

\$~5

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

Date of Decision: 06.04.2021

+ **CM(M) 427/2020 & CM No.20355/2020**

SURAJ PRAKASH PAHWA

..... Petitioner

Through Mr.Anshu Mahajan, Mr.
Hemant Gupta and Mr.Vikas
Aggarwal, Advs.

versus

NAND LAL

..... Respondent

Through Mr.Gaurav Seth, Mr.Vipin
Malik, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition has been filed by the petitioner challenging the order dated 18.07.2020 passed by the learned Rent Control Tribunal, dismissing the appeal filed by the petitioner, being RCT No. 33/2019.
2. The respondent herein had filed a petition under Section 44(3) of the Delhi Rent Control Act, 1958 (hereinafter referred to as 'Act') before the learned Additional Rent Controller, claiming that the respondent is a tenant of the petitioner with respect to shop bearing private no. (32-33) on the ground floor of property bearing no. IX/1604, (old no. X-499/3), Sri Krishna Market, Gandhi Nagar, Delhi-110031, and the same is not habitable or usable besides being in a deplorable condition. The respondent asserted that inspite of the legal

notice dated 07.11.2015 being served on the petitioner, the petitioner has failed to carry out the necessary repairs in the tenanted premises to make the same habitable/usable.

3. The petitioner herein challenged the maintainability of the above petition of the respondent on the ground that based on the same legal notice dated 07.11.2015, the respondent had earlier filed a petition under Section 44 of the Act, being RC/ARC No. 947/2016, which was withdrawn by the respondent without seeking leave of the learned Controller to file a fresh petition thereon, vide order dated 26.08.2017. The petitioner asserted that in view of such withdrawal without leave, the subsequent petition filed by the respondent was not maintainable on account of constructive *res-judicata* and under Order XXIII Rule 1(4) of the Code of Civil Procedure, 1908 (CPC).

4. The plea of the petitioner was, however, dismissed by the learned Additional Rent Controller vide its order dated 02.08.2019, observing as under:-

"6. Before averting to the contentions of both the sides, it would be apposite to reproduce Section 44 of The Delhi Rent Control Act, 1958 which provides as under: -

"44. Landlord's duty to keep the premises in good repair. - (1) Every landlord shall be bound to keep the premises in good and tenant-able repairs

It is clear from said provision that it is the primary responsibility of the landlord to keep the tenanted premises in good shape and do tenantable repairs. Only in cases where the landlord neglects to make repairs which the

landlord is bound to make U/s 44 (1) DRC Act, the tenant is required to give a notice in writing to the landlord to make such repairs and in case if the landlord neglects or fails to make the repairs within reasonable time after notice, the tenant can make repairs and deduct the expenses of such repairs from the rent or otherwise recover them from the landlord.

Now coming to aspect that earlier petition was dismissed as withdrawn on the statement of the petitioner side in the opinion of this Court, the provision of Section 44 of DRC Act has been inserted in the Act to ensure that the premises are kept in good and habitable shape. The said provision appears to have been inserted in DRC Act to save life and loss of goods. In the opinion of this Court, a fresh cause of action would accrue with passage of each day for filing of such petition and earlier petition, if any would not amount to res judicata qua fresh cause of action. Moreover, in this matter the earlier petition was only withdrawn and was not finally adjudicated.

The law cited by Ld counsel for respondent regarding the principle of res-judicata being applicable to the writ petitions which are even dismissed as withdrawn may not be applicable to such benevolent provision U/s 44 of DRC Act which is there to save loss of life and of goods. So in the opinion of this Court, the petition is certainly maintainable.”

5. The above order was challenged by the petitioner before the learned Rent Control Tribunal in form of an appeal, which appeal has been dismissed by the order impugned in the present petition.

6. The learned counsel for the petitioner submits that the observations of the learned Additional Rent Controller as approved by the learned Rent Control Tribunal, to the effect that a notice given by the tenant shall give rise to a continuing cause of action whereby repeated petitions can be filed by the tenant, would be contrary to law. He submits that with the filing of the first petition, the cause of action that accrued to the respondent by the legal notice dated 07.11.2015, stood exhausted and with the withdrawal of the said petition without seeking leave to file a fresh petition, the principles of *res-judicata* would be applicable to the proceedings under the Delhi Rent Control Act, 1958 in view of Rule 23 of the Delhi Rent Control Rules, 1959 and as held by this Court in its judgment in ***S. Rajdev Singh v. M/s. Royal Studios & Ors.***, AIR 1972 Del 150. He also places reliance on the judgment of the Supreme Court in ***Avinash Nagra v. Navodaya Vidyalaya Samiti & Ors.***, (1997) 2 SCC 534.

7. The learned counsel for the petitioner further submits that the respondent has falsely asserted that the earlier petition was withdrawn on the basis of some assurances/threats given by the petitioner herein. He submits that the order dated 26.08.2017 passed by the learned Additional Rent Controller in the earlier petition clearly records that the petition was withdrawn as the petitioner was unable to arrange for the Structural Engineer Report to be filed in Court. No such assurance/threat allegedly made by the petitioner was pleaded by the respondent while withdrawing the said petition. He submits that,

therefore, the present petition under Section 44 of the Act filed by the respondent was liable to be dismissed on the ground of *res-judicata*.

