DELHI HIGH COURT

Batto Mal

Vs.

Rameshwar Nath, (Delhi)

S.A.O. No. 45 of 1966
(Hardyal Hardy and V. S. Deshpande, JJ.)

6.5.1970

JUDGMENT

V.S. Deshpande, J.

1. This is a second appeal under section 39(2) of Delhi Rent Control Act, 1958 by the tenant whose eviction has been ordered both by the Controller and the Rent Control Tribunal under provisos (e) and (h) to section 14(1) of the said Act, i.e. because the landlord requires the premises *bonafide* for his own residence and because the tenant has acquired possession of separate residence for himself.

2. Originally the tenant-appellant attacked the decision of the tribunal on various grounds, namely, that the respondent-landlord was not proved to be the sole owner of the premises, that the respondent-landlord has not been able to prove that he requires the premises *bonafide* for his own residence, that the landlord had not terminated the contractual tenancy by a notice given under section 106 of the Transfer of Properly Act, 1882 and, therefore, he could not maintain a petition for eviction under section 14 of the Delhi Rent Control Act, 1958 and lastly that the proviso (h) to Section 14(1) of the said Act had not been satisfied in as much as the tenant did not continue in vacant possession of a separate residence till the date on which the petition for eviction was instituted by the landlord which petition could not, therefore, be maintained.

3. The respondent-landlord urged that the plea regarding alleged non-compliance with section 106 of the Transfer of Property Act by the landlord could not be taken by the tenant for the first time in second appeal in as much as he was deemed to have waived it by his failure to raise it before the Controller. He tried to raise it before the Tribunal by way of an amendment of his written statement but the Tribunal rightly rejected the application for amendment.

4. The appeal came up for hearing before Hardy. J. He held that the first two grounds of attack by the appellant-tenant did not involve any substantial question of law but did involve pure findings of fact. They could not, therefore, be urged in the second appeal under section 39(2) of the Act which restricted the scope of the second appeal to a substantial question of law only. The other two contentions of the tenant, namely, whether an application for eviction could not be instituted before the contractual tenancy was terminated by a notice including the counter-plea of the landlord that such a plea cannot be raised for the first time in second appeal and the proper construction of proviso (h) to section 14(1) could be said to be substantial questions of law.

5. The learned Judge then surveyed the existing case law as on these two questions and found that the opinion on the first question was decided and no firm view has yet been expressed by this court on it. It was necessary, therefore, to refer the first question for consideration to a larger bench. When this was being done the learned Judge thought the second as well might be considered by the larger bench.

6. By his order dated 8.1.1970 Hardy, J., therefore, referred the following questions of law to the Division Bench for decision:

> 1. Whether in the case of a tenancy to which section 106 of the Transfer of Property Act 1882 applies, an ejectment application under section 14 of the Delhi Rent Control Act, 1958 can be filed without service of proper notice under section 106 ?
> 2. Whether an objection as to want of notice, if raised by the tenant at the stage of appeal before the Tribunal can be held to have been waived by him for the reason that no such objection had been taken before the Rent Controller ?
> 3. Whether in order to entitle the landlord to the benefit of clause (h) of the proviso to section 14(1) of the Delhi Rent Control Act, 1958 the vacant possession of a residence acquired or built by a tenant or allotted to him may be any time after the creation of the tenancy regardless of whether the tenant is in possession of the same at the time of institution of proceedings for his eviction by the landlord?

Question No. 1.

7. The provisions of section 106 of the Transfer of Property Act, 1882 were made applicable to the Union territory of Delhi with effect from Ist December, 1962. Even before that date however, the principle underlying it was applicable to Delhi in the

same way as it was held applicable to Punjab as being a rule of justice, equity and good conscience and as such applicable in lie absence of any statute. A notice of about 15 days even if not expiring by the end of the month of tenancy was essential to determine a monthly tenancy under this principle. Vide *Sahib Dayal v. Joti Pershad)*[1]. The question whether a notice to determine the contractual tenancy must precede an ejectment application under section 14 of the Delhi Rent Control act, 1958 has relevance to both kinds of tenancy in Delhi, namely those commencing from before 1.12.1962 and those commencing thereafter.

Prior to the enactment of section 14 of the Delhi Rent Control Act, 1958 and its predecessor section 13 of the Delhi & Ajmer Rent Control Act, 1952 and other Rent Control Legislation preceding it, section 106 read with Section 111(h) of the Transfer of property Act was perhaps the only requirement to be complied with by the landlord and the tenant if either of them wanted to terminate a periodic tenancy. It is only after thus determining the contractual tenancy that the landlord could sue the tenant for ejectment in a court of law. What effect did the enactment of section 14 of the Delhi Rent Control Act, 1958 and analogous Rent Control Legislation have on the statutory rights of the landlord and tenant as embodied in section 106 of the Transfer of Property Act ? Two views on this question were possible and were in fact adopted by different courts at different times. The difference between the two views is basically due to the different principles of construction of statutes adopted by them. According to the first view the Rent Control Legislation analogous to section 14 of the Delhi Rent Control Act, 1958 a complete code in itself laying down the whole law of eviction of a tenant by the landlord. Special procedure to give effect to the new law is also provided for. The right of the landlord to evict a tenant under the Rent Control Legislation is an independent one. It according to the provisions of the Rent Control Legislation. It has no connection with the right of the landlord to evict the tenant after the determination of the contractual tenancy by notice under Section 106 of the Transfer of Property Act. The Rent Control Legislation over-rides the provisions of section 106 of the Transfer of Property Act and, therefore, makes compliance by the landlord with them unnecessary. This view was first expressed in *Rawa Singh v. Kundan Lal* [2] and in *Hem Chand v. Smt. Sham Devi* [3] court in *Brij Raj Krishna and another v. Messers S.K. shaw and another,* [4] It was followed in *Bhagwant Singh v. Mrs. N D. Khanna* [5] Recently a Full Bench of the Madras High Court in *M/s. Raval and Co. v. K.G. Romachandran and others,* [6] made an exhaustive survey of different parts of Rent Control Legislation and came to the conclusion that the Madras Buildings (lease and Rent Control) Act of 1960 was a self contained code with special machinery of Rent

