

List-I of the Seventh Schedule to the Constitution. Consequently, the levy of sale or purchase tax on such a despatch or consignment of goods and matters ancillary or subsidiary thereto, would be within the exclusive legislative competence of Parliament to the total exclusion of the State legislatures.

42. Once that is so, *a fortiori*, the impugned provision in so far as it levies a purchase tax on the consignment of goods outside the State in the course of inter-State trade or commerce, is beyond the legislative competence of the State of Haryana and is, therefore, void and inoperative. The amendment to Section 9(1)(b) of the Act introduced by Section 3 of the Act No. 3 of 1983, is thus unconstitutional and is hereby struck down. As a necessary consequence, the retrospective validation of the notification, annexure P/2 and the consequential validation of all actions taken thereunder have to be equally quashed. The writ petitions are allowed in the terms aforesaid, but in view of the great intricacy of the issues involved, the parties are left to bear their own costs.

43. Ere I part with this judgment, I feel compelled to notice that on behalf of the writ petitioners, the impugned provisions as also the actions sought to be authorised thereby were assailed on a wide variety of other grounds as well. Included therein was the challenge on the basis of the freedom of trade, commerce and intercourse under Articles 301 to 305, and equally to the levy of penalties for failure to pay the tax and the claim for interest on the alleged tax due. However, in the wake of my aforesaid finding—that the respondent State of Haryana lacks the very legislative competence to make the impugned amendment, which has been struck down, the aforesaid issues are rendered entirely academic. I would, therefore, refrain from pronouncing any opinion thereon.

N.K.S.

Before S. S. Sandhawalia, C.J. and I. S. Tiwana, J.

SOHAN SINGH,—Petitioner.

versus

DHAN RAJ SHARMA,—Respondent.

Civil Revision No. 3223 of 1981.

August 5, 1983.

*Haryana Urban (Control of Rent and Eviction) Act (XI of 1973)—
Section 13(3-A)—Non-residential building in possession of a tenant—
Such building purchased by an ex-serviceman—Tenant sought to be*

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ejected therefrom—Such ex-serviceman—Whether entitled to invoke the provisions of section 13(3-A)—Benefit of section 13(3-A) to an ex-serviceman—Whether available only if he was the landlord of the demised building on the date of his retirement.

Held, that an analysis of section 13(3-A) of the Haryana Urban (Control of Rent and Eviction) Act, 1973 renders its patent that the right or the benefit is sought to be conferred on a twin class. This operates as an exception to the general rule of protection otherwise accorded by the Act to tenants of non residential buildings. Consequently, it has to be somewhat strictly construed. Now comparing the two classes, it is significant to highlight that an orphaned minor son obviously has this right against the particular premises which were under the ownership of his father as the landlord at the time of his death. The right thus attaches to the particular premises at a particular point of time. It is not a roving right to acquire any premises to claim the benefit of eviction either during minority or within three years of attaining the age of majority by such minor. Similarly the analogous right in favour of the retired ex-serviceman should equally be construed as a particularised right to the non-residential building with regard to which the ex-serviceman stood in the relationship of a landlord on a particular point of time, viz., the date of his retirement. In either case, the non-residential building to which the right attaches must be particularised and the crucial watershed for determining the time is the date of the retirement in the case of ex-serviceman and the death of the father of the minor as the landlord in the other. Viewed in the correct perspective the real intent of the legislature is to give the benefit to a member of the Armed Forces who whilst in service is the landlord of the non-residential building on his retirement for purposes of re-settlement. The language employed in the statute is 'a landlord who stands retired or discharged from the Armed Forces'. It is needless to say that the expression 'landlord' is a relative term and, therefore, it must have a meaning with reference to the tenant and the premises. There seems hardly to be any doubt that the expression would mean a landlord who was a landlord as such qua the tenant and the premises on the date of his retirement. It is not a benefit given to retired-serviceman to exercise a roving right over any premises which he may choose to acquire within three years of his retirement for evicting the tenants therefrom. To put it pithily it is a benefit conferred upon a serving member of the Armed Forces on his retirement for the purposes of re-settlement. As such, it is held, that the benefit under section 13(3-A) of the Act is available only to an ex-serviceman who was a landlord of the non-residential building on or before the date of his retirement.

(Paras 8, 9 and 13).