8. On the other hand, the learned counsel for the respondent asserts that the tenanted premises are in deplorable condition and are not habitable/usable. He has placed photographs of the tenanted premises on record. He further asserts that the earlier petition was withdrawn on the basis of the assurance/threat given by the petitioner.

9. I have considered the submissions made by the learned counsels for the parties.

10. Section 44 of the Act reads as under:-

“44. Landlord’s duty to keep the premises in good repair. -

(1) Every landlord shall be bound to keep the premises in good and tenantable repairs.

(2) If the landlord neglects or fails to make, within a reasonable time after notice in writing, any repairs which he is bound to make under sub-section (1) the tenant may make the same himself and deduct the expenses of such repairs from the rent or otherwise recover them from the landlord:

Provided that the amount so deducted or recoverable in any year shall not exceed one-twelfth of the rent payable by the tenant for that year.

(3) Where any repairs without which the premises are not habitable or usable except with undue inconvenience are to be made and the landlord neglects or fails to make them after notice in writing, the tenant may apply to the Controller for permission to make such repairs himself and may submit to the

Controller an estimate of the cost of such repairs, and, thereupon, the Controller may, after giving the landlord an opportunity of being heard and after considering such estimate of the cost and making such inquiries as he may consider necessary, by an order in writing, permit the tenant to make such repairs at such cost as may be specified in the order and it shall thereafter be lawful for the tenant to make such repairs himself and to deduct the cost thereof, which shall in no case exceed the amount so specified, from the rent or otherwise recover it from the landlord:

Provided that the amount so deducted or recoverable in any year shall not exceed one-half of the rent payable by the tenant for that year:

Provided further that if any repairs not covered by the said amount are necessary in the opinion of the Controller, and the tenant agrees to bear the excess cost himself, the Controller may permit the tenant to make such repairs."

11. A reading of the above provision would show that it is the duty of the landlord to keep the premises in good and tenantable repairs. Sub-section (2) of Section 44 provides that if the landlord neglects or fails to make the necessary repairs to make the tenanted premises in good and tenantable condition, within a reasonable time after a notice in writing from the tenant, the tenant may make such repairs himself and deduct the expenses of such repairs from the rent or otherwise recover them from the landlord. Therefore, the only pre-condition for the tenant to invoke the right under Section 44(2) of the Act is a service of notice on the landlord. The tenant does not have to take

recourse to the filing of a petition before the learned Controller, before making deduction from the rent as permitted under Section 44(2) of the Act.

12. Sub-section (3) of Section 44, however, relates to where the tenanted premises are not habitable or usable except with undue inconvenience. Here, in case the landlord neglects or fails to make such repairs as may be necessary for making the tenanted premises habitable/usable, the tenant may apply to the Controller for the permission to make such repairs himself, with an estimate of the cost of such repairs, and on such application the Controller may, after giving the landlord an opportunity of being heard and after considering the estimate of cost that the tenant asserts may have to be extended for making such repairs, permit the tenant to make such repairs and recover the cost from the rent or otherwise from the landlord. Under Section 44(3) of the Act, therefore, recourse to the Controller is mandatory for the tenant before making of repairs and making any deduction from the rent payable.

13. The learned counsel for the petitioner has asserted that giving of a notice in writing is also an equally mandatory part of the cause of action and, therefore, the same stood exhausted on the filing of the earlier petition by the respondent/tenant. He submits that without serving a fresh notice, the respondent could not have maintained a fresh petition before the learned Controller.

14. I am unable to agree with the submission made by the learned counsel for the petitioner. As noticed hereinabove, the purpose of a

notice under Section 44(3) of the Act is to put the landlord to notice that the tenanted premises are not in a habitable or usable state and require repairs. Though normally, the tenant is to give such a notice to the landlord before filing of the petition, the petition itself can be considered as a notice to the landlord of such state of affairs. In this regard, it is to be noted that the learned Controller can pass an order on a petition under Section 44(3) of the Act only after granting an opportunity of hearing to the landlord. In such hearing, the landlord can accept the contents of the petition with respect to the state of the tenanted premises and offer to carry out the repairs; or can dispute the contention of the tenant regarding the tenanted premises being uninhabitable or unusable; or can dispute the estimate of cost required for the necessary repairs. The non-service of notice by the tenant prior to the filing of the petition does not in any manner, therefore, cause prejudice to the landlord. The service of prior notice may only be for the benefit of the tenant as in case the landlord agrees to the notice, the tenant may not be burdened with moving the learned Controller for seeking appropriate relief.

