(2012) 11 P&H CK 0114

High Court Of Punjab And Haryana At Chandigarh

Case No: C.R. No. 5695 of 1998

Mulakh Raj	APPELLANT
Vs	
Neeraj Kumar	RESPONDENT

Date of Decision: Nov. 3, 2012

Acts Referred:

- Haryana Urban (Control of Rent and Eviction) Act, 1973 - Section 1, 1(2), 1(3)

Hon'ble Judges: K. Kannan, J

Bench: Single Bench

Advocate: Amit Jain and Mr. Jaivir Chandel, for the Appellant; Ashwani Chopra and Mr. Harminder Singh, for the Respondent

Final Decision: Dismissed

Judgement

K. Kannan, J.

The tenant is the revision petitioner. The petition for eviction had been ordered with reference to a non-residential building namely the shops in question on the grounds: (i) of default in payment of rent; (ii) change of user of the building and (iii) material alterations in respect of building that has caused impairment in value and utility. The admitted case was that the tenant obtained the property on a rent note dated 19.07.1986 for Rs. 450/- per month. The rent note was with respect to buildings at door Nos. 10 and 11. The landlord contended that the respondent had failed to pay the rent w.e.f. March, 1990 till the date of filing of the petition, that is, for a period of 7 months aggregating the arrears to be Rs. 3150/- plus house tax. The plea of change of user of the building was rested on a contention that the property was let out for establishing a halwai shop, karyana and general merchants but the respondent had changed the user of the building by storing and selling cement without the written consent of the landlord. There had been an extensive addition or alteration of building that consisted of constructing a wall between the two door numbers and raising a permanent structure, that is, upto the front of the shop so as to materially impair the value and utility. The landlord has also brought

about an application indicating the nature of property as existed at the time of original letting and the manner of alterations that had been made by the tenant at the time when the petition had been filed. The rough sketch filed along with the petition would reveal that verandah, which was attached to shop No. 11 on the south of about 6'' width was later converted into a room by raising a wall on the eastern side. A partition wall had been raised at CD in portion of the property in Shop No. 11 and one more partition wall had been raised with a door of about 3'' width between door No. 10 and door No. 11. A chabutra that allowed for 6'' wide projection had been enclosed by a bhatti adjoining Shop No. 10 on its north. There was no dispute with reference to the arrears of rent since the same had been tendered in the course of proceedings and therefore, the case was taken up for consideration only with reference to the other two remaining grounds. The Rent Controller found as a matter of fact that out of the two buildings in question, one building had been constructed only in the year 1983-84 admittedly and when the petition was filed on 17.07.1990, one of the buildings namely Shop No. 11 was a new building to which the provisions of the Act u/s 1(2) of the Haryana Urban (Control of Rent and Eviction) Act, 1973 (hereinafter referred as the Haryana Act) itself was not attracted. Consequently, the Rent Controller had directed eviction only with reference to Shop No. 10 since he found that the fact that there had been an alteration in original of the building was not in dispute. The tenant admitted all these alterations but it was contended that they were intended to enhance the value and utility and there were such alterations, which were temporary and possible of restoration to the building''s original condition at the time when the property was to be delivered back to the landlord. The Rent Controller had also found that the tenant had again not denied the nature of change of user of property by bringing the property for sale of cement and the said ground of change of user had also been established.

2. The appeals had been filed by both the landlord and the tenant. The landlord was contending that the eviction must have been with reference to both the buildings namely Door No. 10 and 11 while the tenant was contending that even the order of eviction that was made with reference to one of the shops was wrong since the act complained of did not constitute actionable grounds for eviction.

3. The Appellate Court found that there were no pleadings that the shops were constructed within a period of 10 years of the institution of the application and that the bar of institution of the petition applied to such alleged new construction. The Court however found that the landlord-Neeraj Kumar while appearing as AW-2 had admitted that Shop No. 10 was constructed in the year 1970 while the construction in Shop No. 11 was completed nearly in the year 1983-84. When the admission was elicited in the course of proceedings although there was no specific averment relating to the maintainability of the petition was taken up, the Rent Controller framed an additional point for consideration regarding maintainability of the petition at the request of counsel for the petitioner as issue No. 5A. Both the parties

did not volunteer to let in any additional evidence on the basis of additional issue and relying on the admission of the landlord that Shop No. 11 had been constructed only in the year 1983-84, the Appellate Court observed that the shop No. 11 constructed in the year 1983-84, was a part of the building comprised in Shop No. 10 and so the shop No. 11, which was given to the respondent along with Shop No. 10 after removing the middle wall and fixing a lump sum of Rs. 450/- as rent for both the shops, the provision of Section 1(3) itself would not apply to a part of the tenanted premises. Consequently, it reversed the finding of the Rent Controller and found that the petition was maintainable with reference to both the buildings. It also found that the change of user and material alterations had been made in the manner complained of by the landlord.

