

IN THE HIGH COURT OF DELHI AT NEW DELHI

CM (M) No. 1518 of 2009

Reserved on: 13th May 2010

Decision on: 12th July 2010

SANJAY MEHRA & ORS. Petitioners
Through: Mr. Sanjeev Sindhwani with
Mr. Sanjay Dua, Advocates.

versus

SUNIL MALHOTRA & ANR. Respondents
Through: Mr. Deepak Gupta and
Mr. Gaurav Shanker, Advocates.

CORAM: JUSTICE S. MURALIDHAR

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| 1. Whether Reporters of local papers may be allowed to see the judgment? | No |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in Digest? | Yes |

JUDGMENT

1. An order dated 3rd December 2009 passed by the learned Additional Rent Controller ('ARC') in Eviction Petition No. 26 of 2008 granting leave to the Respondents/tenants to defend the Eviction Petition preferred by the Petitioners under Section 14 (1)(e) of the Delhi Rent Control Act, 1958 ('DRCA') is challenged by the Petitioners/landlords by way of the present petition under Article 227 of the Constitution.

Background facts

2. The tenanted premises, which forms part of the property at 34 Hanuman Road, New Delhi, was let out to Diwan Hukam Chand Sahni,

the Predecessor-in-interest of the Respondents/tenants by Shri R.S.Devi Dayal Mehra, the grandfather of Petitioner No.1 and father of Petitioner No.2 by way of a lease deed dated 23rd August 1941. The tenanted premises include three servant quarters and one garage. It appears that Shri Krishan Lal Malhotra and others came to occupy the tenanted premises as tenants and sometime in 1942 Shri Devi Dayal Mehra instituted proceedings in the court of the learned ARC against the extension of the tenancy for a period of 12 months from 1st August 1942. This application was rejected by an order dated 22nd November 1942 of the learned ARC.

3. On 10th August 1943 the learned ARC passed an order disallowing the objections raised by Shri Devi Dayal Mehra to the extension of the tenancy by a further period of one year on the ground that he was not satisfied that the tenanted premises was required by the landlord bonafide for occupation by himself and the members of his family. This order was affirmed by the order dated 28th October 1943 of the learned Chief Commissioner of Delhi ('the Appellate Authority').

Eviction proceedings till 1970

4. A petition filed by Shri Devi Dayal Mehra seeking eviction of Shri Krishan Lal Malhotra and others on the grounds of non-payment of rent and misuse was rejected by the learned ARC by an order dated 29th July 1946. A formal order was later passed on 2nd August 1946 by the learned ARC.

5. Shri Devi Dayal Mehra instituted Case No. 429 of 1960 against Shri Tilak Raj Malhotra, the predecessor-in-interest of the Respondents/tenants under Sections 14(1)(b), 14(1)(e) and 14(1)(k) of the DRCA on three grounds. The first was that the tenanted premises was bonafidely required by the landlords for the residence of himself and his family. The second was that the tenant had misused the premises for non-residential purposes and the third was that the tenant had after 9th June 1952 sub let, assigned or otherwise parted with part of the tenanted premises to *malis* and *dhobis* without prior consent of the landlord. This petition was rejected by the learned ARC by an order dated 28th October 1963. The appeal against the said order was dismissed by the Rent Control Tribunal ('RCT') by an order dated 13th May 1964. This was further confirmed with the dismissal on 28th May 1970 of the second appeal SAO No. 267-D of 1964 by this court.

6. The finding by this Court on Section 14(1) (e) DRCA was that the accommodation available with the landlord was more than sufficient for his needs and that he did not bonafide require the tenanted premises. As regards the ground urged in terms of Section 14(1)(a) DRCA, the parties entered into a compromise on 22nd May 1970. The second appeal qua that ground was disposed of by this Court in terms of the said compromise. The above compromise recorded the undertaking of the Appellant landlord that two tenants in the property would be removed and that an area of 1200 sq.ft. of the tenanted premises would continue to remain in possession of the landlord for which the landlord had compensated the

Respondent @ Rs.45 per month. It is further agreed that the tenant would “continue to remain contractual tenant, on the same old terms and conditions, as agreed to with Dewan Hukam Chand vide lease deed dated 23rd August 1941, except the term as regards period.” An application filed in the said second appeal by Shri Devi Dayal Mehra for placing on record a copy of the settlement deed was dismissed as not pressed.

