*Before M. R. Sharma and M. M. Punchhi, JJ.*

BHIM SAIN,—*Petitioner.*

*versus*

LAXMI NARAIN,—*Respondent.*

*Civil Revision No.* 1767 *of* 1981.

October 16, 1981.

*Haryana Urban (Control of Rent & Eviction) Act (XI of 1973)—Sections 7 and 13(2) (i) proviso—Eviction of a tenant sought on the ground of non-payment of rent—Tenant denying in the written statement the rate of rent claimed by the landlord—Such tenant nevertheless depositing rent as claimed on the first date of hearing—Such deposit—Whether could be said to have been made under protest—Application by the tenant for determining the quantum of rent payable—Issue regarding the correct rate of rent—Whether could be decided in ejectment proceedings.*

*Held*, that on reconsideration of the entire case law on the subject as also from the light which is forthcoming from the amendment made to the Code of Civil Procedure, it becomes crystal clear that in availing the provisions of the proviso to section 13(2)(i) of the Haryana Urban (Control of Rent & Eviction) Act, 1973, the tenant does not lose the right of claiming an issue on the quantum of rent and a decision thereon from the Rent Controller in the proceedings

for eviction. Such right or claim in respect of the cause of action having accrued to him on and during the pendency of the eviction application, his defence laid in the written statement will have the effect of a cross claim. In the altered general principles of law even if the landlord does not want to continue with the petition for eviction or gets it stayed or dismissed, the counter-claim can nevertheless be proceeded with as visualised under Order VIII, rule 6-D. Specific defence when set up by the tenant in the written statement would itself be an inbuilt protest for the simultaneous availing of the benefit of the proviso by making excess payment as claimed by the landlord and logically for hopeful adjustment of the excess payment thereafter. This is so while applying general principles of the Code of Civil Procedure to further the intendment of the law framers. One of the foremost consideration for the enactment of Rent Control Laws is restrictions on the quantum of rents. Permitting the landlord to take away the excess rent from the tenant frightened to make payment in order to avail of the benefit of the proviso and the Rent Controller wringing his hands that he could do nothing about it would be a fraud on the statute. Section 7 of the Act conceives of a situation where refund would be necessary for excess payments of rent made by a tenant. There is no reason why a claim under section 7 of the Act cannot be determined by the Rent Controller as a cross claim under the Act simultaneous with the eviction petition. Such a course furthers the purposes of the Act rather than frustrate them. (Para 11).

Behari Lal *v.* Ajudhia Dass 1970 Rent Control Journal 671,— DISSENTED FROM.

*Petition Under Section* 13 *of the Haryana Urban (Control of Rent & Eviction) Act*, 1973 *for revision of the Order of the Court Shri B. N. Singal, H.C.S.. Rent Controller cum-Sub-Judge* 1*st Class. Narwana, dated* 3*rd June*, 1981 *dismissing the application.*

Rajesh Chaudhry, Advocate, *for the Petitioner.*

Puran Chand, Advocate, *for the Respondent.*

JUDGMENT

*M. M. Punchhi, J.*

(1) Since doubt was entertained by S. P. Goyal, J. with regard to the correctness of the rule propounded in *Nasib Singh* v. *Om Parkash and another* (1), this petition for revision was admitted by him to a Division Bench. Hence the listing of the petition before us.

(1) 1979 P.L.R. 502.

(2) Facts giving rise thereto are plain and simple. The landlord-respondent had sought eviction of the tenant-petitioner before the Rent Conroller, Narwana on a variety of grounds. One such ground was that the tenant had not paid or tendered the rent due to him and was thus in arrears from 1st March, 1978 till date. The rate of rent claimed was Rs. 110. The tenant while denying the allegations in the evicion petition claimed in his written statement that the rate of rent was Rs. 75 per mensem. All the same to avoid eviction, the tenant availed of the first proviso to section 13(2) (i) of the Haryana Urban (Control of Rent and Eviction) Act, 1973 (briefly referred to as the Act) by making payment of the arrears of rent at the rate of Rs. 110 per mensem as asked for. Having warded off summary eviction, the tenant applied to the Rent Controller that an issue be struck which should determine the rate of rent—whether it was Rs. 75 per mensem or Rs. 110 per mensem. The Rent Controller issued notice on that application to the landlord. He, while resisting it countered, that after the tender of the arrears of the rent, the ground of eviction on the basis of non-payment of arrears of rent had been rendered infructuous and thus the tenant should seek his remedy by filing an independent suit under section 7 of the Act. According to the landlord, there was no necessity of framing the issue sought. Agreeing with the contention of the landlord, the Rent Controller,—*vide* his order, dated 3rd June, 1981, now under challenge, dismissed the appplication.

(3) The learned counsel for the petitioner in suppport of his contention cited before S. P. Goyal, J. *Nasib Singh's case* (supra) as has been done before us. That decision was rendered by my learned brother M. R. Sharma, J. (who is now with me as a partner in the Bench). In addition thereto, he relied on some other Single Bench cases which wholly or partially supported his contention. We propose to deal with each of them presently. On the other hand, learned counsel for the landlord-respondent did not cite before us a single judgment to the contrary.