4. In revision both the parties have relied extensively on judgments rendered by this Court and the Supreme Court with reference to what constitutes change of user that could would cause prejudice to the landlord and the particular acts that could affect the value and utility of the building. Learned counsel appearing on behalf of the tenant would make reliance on Smt. Sangeeta Goel Vs. Smt. Chandrakanta Bansal, that dealt with the provisions of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as the U.P. Act) that contained a similar clause like the provision u/s 1(2) of the Haryana Act by introducing Section 2(2) of the U.P. Act. The said provision provided for an exemption for new buildings and the evidence showed that two shops had been converted into four shops after due sanction. A Single Judge of the High Court held that a suit for eviction on ground of arrears of rent was barred since the shop in dispute was constructed in the year 1990 and assessment had been made saying that it was assessed for the first time in the year 1991. In such an event, the provisions of the Act was not applicable and therefore, only a suit could have been filed for eviction and not a rent control petition. The counsel would also rely on a judgment of the Rajasthan High Court in Deepchand and Sons Vs. Mohan Das and Another, which dealt with the provision of Section 2(2) of the Rajasthan Premises (Control of Rent and Eviction) Act where a big hall had been converted into four shops by putting partition walls. The Rajasthan Court held that it amounted to new construction and the premises had been exempted from the provisions of the Act. In response to these contentions, learned counsel appearing for the landlord would place reliance on a judgment of the Madras High Court in PSM Nazeer alias P.M. Abdul Nazeer v. M/s. M.J. Company 2000 (2) RCR 205 that dealt with the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. Section 30 of the said Act exempted from the operation of the Act any action for eviction with reference to new buildings. The Court held that exemption was only for the benefit of the landlord. The Madras High Court was referring to a judgment of the Supreme Court in Shri Lachoo Mal Vs. Shri Radhey Shyam, that was dealing with the provisions of the U.P. (Temporary) Control of Rent and Eviction Act, 1947. The relevant provision was "nothing in the Act shall apply to any building or part of a building, which was under erection or was construction on

or after January 1, 1951. "In spite of the exemption, the landlord and tenant had entered into an agreement in the year 1962 in respect of the newly constructed buildings and after construction, the tenant had occupied the building. When dispute arose between the parties, the landlord had issued a notice terminating the tenancy and a suit had been filed. The trial Court dismissed the suit holding that the tenant was entitled to the benefits of the Rent Control Act and the suit could not have been filed. The matter was taken in appeal before the District Court, which reversed the judgment of the trial Court and decreed the suit. The High Court upheld the decision of the District Judge. The Court had held that the landlord is entitled to rely on exemption provisions of the Act and the tenant could not be given the benefit of Section 3 namely the immunity from eviction. Before the Supreme Court, the question was whether the landlord could waive his rights by means of an agreement entered into between the parties. The Supreme Court held that general principle was that every one has a right to waive and agree to waive the advantage of law or rule made for the benefit and protection of individual in his private capacity. This is in recognition of the legal maxim Cuilibet licet renuntiare juri pro se introducto. Section 1 of the Haryana Act deals with short tile and extent of the Act. Clause 2 and 3 state as follows:-
(2) It shall extend to all urban areas in Haryana but nothing herein contained shall apply to any cantonment area. [(3) Nothing in this Act shall apply to any building the construction of which is completed on or after the commencement of this Act for a period of ten years from the date of its completion.]

5. I would find that unlike the provision, which the Madras High Court was dealing with in PSM Nazeer''s case (supra) relating to Tamil Nadu Building Lease and Rent Control Act where the Court had observed in paragraph 7 of the judgment that Section 1A of the Act did not employ a language containing a prohibition against or impose any restriction on a landlord and a tenant to enter into an agreement that they would not be governed by that Section. I find in this case that there is surely sub-Section 3, which stipulates that the Act itself would not be applicable in respect of any building, construction of which was completed on or after the commencement of the Act for a period of 10 years from the date of completion of construction. I would not find this judgment to be applicable but I would still hold that there are at least three reasons why the tenant cannot plead the non-applicability of the Act for founding a petition for eviction. One, the plea regarding the non-applicability of the Act must have been expressly stated. It was open to a tenant, who obtained a particular benefit to waive the same. The tenant did not take such a plea in defence. Two, the additional construction was said to have been made in the year 1983. The petition has been filed in the year 1991 but the evidence itself was taken only on 14.03.1999 after the completion of more than 10 years. Consequently, if the petition were to have been filed at the time when the evidence was given, it would have been competent. At any rate, at the time when the judgment of the rent control proceeding was rendered, it was more than 10

