of the Punjab Relief of Indebtedness Act, 1934, and deposit under which Act should be taken as a compliance of notice under Section 14(1)(a) of the DRC Act.

(iii) The petitioner had shifted his residence from the address at which the demand notice (Ex.AW1/9) dated 14.5.1996 was sent and hence since notice is not validly served no petition on such notice could be filed.

8. So far as the first argument is concerned, reliance is placed on behalf of the petitioner upon two judgments of the Supreme Court in the cases of ***G.Reghunathan Vs. K.V.Varghese (2005) 7 SCC 317*** and ***K. Narasimha Rao Vs. T.M.Nasimuddin Ahmed (1996) 3 SCC 45***. So far as the case of ***G.Reghunathan (supra)*** is concerned, reliance is placed upon para 15 of the said judgment and which reads as under:-

15. Now, the claim under Section 11(2) of the Act. There cannot be any dispute that the tenant had not paid the rent from 5-10-1988 onwards as claimed by the landlord. He had deposited the rent in the proceeding. If he has done so, it is relevant only for considering the question whether he is entitled to relief in terms of Section 11(2)(c) of the Act. The only question is whether the fact that he had paid a sum of Rs. 85,000/- as security, which the landlord was liable to refund to him at the time of his vacating the room, could be taken note of as an amount available with the landlord for being adjusted against the rent due. Under Section 8(1) of the Act, the landlord is not entitled to take any premium or other like sum. Under Section 8(2), he could receive or stipulate for payment only, an amount not exceeding one month's rent by way of advance. In both cases, if he has received it, it becomes refundable at once. Hence, it would be an amount available with him. In *Issac Ninan v. State of Kerala* : 1995 (2) KLT 848) the High Court has declared that provisions relating to fair rent, that is, Sections 5, 6 and 8 of the Act; put together, are ultra vires the Constitution of India and are void. The questions may have, therefore, to be considered without reference to Section 8 of the Act. In a case where a substantial amount had been received as advance at the time of letting, which was liable to be refunded without interest on the expiry of the lease, this Court held in *Modern Hotel v. K. Radhakrishnaiah*,: (1989) 2 SCC 686, that when the amount of arrears of rent was smaller than the advance amount held by the landlord on account of the tenant, there was no default in payment of rent and the grant of eviction on the ground of arrears of rent was not justified. This was reiterated in *K. Narasimha Rao v. T.M. Nasimuddin Ahmed* : 1996 (3) SCC 45). For the purpose of this case, especially when the tenant had pleaded that he had deposited the rent even while filing his objection in the Rent Control Court, we do not think that it is necessary to pronounce finally on this question. We feel that it is only necessary to clarify that the tenant will have two months from today to deposit the rent in arrears till date and the other sums in terms of Section 11(2)(c) of the Act so as to avert the execution of the order for eviction on the ground of arrears of rent granted under Section 11(2) of the Act. (underlining added)

9. So far as the judgment in the case of *K. Narasimha Rao* (*supra*) is concerned, reliance is placed upon paras 4,8,9 and 10 of the judgment and which read as under:-

“4. It was admitted that a sum of Rs. 3000/- was paid by the respondent to the appellant as advance even though according to Section 7(2) of the Tamil Nadu Buildings (Lease and/Rent Control) Act, 1960, (hereinafter referred to as "the Tamil Nadu Act") the landlord could receive only one month's rent in advance. Accordingly, the excess amount of Rs. 2850/- paid as advance by the tenant to the landlord was required to be refunded by the landlord. The question, therefore, is whether the said excess amount paid by the tenant to the landlord being available with the landlord, the tenant can be held to have committed wilful default in payment of rent even though he had not expressly asked the landlord to adjust that amount towards the arrears of rent.