Control Tribunals for dealing with applications for eviction of the tenants. It was not, therefore, necessary for a landlord to terminate the contractual tenancy under section 106 of the Transfer of Property Act as a condition precedent for making an application for ejectment under section 12 of the Madras Buildings (Lease and Rent Control) Act, 1960. In *Des Raj and others v. M/s. Ramji Lat Kundan Lal,* [7] , the tenancy had commenced from before 1.12.1962 when the Transfer of Property Act became applicable to the Union territory of Delhi. The Rent Control Tribunal had observed that notice under section 106 of the Transfer of Property Act to terminate the contractual tenancy could not, therefore, be insisted upon. Dua, C.J. (as he then was) observed that he was unable to find anything wrong with this line of reasoning. This observation was of course literally correct in as much as a notice under section 106 of the Transfer of Property Act as such could not be insisted upon when the tenancy had commenced prior to 1.12.62. We however, do not understand the learned Chief Justice to have laid down any broader rule to the effect that even a reasonable notice of 15 days was not necessary to terminate such a tenancy. There is no inconsistency, therefore, between the view expressed by the learned Chief Justice and the view expressed by us above that even when the tenancy commenced prior to 1.12.62 a notice for about 15 days was essential to determine a monthly tenancy. In *Shri Roop Narain Goda and others v. Smt. Krishna Devi Bagadia* [8] the tenancy was initially for a period of 11 months which came to an end on the expiry of the said

period after which the former tenant became only a statutory tenant protected by the Delhi Rent Control Act, 1958. Since the landlord could not evict such a tenant except after satisfying the Controller of the existence of any of the circumstances mentioned in the provisos to section 14(1) of the Delhi Rent Control Act, 1958, the acceptance of the rent by the landlord from the statutory tenant could not be construed as a revival of the contractual tenancy. As the contractual tenancy had been already terminated by efflux of time, it was not necessary for the landlord to give to the tenant a notice under section 106 of the Transfer of property Act to determine it again. This Division Bench decision is not therefore an authority holding that notice under section 106 of the Transfer of Property Act is not necessary to terminate a contractual tenancy before the landlord makes an application for the eviction of a tenant under the provisions of Delhi Rent Control Act 1958.

8. It seems to us that the above mentioned view of the effect of the Rent Control Legislation on section 106 of the Transfer of Property Act implies a virtual repeal of the latter by the former. But neither the Delhi Rent Control Act, 1958 nor the

analogous Rent Control Legislation repeals the provisions of Section 106 of the Transfer of Property Act. Repeal by implication is not favoured by courts. It is only if the Rent Control Legislation is shown to be irreconcilable with section 106 of the Transfer of property Act that the latter could be said to have repealed or over-ridden by the former to the extent of the inconsistency.

9. A similar problem was considered by the Supreme Court in *Northern India Caterers Private Limited and another v. State of Punjab and another* [9] Over and above the general law (Civil Procedure Code) under which the Government could bring a suit for the recovery of its immovable property from an unauthorized occupier. The Punjab Public Premises and Land (Eviction and Rent Recovery) Act 1959 enabled the Government and its officers acting under the said Act to summarily evict unauthorized occupiers of public property after a summary inquiry under the Act and without having to file a suit in a court of law. The question was whether the new Act was a supplementary remedy available to the Government in addition to the primary one under the general law or whether the new remedy completely substituted the old one so that only the new remedy was available and the old was not available to the Government at all. The majority of the Supreme Court held that the new Act gave only an additional remedy to the Government and there was nothing in the new Act to warrant the conclusion that it impliedly took away the right to suit from the Government. Nor was it possible to say that the co-existence of the two remedies would cause such inconvenience or absurdity that the court would be compelled to infer that the enactment of the new Act resulted in an implied deprivation of the Government's right to sue in the ordinary course. In our view, this reasoning can equally apply to rebut the view that Rent Control Legislation impliedly deprives the tenant of the pre-existing protection enjoyed by him under section 106 of the Transfer of Property Act. We may, therefore, consider the second view as to the effect of the Rent Control Legislation on the rights of the landlord and tenant under section 106 of the Transfer of' property Act. The second view was first expressed by the Supreme Court in *Bhaiya Punjalal Bhagwanddin v. Dave Bhagwatprasad Prabhuprasad* [10] The notice to quit under section 106 of the Transfer of Property Act was impugned as invalid. The court had, therefore, to consider whether it was necessary at all to determine the Contractual tenancy by a notice to quit under section 106 of the Transfer of Property Act before the landlord could proceed to evict the tenant under section 12 of the Bombay Rents, Hotel and Lodging House Rates Control Act.. 1947. The court held that the provisions of section 12 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 could operate only after the contractual tenancy is first