7. In August 1963 Shri Devi Dayal Mehra instituted a further eviction petition against Shri Tilak Raj Malhotra under Section 14(1)(g) of the DRCA. In terms of a compromise between the parties, the said suit was disposed of by an order dated 25th May 1971. The terms of this compromise, *inter alia*, that the landlord had abandoned the idea of reconstruction that he could retain 1200 sq. ft. of the tenanted premises which the tenant would not reclaim and for which the landlord had compensated the tenant at Rs.45 per month; that he would in future give a corresponding deduction in rent and that the Respondent would continue to remain a contractual tenant on the same terms and conditions as set out in the Agreement dated 23rd August 1941 except the term as regards period.

The settlement deed, the 1971 declaratory decree and the Will

8. During the pendency of the above proceedings, on 25th September 1968, a settlement was entered into between Shri Devi Dayal Mehra and his son Shri Jai Dayal Mehra in respect of the suit property. The said settlement deed recorded the fact that the land on which the building at

34, Hanuman Road stood was a leasehold property originally purchased by the father of Shri Devi Dayal Mehra and transferred to him for construction of the main building and four residential independent flats. By way of the said settlement Shri Devi Dayal Mehra settled half of the plot on Shri Jai Dayal Mehra “to be enjoyed by him as owner like party No. 1”. Shri Jai Dayal Mehra and his successors were to be co-lessees along with Shri Devi Dayal Mehra in respect of the suit property.

9. Shri Devi Dayal Mehra filed Suit No. 181 of 1971 in the court of learned Sub-Judge Delhi for a declaration that the portion marked red in the site plan appended to the plaint belonged to Shri Devi Dayal Mehra and the portion marked yellow belonged to Shri Jai Dayal Mehra. On 17th March 1971, Shri Jai Dayal Mehra filed a written statement admitting that his father was the co-lessee of the land in which the suit property stood and further prayed that the suit may be decreed as prayed for. On 30th April 1971, a Suit No. 181 of 1971 was decreed by the learned Sub Judge, Delhi as prayed for in respect of the deed of settlement dated 25th September 1968 and the site plan appended to the plaint.

10. On 12th May 1976, Shri Devi Dayal Mehra executed a Will, the relevant portion of which reads as under:

“And whereas making this my last Will I deem it prudent to make the following provisions about my property and assets which are singly and exclusively owned by me and in which I have exclusive right and power of disposal and transfer.

A. Immovable Assets

Premises known as 34 Hanuman Road

The front half portion of this plot mines the left approach from the main road of which I am the owner as per the orders dated 30/4/71 of Shri R.K. Sain J.I.C. Delhi in suit for declaration No. 181/71, I bequeath to my grandson Sanjay Mehra S/o Dr. Jai Dayal Mehra who would own it for his own good.

2. Premises known as 21 Ratendon Road, N.D.

Half the portion of this of which I am the owner as per orders of Shri R.L. Gupta Sub-Judge 1st Class Delhi, in suit for declaration NO. 711/70 dated 30th November 70 I bequeath to my grand-daughter K. Jaishree Mehra Daughter of Dr. Jai Dayal Mehra who would own it exclusively for her own good.

Mutation for these two properties is under correspondence with the concerned authorities.”

Eviction petitions between 1976 and 1982

11. On 28th April 1976 Shri Devi Dayal Mehra and Shri Jai Dayal Mehra filed an eviction petition E-273 of 1970 against Shri Tilak Raj Malhotra under Section 14(1)(e) of the DRCA pleading bonafide requirement. It appears that Shri Tilak Raj Malhotra filed a suit on 14th October 1976 against Shri Devi Dayal Mehra and Shri Jai Dayal Mehra for a declaration that the decree dated 30th April 1971 passed by the learned Sub Judge in Suit No. 181 of 1971 was a nullity.

12. The eviction petition E-273 of 1973 was dismissed by the ARC on 9th October 1980. Thereafter, on 22nd September 1981 Shri Tilak Raj Malhotra withdrew the suit filed by him seeking a declaration that the decree dated 30th April 1971 passed in Suit No. 181 of 1971 was a nullity. The suit was thereupon dismissed as withdrawn.

13. With the death of Shri Devi Dayal Mehra on 17th February 1978, his portion of the suit property devolved upon his grandson Shri Sunil Mehra, Petitioner No.1 herein in terms of the Will dated 12th May 1976. Shri Devi Dayal Mehra expired on 17th February, 1978. It must be mentioned here that under the said Will Shri Devi Dayal Mehra had also bequeathed certain movable assets in favour of his son Shri Jai Dayal Mehra, Petitioner No.2 herein. In relation thereto Shri Jai Dayal Mehra filed a petition under Section 372 of the Indian Succession Act, 1925 for a succession certificate in respect of the debts and securities of late Shri Devi Dayal Mehra. This petition was allowed by an order dated 2nd February 1981 of the learned Sub Judge.