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8. The provisions in Sub-sections (1) and (2) are similar and provide for cases where fair rent has been fixed or not fixed, as the case may be. Sub-section (3) declares any stipulation in contravention of Sub-section (1) or Sub-section (2) to be null and void. In this case, it is admitted that fair rent of the building had not been fixed and, therefore, Sub-section (2) applied. Clause (a) of Sub-section (2) enacts that a landlord is entitled to claim and receive only the agreed rent, which was Rs. 150/- per month in this case. The proviso to Clause (a) permits the landlord to receive by way of advance an amount not exceeding one month's rent only i.e. Rs. 150/- in the present case. Clause (b) provides for the situation where any sum is paid by the tenant to the landlord in Clause (a), i.e., any sum paid in excess of the agreed rent and an amount not exceeding one month's rent by way of advance. Clause (c) enacts that the amount in excess of the sum which the landlord is permitted to take under Clause (a) shall be refunded by the landlord to the person by whom it was paid, i.e., the tenant, or at the option of the tenant, shall be otherwise adjusted by the landlord. In other words, Clause (b) requires that the excess amount paid to the landlord has to be refunded by the landlord to the tenant unless the tenant exercises the option of requiring the landlord to otherwise adjust the excess amount. It is clear that this excess amount available with the landlord is only for the benefit of the tenant, the liability to refund the amount to the tenant being immediate unless the tenant exercises the option to get it adjusted otherwise. The character of the excess amount undoubtedly is that it is the tenant's money in the hands of the landlord for return to the tenant or for adjustment towards the dues of the tenant, at the tenant's option. Any other stipulation in contravention to it has no legal effect being null and void.

9. The provision clearly enacts the course to be adopted in the case of any excess amount being paid by the tenant to the landlord, taking into account the factor that the tenant in certain circumstances may be compelled to make payment as advance of an amount in excess of that required to be paid to the landlord according to law. For that situation the provision imposes the legal obligation on the landlord to immediately refund the excess amount to the tenant unless the tenant exercises the option of requiring the landlord to adjust that amount towards any dues of the tenant or in any other manner indicated by the tenant. This provision has the effect of creating a corresponding enforceable right in the tenant to recover the excess amount from the landlord or to have it adjusted for his benefit in case the landlord fails to discharge his obligation of refunding that amount. The provision of adjustment of the excess amount at the option of the tenant clearly visualises its adjustment towards the rent due from the tenant since the jural relationship envisages payment only of rent by the tenant to the landlord towards which it can be adjusted.

10. There is no illegality attaching to the payment of the excess amount by the tenant to the landlord and a legally enforceable right clearly flows from the provision to the tenant. The *pari delicto* principle is, therefore, clearly excluded for the purpose of envisaging the consequences of an excess amount being taken by the landlords from the tenant because the provision requires the landlord to refund that excess amount. The corresponding provisions in the Bihar Act are different which import the *pari delicto* principle. This difference in the language of the provisions of the two enactments distinguishes the cases under the Bihar Act.”

(underlining added)

10(i) Reliance placed upon the judgment in the case of ***G.Reghunathan (supra)*** would not help the petitioner/tenant because a reading of para 15 of the judgment reproduced above shows that the Supreme Court has left the question open ie there is no ratio that security deposit amount is to be adjusted against the advance rent due. Also, there is another reason why the judgment in the case of ***G.Reghunathan (supra)*** would not apply to the present case because the judgment in the case of

G.Reghunathan (*supra*) is with respect to the provisions contained in Kerala Buildings (Lease and Rent Control) Act, 1965 whereas the present case is under the Delhi Rent Control Act, 1958 which contains Section 13 which provides limitation period of one year for refund of excess amount received by the landlord and hence adjustment with respect to any excess amount which is received by the landlord from the tenant will have to be claimed within one year of the excess illegal payment. Section 13 of the DRC Act reads as under:-

“13. Refund of rent, premium, etc., not recoverable under the Act.- Where any sum or other consideration has been paid, whether before or after the commencement of this Act, by or on behalf of a tenant to a landlord, in contravention of any of the provisions of this Act or of the Delhi and Ajmer rent Control Act, 1952 (38 of 1952), the Controller may, on an application made to him within a period of one year from the date of such payment, order the landlord to refund such sum or the value of such consideration to the tenant or order adjustment of such sum or the value of such consideration against the rent payable by the tenant.”

(ii) Therefore, the judgment in the case of **G.Reghunathan** (*supra*) will not apply not only for the reason that no ratio is laid down therein with respect to adjustment of security deposit towards rent, but also because of Section 13 of the DRC Act which provides that any excess amount with the

landlord can only be adjusted within a period of one year of making of that excess payment and not thereafter.