determined by the landlord by a notice to quit. Raghubar Dayal, J. observed at pp. 323-324: "The right to possession is to be distinguished from the right to recover possession. The right to possession arises when the tenancy is determined. The right to recover possession follows the right to possession and arises when the person (tenant) in possession does not make over the possession as he is bound to do under law, and there arises a necessity to recover possession through court.....

the provisions of section 12 (of the Bombay Act) deal with the stage of the recovery of the possession and not with the stages prior to it and that they came into play only when the tenancy is determined and a right to possession has come in existence.....

It is for the sake of convenience that the right to possession, by virtue of the provisions of a statute, has been referred to as statutory tenancy."

The above decision was followed by the Supreme Court in *Vora Abbasbhai Alimaomed v. Haji Gulamanabi Haji Safibhai* [11] At page 162, Shah, J. observed that section 12(1) of the Bombay Act applies to a tenant who continues to remain in occupation after the contractual tenancy is determined; it does not grant a right to evict a contractual tenant without determination of the contractual tenancy." In *Anand Nivas (Private) Ltd. v. Anandji Kalyanji Pedhi and ors.*[12] , Shah, J. speaking for the majority made a clear distinction between the contractual tenancy on the termination of which comes into existence the statutory tenancy which is merely the protection given to a tenant by a Rent Control Legislation after the termination of the contractual tenancy by the landlord by a notice to quit. In *Mangilal v. Suganchand Rathi* [13] considered. It stated that "no suit shall be filed in any civil court against a tenant for his eviction from any accommodation except on one or more of the following grounds

> (a) "That the tenant has failed to make payment to the landlord of any arrears of rent within one month of the service upon him of a written notices of demand from the landlord."

This provision is analogous to section 14(1)(a) of the Delhi Rent Control Act and the decision of the Supreme Court as to its construction would, therefore, directly apply to the construction of section 14(1)(a) of the Delhi Rent Control Act. At page 250, Mudholkar, J. speaking for the court observed as follows:

> "The effect of Clause (a) of section 4 is merely to remove the bar created by the opening words of Section 4 on the right which a landlord has under Section 106 of the Transfer of Property Act to terminate the tenancy of a tenant from month

> to month by giving a notice terminating his tenancy. It does not convert a periodic tenancy into one of fixed or indefinite duration nor insert therein a clause of re-entry on the ground of non-payment of rent. The character of the tenancy as one from month to month remains; but to it is added a condition that the unfettered right to terminate the tenancy conferred by Section 106 will be exercisable only if one of the grounds set out in Section 4 of the Accommodation Act is shown to exist".

The necessity of termination of the contractual tenancy before the landlord can proceed to evict the tenant under the Rent Control Legislation is clearly established by the above observations.

10. In *Manujendra Dutt v. Purnendu Prosad Roy Chowdhury & ors.* [14] of the lease required six months' notice for its termination, The landlord, however, filed a suit for ejectment against the tenant without giving the notice. Like section 14(1) of the Delhi Rent Control Act, 1949 also commenced with the words "notwithstanding" anything contained in any other law for the time being in force or in any contract". Shelat, J. speaking for the court observed at P. 480 as follows:-

> "What section 3 therefore does is to provide that even where a landlord has terminated the contractual tenancy by a proper notice such landlord can succeed in evicting his tenant provided that he falls under one or more of the clauses of that section. The word "notwithstanding" in section 3 on a true construction therefore means that even where the contractual tenancy is properly terminated, notwithstanding the landlord's right to possession under the Transfer of Properly Act or the contract of lease he cannot evict the tenant unless he satisfied any one of the grounds set out in section 3".

At p. 483 his lordships further observed as follows:-

> "In our view the construction placed by the High court on section 3 was not correct and the High court was wrong in holding that the words "notwithstanding anything contained in any other law for the time being in force or in any contract" absolved the respondents from their obligation to give the six months notice to the appellant before claiming from him vacant possession of the landlord in question".

11. Learned counsel for the respondents argued that, the opening words of section 14(1) of the Delhi Rent Control Act were sufficient to distinguish the case before us from those decided by the Supreme Court. These words are as follows:-

> "Notwithstanding anything to the contrary contained in any other law or contract, no order or decree for the recovery of possession of any premises shall be made by any Court or Controller in favour of the landlord against a tenant."