(4) *In Gayan Parbha and another* v. *Anar Devi* (2) Chief Justice Mehar Singh took the view that it was the duty of the tenant to make payment or make tender of the amount as

(2) C.R. 210 of 1965, decided on 24-3-1967.

stated, and if he fails to do so, he cannot have the advantage of the proviso to clause (i) of sub-section (2) of section 13 of the East Punjab Urban Rent Restriction Act, 1949. In that case, tender had been made by the tenant at the rate owned by her and not as stated by the landlord. That case was decided against the tenant as there was short payment even at the rate calculated by the tenant and in regard to the interest and costs of the application.

(5) In *Dial Chand* v. *Mahant Kapoor Chand* (3) Mehar Singh, C.J. observed as follows:—

> "It is conceivable that a landlord may make an unreasonable claim with regard to the rate of rent in arrears, may be with the dishonest intention of placing the tenant in such a position that he may not be able to take advantage of the proviso, but even in such a case the tenant ought to know the truth, that is to say, the actual rent that he has been paying all along and the rent that has been agreed to by him with his landlord, and if he holds to the actual rent and succeeds in proving that figure, the exaggerated claim by the landlord would come to nothing. In such a case if the tenant complies with the proviso according to the rate which he says is the true rate and proves that to be so, he has the benefit of the proviso and escapes ejectment. This is an aspect of the provision with regard to ejectment for arrears of rent which does give the landlord a certain advantage to harass the tenant by making an unfounded claim of arrears at a higher rate of rent than the actual rent and for this there is not even a provision in the Act for any penal action against the landlord. In spite of this, the proviso being for the benefit of the tenant, if he wishes to take advantage of it he has to comply with it strictly and in a case like the present he can take one of the three courses. He can under protest make payment or tender of the arrears at the rate claimed by the landlord in the ejectment application, and if the rate is found subsequently to be less, he can hope for adjustment of the excess payment. He can come forward with a straight statement of what is the true rate of rent and on that proceed to comply with the proviso, in which case

(3) 1967 P.L.R. 248.

he has the benefit of proviso, if the finding is that the rate stated by him is the rate of rent for the tenancy. Lastly, he can enter into a dispute with the landlord, as in this case, and insist upon his lower rate of rent and then take the consequence if he is not able to prove that that is the actual rent."

The ratio of the decision in *Dial Chand's case* (supra) was followed by D. K. Mahajan, J. in *Ram Sarup* v. *Sham Sunder and another* (4). Thus an issue on question of rent was held claimable.

(6) *In Behari Lal* v. *Ajudhia Dass*, (5) V.D. Misra, J. of the Delhi High Court while interpreting section 13 of the East Punjab Urban Rent Restriction Act, 1949 took the view that the terminology used therein did not show that any duty was cast on the Rent Controller to assess the arrears of rent due independently of the stand taken by the landlord. It was held therein that in a case where the demand of the landlord had been met availing of the proviso to section 13(2) (i) of the said Act, the Rent Controller had no authority to enter into an inquiry to find out as to what the rate of rent was, before dismissing the application of the landlord on this aspect. The duty of the Rent Controller was confined to see whether on the date of hearing the tenant has paid or tendered the arrears of rent asked for by the landlord along with interest and costs. The moment that was done, it was the duty of the Rent Controller to dismiss the application for eviction. It was also held therein that the mere fact that the tenant had paid the rent while reserving his right to recover the excess paid by him, the payment on his behalf could not be termed conditional.

(7) *In Avtar Singh* v. *Maghhi Ram* (6) R. S. Narula, C.J., took the view that if the tenant disputed in his written statement that the rent was lesser than claimed by the landlord but yet tendered rent at the rate claimed by the landlord unconditionally, the subsequent suit of the tenant to recover the excess amount was barred by principles of *res judicata*. This principle was held applicable to the facts of that case since no express reservation had been made, nor could one be implied, in the earlier

(4) C.R. 1185 of 1972 decided on 27-3-1973.

(5) 1970 Rent Control Journal 671.

(6) 1977 (1) Rent Control Reporter 208.

eviction petition and thus the subsequent suit was held barred by principles of constructive *res judicata*.

(8) Lastly is *Nasib Singh's case* (supra) where the view taken by my learned brother M. R. Sharma, J. was that the proviso to section 13(2)(i) of the East Punjab Urban Rent Restriction Act, 1949 nowhere mentioned that a tenant while making the tender of the rent should do so under protest and all that is required is that the tenant should pay the arrears of rent, interest and costs etc. on the first hearing of the application. Such tender was held not to debar the tenant from claiming trial of the issue relating to the quantum of the rent. The principle of "payment under protest" was held not to be so sacrosanct but was held a matter inferable from the facts and circumstances of each case. In any case if the lower rate had been pleaded in the written statement, there was held to be a presumption that the tender made of the rent at the higher rate was under protest or only provisional so that if the decision of the issue regarding quantum of rent ultimately went against the tenant, he could not be deprived of the benefit of the aforesaid proviso. It was also held that the precautionary measure adopted by him did not debar the tenant from insisting upon the determination by the Rent Controller of the rate of rent fixed by the parties by mutual consent.