years. Three, the petition for eviction itself was not again only in respect of an independent building, which was constructed. I would therefore find that although the rent note had been described in two door numbers, it was an admitted case that construction in Door No. 10 had already been made and a portion of the building in Door No. 11 of the existing structure in Door No. 10 alone had been modified by means of an extension that became a part of the old building. It was not as if the entire construction which was rented out was new to which the division of the building could have been made. When a portion of it had been constructed anew, it ought to be merely taken as a building that had come of what already existed even prior to 10 years. The new edifice that had come about in the year 1983-84 was not a separate entity but a part of the old construction and therefore, the interdict against construction in respect of new building did not apply. I would, therefore, uphold the finding of the Appellate Court and proceed to dispose of the case on the basis of two grounds that had taken up with reference to a claim for eviction.

6. Adverting to the plea that there was change of user of the building from a property let out for the purpose of carrying on a business as general merchant with specific reference to the nature of business namely halwai shop, learned counsel appearing on behalf of the tenant-revision petitioner would refer to a free english translation made for the recital in the rent note to mean that it was for "running business in sweet shop and tea or bakery or grocery or general merchant." This, according to him, meant that within the wide meaning of the expression general merchant, the specification of sweet shop, tea, bakery and grocery were illustrative of the activities of a general merchant and they were not meant to restrict any other use that could be described as falling within such definition. Consequently, if the tenant had used the property also for storing and selling cement and cement products, it was an activity that conformed to his business as a general merchant and therefore, there was no change in user in the manner contemplated by the Haryana Act to found a cause of action for eviction.

7. Learned Senior Counsel appearing on behalf of the landlord would, however, plead for a restrictive use of the expression general merchant by pointing out to a clause No. 3 of the rent note that specifically recited that the tenant shall not make any alterations and shall not install any machinery apart from the above said business and shall not do any other business. Since the specific instances of the business as general merchant were stipulated as sweet shop, tea or bakery or grocery, the parties had even taken care to insert a specific recital that the first party namely the tenant shall not install a hearth, rather he shall use only gas and stove. Learned Senior Counsel would, therefore, argue that the restriction against tenant from installing any other machinery and doing any other business alongside a restriction for installation of a hearth were meant only to ensure that the property did not undergo any change in user of the building. The landlord in evidence as AW-2 had specifically made reference to construction of a hearth on the left side while entering the shop, which was to a height of about 3'' and that it had been

demolished only 10 to 15 days prior to the filing of the petition. It had been elicited in the evidence that the tenant had been doing business in cement for a number of years and he was selling sand, bajri etc. along with cement which were kept at the road.

8. Learned counsel appearing on behalf of the tenant would rely on judgment of the Supreme Court in Mohan Lal Vs. Jai Bhagwan, , dealing with some provision regarding the change of user under the Haryana Act. That was a case where a shop had been let out for running liquor business and the tenant had subsequently changed the business as general merchant. The Supreme Court held that if a building is rented out for business, there would be no change of user if another business was carried out, for that would not damage the building or create a nuisance. A Single Judge of this Court had reiterated the position in Jagdish Chand Vs. Surinder Kumar, that held that a change of business from a cloth merchant to sale of stationery items would not amount to change of user. Learned Senior Counsel appearing on behalf of the landlord would rely on a judgment of this Court in Raman Kumar and Another Vs. Chet Singh, that if a shop had been let out for running a tea stall but the tenant had started using the property as hardware store, it amounted to an actionable change of user contemplated under the Act.