It is true that such a non obstante clause was not present in the Bombay and the Madhya Pradesh Rent Control Legislation considered by the Supreme Court. In our view, however, the presence or absence of non obstante clause is of little consequence. In either case the question for decisions is, whether the provisions of Section 106 of the Transfer of Property Act are repealed, superseded or over-ridden by the Rent Control Legislation. It is only if the Rent Control Legislation can not stand side by side with section 106 of the Transfer of Property Act that such an implied repeal can come about. Even the presence of non obstante clause in Calcutta Thika Tenancy Act, 1949 and in the Delhi Rent Control Act does not necessarily mean that the provisions of section 106 of the Transfer of Property act are repealed thereby. From the point of view of the landlords it is generally argued that the landlords have been given a new right by the Rent Control Legislation to evict tenants on the grounds specified therein. In our view this is a wrong way of looking at the Rent Control Legislation. Its effect is to place additional restriction on the right of the landlord to evict the tenant even after the termination of the contractual tenancy. The thrust of the non obstante clause in section 14(1) is against the landlord. What it says is, even if the landlord is entitled to evict the tenant under the general law after a notice to quit still the Rent Control Legislation will continue to protect the possession of the tenant unless some further defaults or mis-conduct by the tenant or the needs of the landlord specified therein are provided by the landlord to the satisfaction of the Controller. It is not possible, therefore, to distinguish the above mentioned decisions of the Supreme Court which clearly lay down that the determination of contractual tenancy is essential before an ejectment application can be filed by a landlord against a tenant according to the Rent Control Legislation. We are fortified in this view by the Full Bench decision of the Punjab and Haryana High Court in *Bhaiya Ram v. Mahavir Parshad* [15] adopting the second view after over ruling the decision in *Bawa Singh v. Kundan Lal* [16].which had formed the basis of the first view. Our view as to the effect of non obstante clause is further supported by the decision of a Full Bench of five judges of Calcutta High Court in *Surya Properties Private Ltd. and others v. Bimalendu Nath Sarkar and others* [17] section 13(6) of the West Bengal Premises Tenancy Act, 1956 which was considered by their lordships was as follows :-

> "Notwithstanding anything in any other law for the time being in force, no suit or proceeding for the recovery of possession of any premises on any of the

grounds mentioned in sub section (1) except the ground mentioned in clauses (j) and (k) of that sub-section shall be filed by the landlord unless he has given to the tenant one month's notice expiring with a month of the tenancy".

At first blush it would appear that the above provision completely superseded section 106 of the Transfer of Property Act. Nevertheless, their Lordships pointed out that the notice under section 13(6) was a notice of suit while section 106 of the Transfer of property Act required a notice for the determination of the contractual tenancy. The two notices were different and, therefore, section 13(6) did not supersede or repeal the provisions of section 106 of the Transfer of Property Act. In section 14(1) of the Delhi Rent Control Act there is no such provision for month's notice expiring with the month of tenancy. It cannot be argued, therefore, that section 14(1) can at all have the effect of repeal or supersede of section 106 of the Transfer of the Property Act. Our finding on question No. 1 therefore, is in negative.

Question No. 2.

12. Waiver is of a right. Such a right may be based either on a contract or a statute. The terms of a contract are subject purely to the agreement between the parties. Courts are, therefore, inclined to uphold reasonable arrangements for the relaxation of contractual terms between the parties. The waiver of a contractual right is, therefore, close to acquiescence by conduct. (vide Cheshire & Fifoot Law of contract, 7th Edition, pages 500-503). Therefore, if an agreement of lease contains a terms as to how the lease is to be terminated then the parties can vary this term and the tenant can abandon his right to a notice altogether if he wishes to do so.

13. Rights arising out of statutes may be of two kinds, namely, (a) those which are purely for the benefit of a person or a class of persons; and (b) those which represent some public policy or other public considerations with resultant benefit to a person or a class of persons.

14. The tenant has no inherent right that his tenancy should be terminated by a notice. Such a right may be given, to him by his contract with the landlord. In the absence of a contract or usage, section 106 of The Transfer of Property Act requires that a tenancy should be terminated by a notice. This provision is for the benefit of both the landlord and the tenant. As pointed out in *Pritam Singh v. Suraj Pershad* [18] section 106 it self opens with the words "in the absence of a contract or local law or usage to the contrary". These words show that the requirement of notice under section 106 is not rigid. Parties may enter into contract to the contrary at the time of entering into a

lease. Since the lease itself is based on a contract, the parties may agree to vary its terms by a subsequent contract. One of the parties may even agree to abandon a right given to it by section 106 in the absence of a contract to the contrary. If the requirement of notice can thus be waived by an agreement between the parties it would be reasonable to think that it could also be waived by such conduct as would be the evidence of the intention of the parties. For, section 106 itself contemplates that the termination of the lease may come about otherwise than by the notice contemplated therein. Thus viewed, the requirement of notice under section 106 is essentially for the benefit of the parties. The requirement is not mandatory as section 106 itself shows that the tenancy may be terminated in some other way. This is why this statutory right of the tenant must be held to be capable of being waived by him. If the conduct of the tenant in not insisting upon the notice has been acted on by the landlord then the landlord would be altering his position by relying upon the conduct of the tenant and the tenant would be stopped at a later stage from residing from his conduct and raising the objection of want of notice to the suit of the landlord.