(9) It is undisputed that the excess rent paid by the tenant is recoverable by him under section 7 of the Act and that an action by way of suit is also not barred. The remedies can be availed of within a period of six months of such excess payments as provided in section 7. The twin question is whether the tenant should file a separate suit to claim refund of the excess payments or can he claim an issue in the eviction petition itself since an event occurring therein gave him the cause of action.

(10) It is well settled that the general principles of the Code of Civil Procedure, 1908 apply to proceedings before the Rent Controller, though strictly the Code as such is not appplicable. It would be useful now to take note of some new provisions inserted by Civil Procedure Code Amendment Act, 1976 operative with effect from 1st February, 1977. These are embodied in Order VIII, rules 6A to 6G. These rules provide for the filing of a counter claim by the defendant in a suit, based upon any right or claim in

respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit, but before the defendant has delivered his defence or the time set out for the purpose. Such counter claim in rule 6A(2) has the same effect as if it is a cross suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter claim. Rule 6A(4) provides that the counter claim shall be treated as a plaint and governed by the rule applicable to the plaints. Principles embodied in rules 6A to 6G of Order VIII as a whole leave no manner of doubt that a counter claim set up by the defendant (in this case the tenant) that the rent settled between the parties was at the rate of Rs. 75 per mensem and not Rs. 110 per mensem is in the nature of a claim or a right, the cause of action of which accrued to the tenant after the filing of the eviction petition and for the plea taken on that behalf in the written statement. The scope of such defence plea, having the effect of a cross-claim is to enable the Court to pronounce the final judgment in one and the same proceedings. These principles which have now come about as a part of the Civil Procedure Code carry out the broader principles of the public policy that there should be avoidance of multiplicity of proceedings and the parties should litigate once for all lest suffer bars of *res judicata* as spelled out in the aforequoted Single Bench decisions. Protest payment at the rate claimed by the landlord or insisted upon by the tenant is necessary to claim benefit of the proviso to avoid eviction. Unless such protest is lodged or inferred, the subsequent suit for recovery of the excess payment would be barred by principles of constructive *res judicata* as held by Narula. C.J. in *Avtar Singh's case* (supra). Protest is to be presumed if a plea is taken in the written statement by the tenant thaf a lesser sum is due, yet the benefit of the proviso is availed of by him making or tendering the amount claimed by the landlord. And the issue of question of rent is capable of being settled in the same eviction petition as held in *Nasib Singh's case* (supra).

(11) On reconsideration of the entire case law on the subject as also from the light, which is forthcoming from the amendment made to the Civil Procedure Code, it becomes crystal clear that in availing the provisions of the proviso to section 13(2) (i) of both the Acts aforementioned, the tenant does not lose the right of claiming an issue on the quantum of rent and a decision thereon from the Rent Controller in the proceedings for eviction. Such right or claim in

respect of the cause of action having accrued to him on and during the pendency of the eviction application, his defence laid in the written statement will have the effect of a cross claim. In the altered general principles of law, even if the landlord does not want to continue with the petition for eviction or gets it stayed or dismissed, the counter claim can nevertheless be proceeded with as visualized under Order VIII rule 60. Thus the view taken by the Delhi High Court in *Behari Lal's case* (supra), which view seems to have been shared by S. P. Goyal, J. in the admitting order, that the question of rent has not any bearing in the petition for ejectment thereafter, cannot, with due respect to the learned Judges, be taken to be stating the principle now applicable. Specific defence when set up by the tenant in the written statement would itself be an inbuilt protest for the simultaneous availing of the benefit of the proviso by making excess payment as held in *Nasib Singh's case* (supra) by my learned brother M. R. Sharma, J. and logically for hopeful adjustment of the excess payment as conceived of by Mehar Singh, C.J. in *Dial Chand's case* (supra). We are persuaded to come to this view, while applying general principles of the Civil Procedure Code, to further the intendment of the law framers. One of the foremost consideration for the enactment of Rent Control Laws is restrictions on the quantum of rates. Permitting the landlord to take away the excess rent from the tenant frightened to make payment in order to avail of the benefit of the proviso and the Rent Controller wringing his hands that he could do nothing about it would, to our mind, be a fraud on the statute. Section 7 of the Act conceives of a situation where refund would be necessary for excess payments of rent made by a tenant. We see no reason why a claim under section 7 of the Act cannot be determined by the Rent Controller as a cross claim under the Act simultaneously with the eviction petition. Such a course to our mind furthers the purposes of the Act rather than frustrate them.

(12) For the view thus taken, we hold that the order of the Rent Controller in refusing to frame the issue on the quantum of rent was illegal and improper and deserves to be set aside. While allowing the petition and setting aside the impugned order, we direct that the Rent Controller shall, in the light of the observations made by us, frame the requisite issue, determine the quantum of rent and settle it one way or the other and give such relief to

the parties as is consonant with the ends of justice. This petition is accordingly allowed but with no order as to costs.

M. R. Sharma, J.—I agree.