14. A further eviction petition being E-381 of 1982 was filed jointly by Shri Jai Dayal Mehra and Shri Sanjay Mehra against Shri Tilak Raj Malhotra under Section 14(1)(a) of the DRCA on the ground of non-payment of rent. This eviction petition was allowed by the learned ARC by the order dated 13th October 1987. This was affirmed by the RCT on 7th January 1988 with the dismissal of the appeal filed by Shri Tilak Raj Malhotra. This was further challenged by him by filing SAO No. 27 of 1988 in this Court. Ultimately, when the proceedings were pending in

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this Court a compromise was arrived at between the parties on 21st August 1995, in terms of which the aforementioned Eviction Petition No. 381 of 1982 was disposed of. In terms of the compromise, a statement was made by Shri Tilak Raj Malhotra that he would pay future rent to the Petitioners by the 15th day of every month. On the basis of the above statement, the eviction petition was dismissed as withdrawn.

Present eviction petition

15. Thereafter the present Eviction Petition No. 26 of 2008 under Section 14(1)(e) DRCA was jointly filed by Shri Sanjay Mehra, Shri Devi Dayal Mehra as well as other children of Shri Devi Dayal Mehra including Group Captain Har Dayal Mehra, late Shri Basant Dayal Mehra through his legal representatives, Major General Roop Dayal Mehra, Smt. Durga Khanna and Smt. Savitri Kaicker on 13th September 2006. The site plan of the suit premises was filed thereafter on 7th March 2007. It was specifically urged in the petition that the eviction was being sought “on account of bonafide necessity of Petitioner No.1 (Sanjay Mehra) and his family members which include his wife and minor daughter”. It was stated that “Petitioner No.1 & 2 are the only owners/landlords of the suit premises.” Further in para III in Clause 18 (a) of the Form, it was stated as under:

“The Petitioners No. 3 to 7 who are the other relations of Petitioner No.1, being his uncles and aunts (brothers and sisters of Petitioner No.2), have no right, title or interest in the suit property they have only been made parties to avoid any technical objection and no relief is sought by them.

It is submitted that the father of the respondents, Late Shri T.R. Malhotra, had in the past, with malafide reasons and oblique motives, sought to tender rent to Petitioners Nos. 3 to 7 also on the false pretext of their being landlords and owners along with the Petitioners Nos. 1 & 2.

The Petitioners Nos. 3 to 7 have in fact in earlier litigation under Section 14(1)(a) of the Delhi Rent Control Act, titled Shri Jai Dayal Mehra and another vs. Tilak Raj Malhotra & others, bearing Eviction No. 381/82, made statements/given no objections in the Court saying that they have no interest in the suit property.

Petitioners Nos. 3 to 7 have been made parties only to avoid any technical objection being raised by the respondents and as stated, in fact and law the Petitioners Nos. 3 to 7 have no right, title or interest in the entire property. Petitioners Nos. 3 to 7 have along with this petition have sworn and given independent affidavits declaring that they have no right, title or interest in the property and there exists no relationship of landlord(s) and tenant between them and the Respondents.”

16. A reference was made specifically to the settlement deed dated 25th September 1968, the declaratory decree dated 30th April 1971, the Will dated 12th May 1976 and the grant of succession certificate by order dated 2nd February 1981. It was mentioned that on the basis of the declaratory decree dated 30th April 1971 and on the basis of the Will dated 12th May 1976, the Land & Development Office (‘L&DO’) had

mutated/transferred the leasehold rights in respect of the suit property in favour of Petitioners 1 and 2. It is mentioned that Petitioner No.1 was at that time living with Petitioner No.2 in the portion behind the tenanted premises which is owned exclusively by Petitioner No.2. It was mentioned that “Petitioner No.1 has no right, title or interest in the said portion and in fact had been granted permissive user by Petitioner No.2.”