15. On the contrary certain statutory provisions give a right or an unity or protection to certain persons as a matter of public policy. Such statutory provisions cannot be waived. This is why, for premises by a tenant was held incapable of being waived by the landlord in (1959) Supplement (2) S.C.R. 217. Similarly when the court does not have inherent jurisdiction to deal with a matter consent of parties cannot give it such jurisdiction and, therefore, the objection to a lack of inherent Jurisdiction cannot be waived as held in *"I. K. Kanakara Thanamma v. State of A. P.*[19] . For the same reason a tenant cannot agree to waive the statutory protection given to him by the provisions of section 14 of the Delhi Rent Control Act, 1958 eviction or the provisions of section 9 and 12 thereof regarding the fixation of standard rent vide *Kaushalya Devi v. K.L. Bansal.)*. [20] It is clear, however, that the requirement of a notice under section 106 is not based on any such mandatory provisions based on a public policy They can, therefore, be waived. Waiver of course implies that the person waiving his right is aware of the right. If he did not know of the right at all, of course there could be no waiver of it by him. The right given to the tenant under section 106 of the Transfer of Property Act vis-a-vis the provisions of section 14 of the Delhi Rent Control Act was a matter of common knowledge especially because it was a statutory right. It would appear from the course of litigation in this court that the tenants were not generally raising the plea of want of notice under section 106 of the Transfer of Property Act in defense to a petition for eviction by the Landlord under section 14 of the Delhi Rent Control Act, 1958 following the Punjab High court view expressed in *Bawa Singh v.*

Kundan Lal 1952 P.L.R. 358 and *Hem Chand v. Smt. Sham Devi* [21] They started raising these pleas mostly after the decision of the Supreme court in *Manujendra Dutt v. Purnendu Prosad Roy Chowdhury & ors*[22]As pointed out by us, however, the Supreme Court has been expressing the view that the provisions of section 106 of the Transfer of Property Act were not superseded by the provisions of the various Rent Control Acts from their decision in (*Bhaiya Punjalal Bhagwanddin v. Dave Bhagwatprasad Prabhuprasad* [23] onwards. We have also pointed out that the mere fact that in Manujendra's case the Supreme Court was dealing with a statute which contained a non obstante clause similar to the non obstante clause in section 14 of the Delhi Rent Control Act, 1958 cannot be used as a point of distinction between those statutes and the other statutes dealt with by the Supreme Court in Bhaiya Punjalal Bhagwanddin's case as also in "Vora Abbashbai Alimahomed's case, Anand Nivas (P) Ltd's case and Mangilal's case. It cannot be said, therefore, that the tenant became aware of the protection given to him by section 106 of the Transfer of Property Act vis-a-vis section 14 of the Delhi Rent Control Act 1958 for the first time after the decision of Manujendra's case by the Supreme Court. As a rule, a statutory right must be considered to become known when the statute is enacted. It would not be correct to argue that such a right becomes known only after the interpretation of the statute by the Court. For the interpretation is not supposed to make new law but only to point out the law which already existed. It is only if a statute is held unconstitutional for the first time by a judicial decision that a right based on such unconstitutionality could be said to become known for the first time by such a judicial decision as was pointed out by S. K. Dass, J. in *Basheshar Nath v. Commissioner of Income Tax (1959) Supplement (1)*[24].

16. This view finds support in the relevant provisions of the Civil Procedure Code. Under Order 6 Rule 4 a party which relies on a particular circumstances such as misrepresentation, willful default etc. and in all other cases where particulars will be necessary beyond such as are exemplified in the forms in Appendix 'A', the particulars shall be stated in the pleadings. The compliance with the provisions of section 106 of the Transfer of Property Act is extremely important in ejectment proceedings between the landlord and tenant. It is, therefore absolutely necessary that the party which relies upon the compliance or non-compliance must give the particulars in the pleadings. Under Order 6 Rule 6 the party interested in stating anything about the performance or otherwise of a condition precedent must make a distinct pleading about it. Under Order 6 Rule 11 it is sufficient to allege the notice as a fact. Under Order 8 Rule 3 it is not sufficient for the defendant to deny generally the ground alleged by the plaintiff.

Under order 8 Rule 4 an evasive denial is not sufficient and may amount to admission by non-traverse. Under Order 8 Rule 5 the denial has to be specific.

17. Ordinarily a landlord suing or applying for the eviction of a tenant must plead that the contractual tenancy has been terminated. If the tenant does not take the plea that the suit or the application is untenable due to the non-termination of the contractual tenancy then he would be either deemed to have admitted the allegation of the landlord by non-traverse or to have waived the benefit of the protection of section 106 of the Transfer of Property Act. If, however, the landlord fails to plead the termination of the contractual tenancy, then the question arises whether his petition for eviction of the tenant would be liable to be rejected for want of a cause of action. In our view, the answer to this question should be in the negative. For, in additions to the termination of the contractual tenancy some other facts such as wrongful acts of the tenant also constitute a cause of action for eviction. The mere omission to mention the termination of contractual tenancy would not amount to a non-disclosure of the whole of the cause of action. For a part of the cause of action would still be disclosed. It is even arguable that the necessity to plead the termination of a contractual tenancy is not so much a matter of setting out the cause of action as one of making a relevant and perhaps necessary pleading.