15. In *M/s. Jeevan Diesels & Electricals Ltd. v. M/s. Jasbir Singh Chadha (HUF) & Anr.*, (2011) 182 DLT 402, this Court, while rejecting a challenge to the maintainability of a suit on the ground of non-service of a notice under Section 106 of the Transfer of Property Act, 1882, had observed as under:-

“11. The second argument that the legal notice dated 15.7.2006 was not received by the appellant, and consequently the tenancy

cannot be said to have been validly terminated, is also an argument without substance and there are many reasons for rejecting this argument. These reasons are as follows:-

xxxxxxx

(ii) The Supreme Court in the case of Nopany Investments (P)Ltd. v. Santokh Singh (HUF), (2008) 2 SCC 728 has held that the tenancy would stand terminated under general law on filing of a suit for eviction. Accordingly, in view of the decision in the case of Nopany (supra) I hold that even assuming the notice terminating tenancy was not served upon the appellant (though it has been served and as held by me above) the tenancy would stand terminated on filing of the subject suit against the appellant/defendant.

(iii) In the suits for rendition of accounts of a dissolved partnership at will and partition of HUF property, ordinarily it is required that a notice be given of dissolving the partnership at will or for severing the joint status before the filing of such suits because such suits proceed on the basis that the partnership is already dissolved or the joint status of an HUF stands severed by service of notices prior to the filing of such suits. However, it has been held in various judicial pronouncements that the service of summons in the suit will be taken as the receipt of notice of the dissolution of the partnership or severing of the joint status in case of non service of appropriate notices and therefore the suits for dissolution of partnership and partition of HUF property cannot be dismissed on the technical ground that the partnership was not dissolved before filing of the suit or the joint status was not severed before filing a suit for partition of the HUF property by serving of appropriate notices. In my opinion, similar logic can be applied in suits for possession filed by landlords against the tenants where the tenancy is a monthly tenancy and which

tenancy can be terminated by means of a notice under Section 106 of the Transfer of Property Act. Once we take the service of plaint in the suit to the appellant/defendant as a notice terminating tenancy, the provision of Order 7 Rule 7 CPC can then be applied to take notice of subsequent facts and hold that the tenancy will stand terminated after 15 days of receipt of service of summons and the suit plaint. This rationale ought to apply because after all the only object of giving a notice under Section 106 is to give 15 days to the tenant to make alternative arrangements. In my opinion, therefore, the argument that the tenancy has not been validly terminated, and the suit could not have been filed, fails for this reason also. In this regard, I am keeping in view the amendment brought about to Section 106 of the Transfer of Property Act by Act 3 of 2003 and as per which Amendment no objection with regard to termination of tenancy is permitted on the ground that the legal notice did not validly terminate the tenancy by a notice ending with the expiry of the tenancy month, as long as a period of 15 days was otherwise given to the tenant to vacate the property. The intention of Legislature is therefore clear that technical objections should not be permitted to defeat substantial justice and the suit for possession of tenanted premises once the tenant has a period of 15 days for vacating the tenanted premises.”

16. A similar logic would apply to Section 44(3) of the Act as the non-service of prior notice by the tenant does not cause any prejudice to the landlord and the object of such notice can be, in any case, achieved by considering the notice of the petition itself as a notice contemplated under Section 44(3) of the Act.

17. In *Yogender Pal Bhatia v. Rajesh @ Sonu & Ors.*, 2005 (79) DRJ 294, which was also in relation to Section 44(3) of the Act, this Court has held that the philosophy behind rent control legislation is to avoid exploitation of a tenant by an unscrupulous landlord. It is, therefore, necessary to give a meaningful and pragmatic interpretation to the rights of tenants and obligations of landlords under the rent laws. Applying the above test, I see no impediment in holding that the petition under Section 44(3) of the Act itself can be treated as a notice to the landlord as contemplated by the said provision.

18. Even otherwise, in the facts of the present case, the notice in writing has admittedly been given by the respondent/tenant. The same was followed with a petition before the learned Controller, however, was withdrawn on 26.08.2017, when the following order was passed by the learned Additional Rent Controller:-

“26.08.2017

Statement of Sh. Gaurav Seth, Enrollment No. D-865/2000, Chamber No. D-319, KKD Courts, Delhi-32, Phone No. 9717355900.

I am counsel for the petitioner in the present petition. I have instructions from petitioner to make the present statement.

Petitioner has instructed that he has not been able to arrange the structural engineer report to be filed in the court and as such he has instructed me to withdraw the present petition. I may be permitted to withdraw the present on behalf of petitioner.”

19. The respondent has thereafter, filed the present petition under Section 44 of the Act. As long as the premises have remained uninhabitable/unusable, the cause of action would continue to subsist with the tenant. The learned Additional Rent Controller has rightly held that keeping in view the object of the provision, insistence of a fresh notice may not be mandatory. In fact, as held by me above, the petition filed by the respondent itself can be considered as a notice under Section 44(3) of the Act, giving rise to a fresh cause of action. Therefore, provisions of Order XXIII Rule 1(4) CPC may not come to the aid of the petitioner herein.

20. I, therefore, find no merit in the present petition. The same is dismissed.

21. As the petition filed by the respondent before the learned Additional Rent Controller is pending since October, 2018, the learned Additional Rent Controller is requested to expedite the consideration thereof and adjudicate thereon, preferably within a period of four months from the next date of hearing fixed before it.

22. There shall be no order as to costs.

NAVIN CHAWLA, J

APRIL 6, 2021/NS

A.