17. As regards the bonafide need, it was pleaded as under:

“Lately, there have developed differences of opinion between the Petitioner No.1 and his wife on one side and the Petitioner No.2 on the other side, as a result of which the Petitioner No.2 has been repeatedly requesting the Petitioner No.1 to leave his portion of the premises, which the Petitioner No.1 as of now is occupying. As such the Petitioner No.1 is no more interested in continuing to live with Petitioner No.2 and left with no alternative, but to seek back his own portion occupied by the Respondents. Petitioner No. 1, therefore, bonafidely requires the suit premises for occupation for himself and the family members dependent upon him.

Petitioner No.1 submits that in case he continues to live with Petitioner No.2, their relations are likely to deteriorate further to the extent of it becoming unpleasant to live with each other. Hence, the immediate need of getting the tenanted premises vacated. The Petitioner No.1 has no legal right, title or interest to stay in the portion owned by Petitioner No.2.

Petitioner No.1 submits that he has no other suitable accommodation in Delhi and is therefore left with no other alternative but to file the present eviction petition on the ground of bonafide necessity.”

18. An application was filed on behalf of Respondents under Section 25 B (4) and (5) of the DRCA seeking leave to contest the proceedings. The application was accompanied by the affidavit of Mr. Sunil Malhotra Respondent No.1. A reply was filed to the said petition by Petitioners 1 and 2 herein to which a rejoinder was filed by Mr. Sunil Malhotra.

19. By an order dated 6th June 2009, the learned ARC allowed the application filed by the Petitioners for bringing on record a certified copy of the site plan that was enclosed with the decree dated 30th August, 1971. Thereafter, an affidavit of Mr. Sunil Malhotra was filed raising, *inter alia*, objections to the genuineness of the certified copy of the site plan. On 8th October 2009, an application filed by the Respondents for bringing on record the institution register was dismissed by the learned ARC.

Impugned order of the learned ARC

20. By the impugned order dated 3rd December 2009, the learned ARC allowed the application of the Respondents for leave to defend. The summary of the findings of the learned ARC is as under:

(a) A bare perusal of the site plan filed on 7th March 2007

suggested that three servant quarters, one garage and some space near the garage is not “in the ownership/landlordship of the Petitioner No.1 for whose bonafide the present eviction petition under Section 14(1)(e) has been filed.”

(b) There was a dispute with regard to existence of the tenancy in favour of the Respondents/tenants with regard to one room shown in green colour in the yellow shaded area shown in the site plan filed on 7th March 2007. The Petitioners were not accepting the claim of the Respondents with regard to the tenancy of the said room in question unconditionally.

(c) The deed of settlement dated 25th September 1968 did not specifically point out as to which portion of the suit property belonged to Shri Devi Dayal Mehra and which portion came to the share of Petitioner No.2.

(d) Initially the site plan referred to in the decree dated 30th April 1971 was not produced by the Petitioner. It was filed only on 25th September 2008. The certified copy of the same was challenged by the Respondents as not being a genuine document. It was alleged that a certified copy of the site plan was not in conformity with the site plan filed on 7th March 2007. The learned ARC held as under:

“As per the said certified copy of the site plan, three servant quarters and the space near garage has come to the ownership of the Petitioner No.2 and further some portion of the tenanted, near the

gate on the front portion of the property in question has also come to the ownership of Petitioner No.2. Keeping in view the said certified copy of the site plan, it cannot be concluded that Petitioner No.1 is the owner and landlord of the complete tenanted premises in use and occupation of Respondents as tenants.”

(e) The Will dated 12th May 1976 also created certain doubts as to the site plan.

(f) There was no need for the Respondents to file any site plan as to their version because there appeared to be no dispute as regards the extent of the tenanted premises but only as regards the ownership/landlordship of Petitioner No.1 qua the whole tenanted premises.

(g) If Petitioners 1 and 2 were to be taken to be owners/landlords of every portion of the suit property as depicted in the site plan then it could not be said that Petitioner No.1 bonafide required the tenanted premises for occupation as a residence for himself. As far as the requirements of the Petitioners as to accommodation was concerned, there was no change since 1976 when the earlier petition under Section 14(1)(e) DRCA was dismissed.

(h) Given the history of the litigation, the possibility of the Petitioners’ version as regards the need for Petitioner No.1 to shift to his own portion in the premises being not bonafide and genuine “cannot be ruled out altogether.”

21. The impugned order held that there existed triable issues and accordingly granted the Respondents leave to defend.

22. This Court has heard the submissions of Mr. Sanjeev Sindhwani, learned counsel for the Petitioner and Mr. Deepak Gupta, learned counsel for the Respondents.