18. The question whether the failure of the tenant taking the plea of non-compliance with section 106 of the Transfer of Property Act amounts to a waiver of the said plea and whether the landlord is thereby exempted from the necessity to comply with section 106 of the Transfer of Property Act can be answered only after the nature of the compliance with section 106 of the Transfer of Property Act is understood. We have stated above that such compliance is not a jurisdictional condition nor does the inherent jurisdiction of a court or the Rent Controller depend on the satisfaction of this condition. The compliance must, however, be pleaded by the landlord. But the failure to make such a pleading would not ordinarily amount to non disclosure of the cause of action itself. It is for these reasons that we are inclined to the view that the failure of the tenants to raise the objection regarding the non-compliance with section 106 of the Transfer of Property Act at an early stage of the litigation would amount to a waiver of the plea by them. It would depend upon the facts and circumstances of each case when the conduct of the tenant would amount to such a waiver. The greater the delay on the part of the tenant in raising such a plea the greater the probability of his conduct amount to waiver. This court has consistently taken the view that the failure of the tenant to raise such a plea before the Controller would amount to a waiver of such a

plea and, therefore, the plea cannot be raised for the first time in the first appeal much less in the second appeal. (Vide *Des Raj v. M/s Ramji Lal Kundan Lal* [25] *;Inder Singh v. Nanak Chand* [26] *and Pritam Singh v. Suraj Pershad).* [27]

19. In *Niranjan Lal and another v. Chaitanyalal Ghosh and another* [28] the majority of two learned Judges against the dissent of one learned Judge took the view that the contractual tenancy must be determined before a petition for eviction under the Bihar Buildings (Lease, Rent & Eviction) Control Act, 1947 is filed by the landlord. This view is in accordance with the finding given by us on question No. 1. We also need not disagree with the majority view that it was for the landlord to mention in his plaint the fact of determination of the contractual tenancy as one of the facts constituting the cause of action which he is required to state under order 7 Rule 1 Civil Procedure Code. Their Lordships, however, further observed that if the plaintiff-landlord fails to make such a pleadings then the tenant can take the plea of non-compliance with section 106 of the Transfer of Property Act for the first time in second appeal. We find ourselves unable to agree with this observation of their Lordships for the reasons already stated above namely, (1) the plea regarding the termination of the contractual tenancy does not constitute the whole of the cause of action for a petition for eviction with the result that facts constituting the rest of the cause of action would still be before the court; and (2) the non compliance with section 106 of the Transfer of Property Act does not go to the jurisdiction of the court. It is to be further noticed that the statutory requirement of notice under section 106 of the Transfer of Property Act is solely for the benefit of the parties to the contract of the tenancy. There is no public policy behind it. This is why the requirement can be waived by the parties. Contrasting with this requirement the necessity of notice under section 80 Civil Procedure Code may be said to be based on the public policy in as much as the Government has to be given time to consider the claims made against it so that the Government may admit or settle them and unnecessary litigation and the waste of public time and money should be avoided. But even such notice can be waived. In *Vellayan Chettiar and others v. The Government of the Province of Madras and another,* [29] it was held competent to the secretary of the state to waive notice under section 80 Civil Procedure Code and he was held to have been stopped by his conduct from pleading the want of notice at a later stage of the trial. Thus, where the Secretary of the State took, objection to the sufficiency of the notice in his written statement but raised no issue on the point when issues are settled and took no objection during the trial, the court held that another during the trial, the court held that another defendant was not competent to raise this issue at later stage as the Secretary of the State had

waived the notice. A fortiori the requirement of the notice under section 106 of the Transfer Property Act can be waived and it was waived in the present case.

20. In the present case the landlord specifically stated in his petition for eviction under Section 14 (1) in column 18 (b) as follows:

> "Notice not required. But notice dated 9-9-63 was given. Copy attached."

The notice was of a fortnight terminating the tenancy at the end of the month. The landlord also filed the reply received from the tenant to the said notice. In the amended written statement the defendant simply stated that "para 18 (b) of the application is not admitted." This was a very general denial. The tenant did not object to the maintainability of the petitioner on the ground that the contractual tenancy had not been terminated by a notice to quit. The reason was very obvious. The landlord had actually terminated the contractual tenancy and produced a copy of the notice and the reply received from the tenant. The tenant formally denied them merely to put the landlord to their proof. The view current among the Delhi Lawyers in those days was that the Delhi Rent Control Act, 1958 was a self contained code and that it was not necessary that the contractual tenancy should be terminated before an ejectment petition could be filed there under. This was why the landlord expressly averred that no notice was necessary. The tenant was also obviously under the same impression and, therefore, did not object to the maintainability of the petition on the ground of non-compliance with section 106 of the Transfer of Property Act or with the principle underlying it. The Controller was also apparently of the same view. Therefore, the question of compliance with Section 106 of the Transfer of Property Act or the principle underlying it was neither raised by the parties nor decided by the Controller. It was left out as unnecessary for decision by the parties as well as by the Controller. Even when the tenant filed an appeal before the Rent Control Tribunal against the order of eviction passed by the Controller he did not urge that the decision of the Controller was bad because the landlord had not complied with section 106 of the Transfer of Property Act or the principle underlying it. It is only after the Supreme Court decision in Manujendra's case became known that the tenant applied for amendment in his written statement while his appeal before the Tribunal was pending. By the proposed amendment he wanted to plead as follows:

> "That notice as required under Section 106 of the Transfer of Property Act terminating the contractual tenancy of the appellant was never given by the respondent. In the absence of notice terminating the contractual tenancy of the tenant, the application is without jurisdiction and is bad in law. The same does

not lie and is not maintainable and is liable to be dismissed with costs.