9. In the instant case, the fact that there had been a change in user of the property is not in dispute. It is also not in dispute that the rent note made stipulations about carrying on a business as general merchant. The Supreme Court decision in Mohan Lal''s case (supra) must be understood as laying down the law that so long as the change in business was part of the expanding concept of departmental store, the mere addition of one more activity cannot be taken as constituting a cause of action for eviction. It ought to be restricted to such a change, which would fall within the ejusdem generis clause. The Supreme Court was actually dealing with the case of a liquor business that allowed for vending other articles of general merchant as well. The sale of liquor products as part of general merchant was the hallmark in that case that allowed for a flexible approach. In this case the rent note that prescribed the user of the property as general merchant stipulated the nature of activities. This was followed by another clause that restricted the user to ensure that no other activity than the stipulated business could be carried on. Even while admitting that the tenant carried on the business in bakery products, the landlord had ensured to introduce a clause that it would not mean allowing for the tenant to erect a hearth. The landlord was, therefore, introducing a restrictive understanding to the clause of general merchant and by stipulating the nature of business that would fall within that expression was also directing that it would allow for only keeping of certain types of machineries. Intention of the parties to control the nature of user, the nature of installations and the addition that could be made, could not be therefore missed. I would find, therefore, that the tenant had been guilty of changing the business, which was not merely in violation of the terms of the contract but also was bringing about a commencement of a new activity that could prejudice the landlord.

There was definite evidence by the landlord to contend that even apart from cement, there was also sand stacked outside and building materials had been placed outside the shop itself. A prejudice was clearly shown through the evidence brought, which was not inconsistent with the plea that the change of activity had resulted in some form of prejudice to the landlord. I will therefore confirm the findings of both the Courts below that the tenant''s activity was impermissible in the manner that was contemplated between the parties as regards the nature of user of the premises that fell foul of the relevant provisions of the Haryana Act imposing a restriction on the change of user of the building.

10. As regards the case of material alteration, the landlord''s plea was that the tenant had without written consent raised a wall, which was removed by the landlord earlier when the building was let out to him. A rough sketch filed along with the petition showed at point AB in the site plan and at points CD and EF and there had been walls raised by the tenant. A Bhatti in front of the shop in question had been installed. We have already seen the specific terms of the lease, which contains inter alia a clause that the tenant shall not make any alteration and shall not install any machinery and that apart from the above said business (sweet shop, tea or bakery or grocery or general merchant), he shall not do any other business. It also states that the tenant shall not be able to establish a hearth and that he will use only a gas stove. What the tenant had done was a clear violation of every one of the terms. Learned counsel appearing on behalf of the tenant would rely on the judgment of this Court in Narinder Kumar Vs. Smt. Pushpa Gupta and Others, to hold that a tenant, who had raised a temporary wall in front of the shop without foundation to protect entry of flood water and placement of wooden frame could not be taken as reducing the value and impairment of utility of the building. Learned counsel would also refer me to the decision of the Supreme Court in G. Reghunathan Vs. K.V. Varghese, that held in relation to the provisions of Kerala Buildings (Lease and Rent Control) Act, 1965 that a tenant, who took a shop for jewellery business lowered the floor, tampered with the roof and fixed roller shutter in place of rafters could not be said to have caused any impairment to the value and utility of the building. On the other hand, they went to enhance the value and made the building secure for conducting the jewellery business. In Waryam Singh Vs. Baldev Singh, the Supreme Court while dealing with the provisions of the East Punjab Urban Rent Restriction Act, 1949 held that the tenant, who covered the verandah by constructing the side walls and putting a rolling shutter in front without in any way removing the permanent fixtures already made or causing any obstruction to the floor, air and light did not cause impairment of value and utility of the building. In this case, the landlord was complaining of violation of the terms of the lease themselves. If the landlord had originally removed some walls and made them as a single composite building although it still carried two door numbers in municipal records, the tenant could not have raised walls within the building and caused partitions. Learned counsel appearing on behalf of the revision-petitioner

tenant would contend that even the expert did not find that these walls which had been removed by the landlord previously to make a single composite building caused any damage to the roof. This, according to him, meant that walls were not really supporting the roof and a subsequent erection of walls within the building, which were temporary in nature could not be said to constitute impairment in value of the building. The placement of bhattis, which was specifically barred under the lease terms and construction of walls, which was again specifically stated as being impermissible clearly showed what the parties were bargaining for. The tenant cannot contend in the face of such express terms that he was at liberty to make any alteration to suit his own business. It is a trite law that the nature of impairment that the Court would be considered should be through prism of the landlord''s perspective. Surely it cannot be arbitrary but they have to be inevitably considered in the light of whether the landlord''s objection was reasonable or not and whether the tenant''s act constituted violation of statutory terms. I have no doubt in my mind that the tenant had indulged in acts which were contemplated by parties as actionable and which the law sanctions as making possible for a landlord to secure an order of eviction. The order of the Appellate Court would stand confirmed and the revision petition filed by the tenant would require to be dismissed and accordingly dismissed. Time for eviction 4 months.