Petition under Section 15(6) of the Haryana Urban (Control of Rent and Eviction) Act, 1973 for revision of the order of the Court

of *Shri Jag Bhushan, Appellate Authority (District Judge) Ambala, dated 17th November, 1981, accepting the appeal and setting aside the judgment of Shri Dhani Ram, Rent Controller, Ambala dated 11th January, 1980, dismissing the eviction application and leaving the parties to bear their own costs.*

H. L. Sarin, Sr. Advocate and R. L. Sarin, Advocate, for the Petitioner.

J. S. Shahpuri, Advocate, for the Respondent.

ORDER

S. S. Sandhawalia, C.J.

1. Is the benefit of section 13(3A) of the Haryana Urban (Control of Rent and Eviction) Act, 1973 available to an ex-serviceman, who was the landlord of the non-residential building prior to the date of his retirement. This is the significant question which has necessitated the admission of these two civil revisions for a hearing by the Division Bench.

2. The facts deserving recapitulation, relevant to the aforesaid issue, are that Sohan Singh petitioner-landlord retired from the Air Force on 3rd of March, 1976 and later on the 17th of November, 1978 purchased the shop bearing No. 2454 Block No. II, Patel Road, Ambala from Shri Wajinder Singh, Advocate. Thereafter on the 2nd of February, 1979 he presented an application for the ejection of the respondent-tenant from the said shop on the ground that he required the same for his personal use of setting up his own business therein under section 13(3A) of the Act.

3. In contesting the said application, the respondent-tenant took up the plea that the petitioner-landlord was not a genuine purchaser but a simple figure head and alleged the transaction of sale to be a *Benami* one and further contested the petitioner's right to avail of the benefit under section 13(3A) of the Act. The trial Court framed the following issues:—

- (1) Whether the respondent is liable to ejection from the premises in question on the ground mentioned in para No. 5 of the application?
- (2) Whether sale of the shop in question in the name of the applicant is *benami*, and so a mere figure head, if so, to what effect?
- (3) Relief.

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On the material issues Nos. 1 and 2, it held that the sale of the shop in dispute in the name of the petitioner-landlord was genuine and further that he was entitled to evict the tenant on the ground of his personal necessity. The eviction application was consequently allowed.

4. On appeal, the appellate authority affirmed the findings on issue No. 2 but reversed them on issue No. 1 holding that the petitioner-landlord could avail of the benefit of Section 13 (3A) only if he was the landlord of the premises prior to his retirement from the Armed Forces. This being common ground that the petitioner-landlord had purchased the premises after his retirement, as a necessary consequence the appeal was allowed and the application dismissed. The petitioner has now come up by way of this revision petition.

5. Mr. R. L. Sarin, the learned counsel for the petitioner has projected a solitary and pristinely legal contention that sub-section (3A) of Section 13 should be liberally construed so as to accord the benefit thereof to an ex-serviceman within a period of three years from the date of his retirement or discharge irrespective of the fact whether he was the landlord of the non-residential building prior to or subsequent to his retirement. On the other hand, the firm stand on behalf of the respondent is that sub-section (3A) is applicable only to those ex-servicemen who on or before their date of retirement were the landlords of the particular non-residential building and no others.

6. Now to appreciate and adjudicate on the aforesaid rival contentions, one must inevitably advert to the provisions of sub-section (3A) around which the controversy revolves. However, before analysing the specific language of the statute it is not only apt but necessary to examine the same against the background of its legislative history. The East Punjab Rent Restriction Act 1949 continued to hold sway within the State of Haryana till its repeal and substitution by the Haryana Act of 1973 (Act No. 11 of 1973) (hereinafter called the Act). The actual working of the Act brought out some difficulties and lacuna and these were sought to be remedied by the Haryana Urban (Control of Rent and Eviction) Amendment Act, 1978 (Haryana Act No. 16 of 1978). It was at this stage that a right was also conferred on ex-servicemen and orphaned minor sons to evict their tenants from non-residential buildings for their personal use. It is significant that no such provision existed in the

earlier Punjab Act and is equally non-existent in most other rent jurisdictions. One may instructively refer to the Objects and Reasons of the Amending Bill in the undermentioned terms:—