The Tribunal rejected the application for amendment and this has been made a ground of appeal by the appellant before us.

21. Normally it is in the discretion of the Tribunal to which the application for amendment is made to allow or reject the same. This court will not interfere with the discretion unless it was exercised illegally or inequitably. In the present case both the law and the equity were against the tenant. He deliberately did not raise the question of notice before the Controller because the notice had actually been given. Moreover the parties land the Controller were of the view, universally held at that time in Delhi, that notice was unnecessary. The landlord, therefore, did not adduce evidence to prove the notice and the tenant's reply to it. The landlord was induced by the conduct of the tenant to believe that the proof of the notice was not necessary. He changed his position by acting on this belief by omitting to prove the notice. After this change of position the tenant is estopped from going back on his previous conduct and now trying to object to the eviction proceedings on the ground of want of notice. In *Union of India v. D. N. Mendal, LXIII Calcutta Weekly Notes 253* the defendant had merely denied the receipt of the notice which was required to be given to him. He was held to be estopped from subsequently raising an object on to the validity of the notice. The facts of the present case are even strongly against the tenant.

22. Even if the application for amendment were to be allowed, the landlord would necessarily have to be given an opportunity to meet the new objection raised by the tenant. The landlord will then simply prove the notice given by him, the reply given by the tenant and the fact that the eviction application was filed more than 15 days later and this may be a sufficient answer to the plea which the tenant is trying to raise *(Burindehing Tea Co. Ltd. v. Dominion of India, [30] Paragraph 9)* though we would not like to express final opinion as to whether the notice was valid or not. In the circumstances it would be futile to allow the tenant to raise such a plea. The decision of the Tribunal in rejecting the application for amendment is, therefore, upheld both on the grounds of law and equity.

23. Learned counsel for the appellant vehemently argued that the plea that the petition for eviction was not maintainable for want of notice raised a pure question of law and the tenant, therefore, be allowed to raise such a plea. In so far as this is a question of law, we have already answered it in question No. 1 above. But in the present case it is a mixed question of fact and law in as much as the landlord had actually given the notice to the tenant. Such a mixed question of fact and law in as much as the landlord

had actually given the notice to the tenant. Such a mixed question of fact and law cannot be allowed to be raised for the first time in second appeal particularly because the present appeal is under section 39(2) of the Delhi Rent Control Act, 1958 only restricted to a "substantial question of law".

Question No. 3.

24. Proviso (h) to section 14(1) of the Delhi Rent Control Act, 1958 is as follows :-

> "(h) That the tenant has, whether before or after the commencement of this Act, built, acquired vacant possession of, or been allotted, a residence."

Learned counsel for the appellant has argued that the words "has..... built, acquired vacant possession of" show that the tenant must have built or acquired vacant possession of a residence before the filing of the petition for ejectment and that these state of affairs must have continued till the date of the filing of the petition. In other words, if the tenant sells away or transfer the possession of the residence to someone else before the petition for eviction is filed against him. If this interpretation is accepted then it would lie in the power of the tenant to destroy the cause of action which has arisen in favor of the landlord and to deprive the landlord of the right to file a petition against him.

25. Apart from the fact that the Legislature could not have intended that the right arisen in favor of the landlord could be so easily defeated at the sweet will of the tenant, we are not at all convinced that the mere use of the word "has" can support the argument of the tenant as to the meaning of the proviso (h) to section 14(1) of the Delhi Rent Control Act, 1958. The cause of action in favor of the landlord arises in three ways namely, (1) if the tenant has built a new residence; (2) he has acquired a vacant possession of it; and (3) he has been allotted a residence. If the tenant has built a new residence, cause of action arisen in favor of the landlord cannot be destroyed at all in as much as it is conceivable that the residence so built can itself be destroyed by the tenant. Even if it is destroyed, the tenant cannot take advantage of his own wrong to defeat the petition filed by the landlord. The same reasoning would apply to the acquisition of vacant possession of a residence by the tenant. The mere fact that the tenant has subsequently disposed of the residence does not efface the fact that he had once acquired it and thus gave a cause of action to the landlord for filing a petition for eviction. Similarly, if a residence is allotted to the tenant, we do not see how in subsequent disposal of the residence by the tenant would bring about. a situation in which the tenant would be deemed not to have been allotted a residence at all.