11. The judgment in the case of *K.Narasimha Rao Vs. T.M.Nasimuddin Ahmed (1996) 3 SCC 45* is once again not under the Delhi Rent Control Act, but is under the T.N.Buildings (Lease and Rent Control) Act, 1960 and therefore, the same would not apply to cases to be decided under the Delhi Rent Control Act, 1958 in view of Section 13 of the DRC Act. Another reason why the judgment in the case of *K.Narasimha Rao (supra)* would not apply is also because in the case of *K.Narasimha Rao (supra)* Supreme Court was dealing with the adjustment of advance rent lying with the landlord and not of security deposit amount which was lying with the landlord. Therefore, the judgment in the case of *K.Narasimha Rao (supra)* will not apply to the facts of the present case where the claim is of adjustment and amount lying towards security deposit. It may be noted at this stage that security deposit amount is not only towards adjustment of rent but also for any claim towards any damage to the tenanted premises, as also for claims towards unpaid electricity or water charges by the tenant and so on and which amounts are only known when the tenant vacates the suit premises and therefore, this is another reason why a security amount cannot

be taken towards discharge for payment of rent which falls due under Section 14(1)(a) of the Act.

12. I therefore reject the first argument which is urged on behalf of the petitioner/tenant that the security deposit amount is liable to be adjusted towards arrears of rent claimed under a demand notice sent under Section 14(1)(a) of the DRC Act.

13(i) The second argument which is raised of deposit made under Section 31 of the Punjab Relief of Indebtedness Act, 1934 by distinguishing the judgment of the Supreme Court in the case of *Atma Ram Vs. Shakuntala Rani AIR 2005 SC 3753* as amounting to payment or tender under Section 14(1)(a) of the DRC Act is concerned, this argument is misconceived for two reasons.

(ii) Firstly, a deposit, if could be validly made under the Punjab Relief of Indebtedness Act, 1934 had to be in terms of Section 14(1)(a) of the DRC Act ie within two months of sending of demand notice. It is not disputed before this Court that the deposit under the Punjab Relief of Indebtedness Act, 1934 was made on 4.9.1996 i.e beyond the period of two months of receipt of the legal notice dated 14.5.1996. Therefore, even if deposit under the Section 31 of the Punjab Relief of Indebtedness Act, 1934

is taken as a valid deposit for the purposes of the DRC Act, yet, since the deposit is made beyond the period of two months, as provided under Section 14(1)(a) of the DRC Act, this deposit cannot be considered to be a valid deposit.

(iii) The second reason why the deposit cannot be considered as a valid deposit is because the judgment in the case of *Atma Ram (supra)* of the Supreme Court does not show that the ratio thereof was only to apply prospectively. Putting it in different words, by the judgment in the case of *Atma Ram (supra)* Supreme Court has only declared the law i.e a declaration has been granted that the deposit which is made under the Punjab Relief of Indebtedness Act, 1934 cannot be taken as a valid discharge of liability under Section 14(1)(a) of the DRC Act and therefore once the judgment in the case of *Atma Ram (supra)* is only declaratory of law and declares that there would be no valid deposit under Section 31 of the Punjab Relief of Indebtedness Act, 1934 in view of provision of Section 27 of the DRC Act, therefore, the ratio of the judgment in the case of *Atma Ram (supra)* squarely applies and this is the second reason why the deposit made under the Punjab Relief of Indebtedness Act, 1934 cannot be taken as a valid

discharge of arrears of rent due terminated by the legal notice under Section 14(1)(a) of the Act.

14. The third argument which is urged before this Court that the petitioner has shifted his address, and therefore, the legal notice dated 14.5.1996, Ex.AW1/9 cannot be said to be validly served is an argument which cannot be accepted for the reason that this argument if permitted to be raised will amount to allowing a respondent whose defence has been struck off to lead evidence on a defence that he has vacated his address and hence the presumption under Section 27 of the General Clause Act, 1897 and Section 114 of the Evidence Act, 1872 cannot to be raised and which cannot be as the defence of the petitioner is struck off. It is only if there is a written statement on record in which specifically a defence is taken that the address of the petitioner has changed and therefore legal notice served under Section 14(1)(a) of the DRC Act was not served on a correct addresses, only then the courts would be entitled to look into the plea of the legal notice not being validly served on account of change of address but since the defence of the petitioner was struck off, a plea which is in the nature of defence and which can only be looked into if it is raised in the written statement which is on record, accordingly, such a plea cannot be permitted by courts once the

written statement does not exist on record on account of defence having been struck off.

15. In view of the above, I do not find any merit in the petition, and much less for exercise of the extraordinary and discretionary jurisdiction under Article 227 of the Constitution of India. The petition is dismissed with costs of Rs.50,000/-. Costs shall be paid within a period of six weeks from today.

AUGUST 25, 2014
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VALMIKI J. MEHTA, J.