“The Haryana Urban (Control of Rent and Eviction) Act, 1973, was enforced from 27th April, 1973, by repealing the East Punjab Urban Rent Restriction Act, 1949. By virtue of the provisions contained in sub-section (3) of Section 1 of the said Act, only the ‘residential buildings’ have been granted exemption for a period of ten years from the date of their completion whereas non-residential buildings and rented lands completed/let out after 31st March, 1962, have been left out of the purview of the Act. It has caused a great hardship to the tenants of non-residential buildings and rented lands. To remove rigours from various provisions of the Act, it has been considered just and proper that among other things the provisions of the Act may be made applicable to non-residential buildings as well. The power of the Controller as well as that of the appellate and revision authority are proposed to be restored to the Judiciary. *It is also proposed that a right be also given to specified categories of persons, such as ex-servicemen and fatherless minor son to apply for eviction of tenant from non-residential building for their own use.*”

To complete the history it may be noticed that by Haryana Act No. 5 of 1979, the words ‘Non-commissioned Officer’ were deleted and the benefit was extended to all ex-servicemen.

7. It is plain from the above that the legislature whilst extending the protection of the rent laws to the tenants of non-residential buildings completed or let out after 31st of March, 1962, as well has sought to match the same by giving a limited right to a twin class of landlords. The plain object thereof was to vest a right in an orphan minor son to claim possession of the premises for setting up in life at the very threshold on or within three years of attaining majority), and a similar right in a landlord ex-serviceman upon his retirement or discharge for his resettlement afresh. We are herein primarily concerned with the benefit accorded to the ex-servicemen. There seems no manner of doubt that the cases of defence service personnel due to their special obligations and disabilities would need different treatment from that accorded to

ordinary landlords and in recognition thereof provisions have been made in many other statutes whereby process for such personnel to regain possession of their premises have been simplified and made more effective. It is particularly so in view of the earlier age of retirement in the Armed Forces and the difficulties of re-settlement in civilian life which they face thereafter. It would appear that the mischief which the legislature wanted to remedy was to alleviate the hardship to retired ex-servicemen for starting life afresh on resettlement in non-residential buildings owned by them which had earlier been tenanted away due to the exigencies of their service conditions.

8. With the aforesaid background, one may now advert to the language of the sub-section itself which is in the following terms:—

“13(3A). In the case of non-residential building, a landlord who stands retired or discharged from the armed forces of the Union of India or who was a minor son at the time of death of the deceased landlord, and requires it for his personal use, may, within a period of three years from the date of retirement or discharge or attaining the age of eighteen years, as the case may be, apply to the Controller for an order directing the tenant to put the landlord in possession;

Provided that where the landlord has obtained possession of a non-residential building under this sub-section, he shall not be entitled to apply again for the possession of any other non-residential building of the same class.”

An analysis of the aforesaid provisions renders it patent that the rights or the benefit is sought to be conferred on a twin class. This operates as an exception to the general rule of protection otherwise accorded by the Act to tenants of non-residential buildings. Consequently it has to be somewhat strictly construed. Now comparing the two classes, it is significant to highlight that an orphaned minor son obviously has this right only against the particular premises which were under the ownership of his father as the landlord at the time of his death. The right thus attaches to the particular premises at a particular point of time. It is not a roving right to acquire any premises to claim the benefit of eviction either during minority or within three years of attaining the age of majority by such minor. Similarly the analogous right

in favour of the ex-serviceman should equally be construed as a particularised right to the non-residential building with regard to which the ex-serviceman stood in the relationship of a landlord on a particular point of time, viz. the date of his retirement. In either case, the non-residential building to which the right attaches must be particularised and the crucial watershed for determining the time is the date of retirement in the case of ex-serviceman and the death of the father of the minor as the landlord in the other.

9. Viewed in the correct perspective the real intent of the legislature is to give the benefit to a member of the Armed Forces who whilst in service is the landlord of the non-residential building on his retirement for purposes of re-settlement. The language employed in the statute is 'a landlord who stands retired or discharged from the Armed Forces'. It is needless to say that the expression 'landlord' is a relative term and, therefore, it must have a meaning with reference to the tenant and the premises. There seems hardly to be any doubt that the expression would mean a landlord who was a landlord as such *qua* the tenant and the premises on the date of his retirement. It is not a benefit given to a retired ex-serviceman to exercise a roving right over any premises which he may choose to acquire within three years of his retirement for evicting the tenants therefrom. To put it pithily it is a benefit conferred upon a serving member of the Armed Forces on his retirement for the purposes of re-settlement.