26. In Mangal Lal's case referred to above, the words of section 4(a) of Madhya Pradesh Accommodation Act were "that the tenant has failed to make payment to the landlord of any arrears of rent". In that case, the tenant subsequently paid up the arrears of rent. It was argued for the defendant that the non-payment of rent must continue till the filing of the suit for eviction by the landlord. This contention was rejected by the Supreme court and it was held that it was not necessary for the landlord to show the non-payment of arrears of rent due till the date of the institution of the suit. Learned counsel for the appellant relied on another supreme court decision in *Gopulal v. Thakurji Shrihi Shirji Dwarkudagji* [31]. But the question in that case was a different one, namely, whether the subletting which was made before coming into force of the Act could be covered by section 13(1)(e) of Rajasthan Premises (Control & Eviction) Act, 1950. It is in that context that it was held that the present perfect tense contemplated a completed transaction even connected in some way with the present time. Therefore, all subletting made whether before or after commencement of the Act were held to be covered by section 13(1)(e). This decision is, therefore, no authority for the proposition that wherever the present perfect tense is used, the state of affairs so described must continue till the filing of the petition for eviction. In our view the scheme of the various provisos to section 14(1) is to set out the different causes of action which arise in favor of the landlord for filing an eviction petition against the tenant. Whether the state of affairs constituting a cause of action trust continue till the filing of the petition for eviction or till the order of eviction is passed or whether its existence at the time of arising of the cause of action is sufficient to enable the landlord to file the eviction petition and obtain an order for eviction depends entirely on the individual nature of each cause of action. No rigid rule can be laid down either that the use of the present perfection means that the state of affairs must continue till the filing of the petition or the passing of the order of eviction or whether it need not continue beyond the date of the cause of action. Provisos (a) (b) (c), (d) and (h) describe certain wrongful acts done by the tenant. The landlord gets the right to apply for eviction of a tenant due to these wrongful acts of the tenant. It cannot, therefore, lie within the power of the tenant to deprive the landlord of the right which has arisen in his favor by pleading that he has since then ceased to continue doing those wrongful acts and, therefore, the cause of action in favor of the landlord should also be deemed to have come to an end. The reason is that these provisos become applicable on the commission of the wrongful acts by the tenant and do not indicate the necessity of the continuance of those wrongful acts. If the tenant at a later date desists from the wrongful acts of changes the situation to make it as it was before

the commission of the wrongful acts, the result is that at a subsequent date the wrongful acts cease to continue. But such a subsequent change cannot wipe out the fact that these acts were committed by the tenant and for some time they continued as such. It cannot be open to the wrongful-doer himself to put the aggrieved party out of court by subsequently charging the situation unilaterally. The same view was expressed by one of us (Deshpande, J) in dealing with proviso (a) to section 14(1) in *Munshi Lal v. Thakur Prem Chand, S.A.O.* [32]

27. On the other hand there are provisos like (e), (f) and (g) which are primarily for the benefit of the landlord without any wrongful act being committed by the tenant. Landlord's own subsequent conduct may deprive him of his right to evict the tenant. For instance if landlord acquires a suitable residential accommodation in some other way then he would not able to continue his claim under proviso (e). Similarly if he abandons his intention to repair or reconstruct the premises, he cannot avail himself of provisos (f) & (g).

28. In the present case the tenant owns other premises which he has let out on rent. One of them fell vacant in 1958 and another in 1962. He must, therefore, be said to have acquired vacant possession of a residence in 1958 and 1962 within the meaning of proviso (h) to section 14(1). On 12.1.1961, the tenant Batto Mal had made as statement before the Magistrate, First Class Delhi, that he would vacate the premises in favor of the landlord as and when his own house would become vacant (vide Exhibit R/1). The tenants house has actually become vacant in 1962. The eviction petition was filed in 1962. Learned counsel for the tenant said that the house which had become vacant in 1962 was not sufficient for the purpose of residence of the tenant. But the tenant cannot be heard to dispute its sufficiency in view of his own admission that he would vacate the premises when his own house would become vacant. Apparently he had thought that his house would be sufficient for his residence nor did the landlord delay too much in filing the eviction petition on this cause of action. It may be that in an exceptional case if the landlord files the eviction petition too long after the tenant obtains vacant possession of a residence for himself then the tenant may defend the eviction petition on the ground that he had in the mean while let out his own residence to some other person as he was not bound to keep it vacant waiting for the landlord to file an eviction petition. The present is not such a case.

29. In view of the above answers given by us to the referred questions the appeal is dismissed with costs.

Appeal Dismissed

Cases Referred.

1. 1968 D.L.T. 182. IV

2. 1952 P.L.R. 358

3. 1955 P.L R. 441 (D.B.) Some support for this view was derived from the observations of the Supreme

4. 1951 S C.W 145.

5. 1964 P L R. 402.

6. AIR 1967 Madras 57

7. 1969 RCR 54

8. 1969 D.L.R. 127 : 1969 RCR 57

9 . (1967) S. C. R. 399.

10. , (1963) 3 S. C. R. 312.

11. (1964) 5 S. C. R. 157.

12. (1964) 4 S.C. R. 892 to pp. 908-909

13. (1964) 5 S.C.R. 239, Section 4(a) of the Madhya Pradesh Accommodation Control Act, 1955 was

14. (1967) 1 S. C. R. 475, (7)

15. 1968 P. L. R. 1011

16. 1952 P.L.R. 358

17. AIR 1964 Calcutta 1

18. 1967 D.L.T. 704

19 (1964) 6 S.C.R. 294

20. 1969 RCR 703 S.C

21. (1967) 1 S.C.R. 475).

22. . (1967) 1 S.C.R. 475).

23. (1963) 3 S. C. R.

24. S. C. R. 528 at p. 589

25. 1969 RCR 54

26. 1969 RCR 79

27. 1967 D. L. T. 704

28. AIR 1964 Patna 401

29. AIR 1947 Privy Council 197

30. AIR 1955 Calcutta 360,

31. 1969 RCR 300

32. 345 of 1967 decided on 31.7.69.