Preliminary Objections as to maintainability

23. At the outset, a preliminary objection was raised by the Respondents/tenants that the remedy of the Petitioners/landlords against the order granting leave to defend was to file a revision petition under Section 25 B (7) of the DRCA and not under Article 227 of the Constitution.

24. Mr. Sindhwani has countered the preliminary objection referring to the proviso to sub-section (8) of Section 25 B DRCA which empowers the High Court to call for the record of the case and pass such orders in regard to any order made by the learned ARC as it thinks fit. Reference is made to the decisions in ***R.S. Bakshi v. H.K.Malhari 2002 (62) DRJ 272 (DB)*** and ***Vinod Kumar Chowdhry v. Narain Devi Taneja AIR 1980 SC 2012***.

25. In ***Vinod Kumar Chowdhry*** a three-Judge Bench of the Supreme Court negated the contention that the landlord could not have filed a revision petition against an order granting leave to defend thus negating her right to recover possession. In other words, it was held that a ***CM (M) No. 1518 of 2009***

landlady could file a revision petition where the learned ARC had refused recovery of the possession of the premises. The above decision was, however, not noticed by a subsequent two-Judge Bench of the Supreme Court in *Major D.N. Sood v. Shanti Devi* (1997) 10 SCC 428 where it was held that a revision petition cannot be filed by the landlord against an order granting leave to defend.

26. A Division Bench of this Court considered the question whether the judgment in *Major D. N. Sood* prevailed, and answered the question in negative in *R.S. Bakshi* by explaining that the judgment in *Major D. N. Sood*, which was by a Bench of two Judges, failed to notice the earlier judgment of a Bench of three Judges in *Vinod Kumar Chowdhry* and therefore the judgment in *Major D. N. Sood* was clearly *per incuriam*. The law settled by the Supreme Court in *Vinod Kumar Chowdhry* was explained by the Division Bench of this Court by holding that a writ petition can be filed by a landlord against an order granting the tenant leave to defend in terms of the proviso to Section 25 B (8) of the DRCA.

27. The present petition under Article 227 of the Constitution could be treated by this Court as a revision petition in terms of the proviso to Section 25 B (8) of the DRCA. In that event, the scope of the jurisdiction of this Court could not be very different. In any event, this Court cannot act as an Appellate Court to scrutinise findings of fact. At the stage of granting leave to defend, the learned ARC was expected to form only a prima facie view and, therefore, the scope of the power of this Court to interfere whether in the revision petition in terms of the proviso to

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Section 25 B (8) of the DRCA or Article 227 of the Constitution is not very different.

28. In the above view of the matter, this Court could well entertain the present petition under Article 227 of the Constitution as a revision petition under the proviso to Section 25 B (8) of the DRCA. Consequently, there is no merit in the preliminary objection as to the maintainability of the petition. It is accordingly overruled.

Submissions of the Petitioners/landlords on merits

29. Mr. Sindhwani assails the findings of the learned ARC in the impugned order by pointing out that belated challenge raised by the Respondent to the family settlement dated 25th September 1968 which has attained finality with the passing of the decree dated 30th April 1971 and which has formed the basis of the Will dated 12th May 1976, which has also been acted upon, cannot possibly raise a triable issue. He submits that as long as the Respondent/tenants have accepted that Petitioners 1 and 2 are the co-owners of the entire suit property, even in their application for leave to defend, it was not open to the Respondents to challenge the respective portions belonging to Petitioners 1 and 2 in terms of the family settlement dated 25th September 1968. The challenge by the tenants to the declaratory decree dated 30th April 1971 passed on that basis and the Will dated 12th May 1976 is also untenable in law. Relying on the judgments in ***Rajinder Pershad v. Nathu Ram 56 (1994) DLT 279, Prahlad Singh Rekhi v. Bhawani Devi 2004 (2) RCR 578,***