10. When viewed as above, particular emphasis is called for on the designed use of the words 'stands retired or discharged' in sub-section (3A). Similarly the opening part of the Section co-relates to landlord and the non-residential building. The particular condition, therefore, is the landlordship *qua* the non-residential building before retirement or discharge. It cannot possibly be reversed in sequence by holding that a retired serviceman may later choose to become a landlord of any premises and claim the right of eviction of the tenant within three years. Therefore, the capacities of being a landlord *qua* the non-residential building and being a serviceman must both co-exist before the right can accrue on the date of retirement and thereafter continue for a period of three years.

11. I am clearly of the view that for the aforesaid reasons hardly any other construction of the provision is possible. However, assuming entirely for the sake of argument that an alternative

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interpretation is possible, one must necessarily shrink back in view of what appears to me as the grave anomalies resulting therefrom. If it were so held as is sought to be canvassed on behalf of the petitioner it would mean that every retired serviceman would have a roving avaricious right within three years to acquire any non-residential building that he may choose and claim eviction of the tenants therefrom under sub-section (3A). This in essence would destroy the protection solicitously given by the statute to the tenants of non-residential premises. They would remain perpetually under the sword of Democles, that if their premises at any time are transferred to any ex-serviceman, they would then face eviction therefrom. Equally on such an interpretation the provision is likely to be a grave abuse insofar as avaricious landlords could also pass or threaten to pass a whole or limited title to an ex-serviceman, e.g., a mortgage with possession and under that grab secure eviction of a virtually unevictable tenant from non-residential buildings. The facts in *Gian Chand Bansal v. Tilak Raj*, (1) are an apt example of such a misuse wherein the landlord has actually mortgaged his premises in favour of an ex-serviceman apparently to bring him under the umbrella of this sub-section. There is thus both force and plausibility in the stand of the learned counsel for the respondent that the statutory benefit is meant for the limited class of serving defence personnel only. It never was nor is intended to be for the benefit of a class of unborn landlords who even after three years of their retirement from the Armed Forces may assume such a character by purchase or assignment to exercise the right of eviction against the protected tenant.

12. Learned counsel for the parties could not bring to our notice any precedent directly governing the issue. However, by way of analogy a reference may be made to *Bhanu Aththayya v. Comdr. Kansal and others*, (2). The Division Bench therein was construing the provisions of Section 13-A of the Bombay Rent, Hotel and Lodging House Rates Control Act (57 of 1947). It is true that the language and the import of the aforesaid provision in favour of servicemen is different. However, in construing somewhat similar provision, the Bench held that the benefit therein also was available to a member of the Armed Forces who was such a member *qua* the tenant and the premises at the time of his retirement.

(1) C.R. 2573 of 1983.

(2) (1979) 2 All India Rent Control Journal 338.

13. To conclude the answer to the question posed at the outset is rendered in the affirmative and it is held that the benefit under section 13(3A) of the Act is available only to an ex-serviceman who was a landlord of the non-residential building on or before the date of his retirement.

14. Once it is so held, the learned counsel for the petitioners in both these cases were fair enough to concede that no other point survives. Both the civil revisions are consequently dismissed. However, in view of the somewhat interesting and intricate issue involved, the parties are left to bear their own costs.

N.K.S.

Before S. S. Sandhawalia, C.J. and M. M. Punchhi, J.

KASHMIR SINGH AND ANOTHER,—Petitioners.

versus

THE STATE OF PUNJAB,—Respondent.

Criminal Misc. No. 2254-M of 1982.

August 24, 1983.

Code of Criminal Procedure (II of 1974)—Section 167—Exercise of power by a Magistrate under Section 167—Such power—Whether judicial in nature.

Held, that the jurisdiction under section 167, Criminal Procedure Code, 1973 has been vested in a Judicial Magistrate barring cases of exceptional and emergent nature provided for in sub-section (2-A) where a Judicial Magistrate is not available. The Judicial Magistrate hereunder is to exercise his power on the material placed before him by the Investigating Agency. The section mandates that the Police Officer shall forthwith transmit to the nearest Judicial Magistrate, a copy of the entries in the diary made with regard to the investigation. It would inflexibly follow therefrom that apart from the fact that the Judicial Magistrate would in no way be inhibited from looking at any other materials, he is obliged to apply his mind to the investigation which had already taken place and so recorded in the police diary before determining whether the accused person is to be detained in custody at all, and if so, whether it is to be judicial or police custody. It, therefore, follows, that the exercise of power is not to be made in a vacuum but on the basis of materials mandated by the statute and the application of a judicial mind thereto. Reference to sub-section (2) would then indicate that once the requisite materials have been placed before the Magistrate he has to consider whether further