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ALL. 40, Satya Malhotra v. Mohinder Singh Arora 2000 (52) DRJ 146, A.K. Nayar v. Mahesh Prasad 153 (2008) DLT 423 and Bharat Bhushan Vij v. Arti Teckchandani 2008 VIII AD (Del) 285, it is submitted that it is not open to the tenants to either challenge a partition between the landlords or the title of one of them, who is admitted to be a co-owner, to the suit property. It is pointed out that a partition or a family settlement does not amount to division of leasehold rights and, therefore, there is no violation of the terms of the perpetual lease. To hold otherwise would result in partition of leasehold rights violating the terms of the perpetual lease which would invite cancellation of the lease and re-entry by the L&DO. It would be absurd that every time there is a partition of the tenanted premises, the eviction of the tenant could never be achieved if any one of the co-owners is not permitted to seek eviction of the tenants from that portion of the premises of which he is co-owner. It is pointed out that in the instant case while a substantial portion of the tenanted premises has fallen to the share of the Petitioner No.1, a small portion thereof may be in the ownership of the Petitioner No.2. Therefore, out of abundant caution he, along with the other legal representatives of late Shri Devi Dayal Mehra, has joined in the petition seeking eviction. Mr. Sindhwani submits that after the settlement, Petitioner No.1 had no legal right in the portion falling in the share of Petitioner No.2 and this validly constituted his bonafide need for the tenanted premises. Reliance is placed on the judgments of *Sita Nagpal v. Vinod Kumar Nijhawan 36 (1998) DLT 238, Jeevan Kumar Khanna v. Ajudhia Pershad Murgai 34 (1998) DLT 355 and M.L. Gupta v. Kripal Singh 2003 (66) DRJ 773 (SN).*

30. Relying upon the judgments of the Supreme Court in ***Kanta Goel v. B.P. Pathak AIR 1977 SC 1599*** and ***Mohar Singh v. Devi Charan AIR 1988 SC 1365*** it is submitted that it is perfectly possible for a co-owner to file a suit for eviction and that would not result in splitting up the unity and integrity of the tenancy. The eviction petition is, therefore, required to be filed in respect of the entire premises and not for a part thereof.

31. Mr. Sindhwani submits that as regards the bonafide need of a landlord for the premises the principle of *res judicata* will not apply. Reliance was placed on the judgment of the Supreme Court in ***N.R. Narayan Swamy v. B. Francis Jagan AIR 2001 SC 2469***. The mere fact that an eviction petition jointly filed in 1982 by Petitioners 1 and 2 under Section 14(1)(e) of the DRCA or that an eviction petition under Section 14(1)(e) DRCA was filed in 1976 by Shri Devi Dayal Mehra and Petitioner No. 2 Shri Jai Dayal Mehra both of which ended in dismissal will not preclude the present Petitioners from again seeking eviction on the same ground. He points out that in the last two decades since the last such petition was filed, the circumstances have changed.

32. Finally, it is submitted that the learned ARC erred in treating the Petitioners' eviction petition as the basis for deciding the Respondents' application for leave to defend particularly with reference to the site plan filed by the Petitioners. It is pointed out that the Respondents/tenants themselves never produced any site plan. As long as the site plan appended to the plaint on the basis of which the declaratory decree dated

30th April 1971 (which has become final) specified the portions which fell to the share of Petitioners 1 and 2 respectively, there was no question of any triable issue arising on that basis. Reliance is placed on the judgments of this Court in *Krishan Kumar Gupta v. Swadesh Bhushan Gupta* 152 (2008) DLT 556 and *Amrit Lal v. Jagpal Singh Verma* 63 (1996) DLT 621. Mr. Sindhwani tried to explain the “left hand” approach which has been commented upon by the learned ARC as regards the description of the property in the Will dated 12th May 1976 and pointed out that even this did not give rise to any triable issue. Referring to the judgment in *Milk Food Ltd. v. Kiran Khanna* 51 (1993) DLT 141 it is submitted that when the person in whom the title is stated to be vested denies his own title and confirms the title of the landlord, the challenge by the tenants cannot come in the way of the Petitioners being held to be the owners. The right (or absence of the right) of Petitioner No.1 to reside in the portion owned by Petitioner No.2 also, therefore, did not give rise to a triable issue.

Respondents/tenants’ submissions

33. The stand of the Respondents as articulated by Shri Deepak Gupta, learned counsel appearing for the Respondents and as further explained in the written synopsis filed at the conclusion of arguments is that they are not attempting to suggest that the proceedings are barred by res judicata on account of the dismissal of the earlier eviction petition in terms of the order dated 28th May 1970 passed by this Court in SAO No. 267-D of 1964 or by the dismissal by the learned ARC on 9th October 1980 of the second eviction petition E-273 of 1976 filed by Shri Devi

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Dayal Mehra and Shri Jai Dayal Mehra. It is urged that at that point of time it was the grandfather Shri Devi Dayal Mehra who was propounding bonafide requirement for himself claiming to be the owner/landlord and today it is his grandson Shri Sanjay Mehra Petitioner No.1 who is seeking the premises for his own alleged residential use. According to the Respondents, “there has been no change much less substantial change in the circumstances of the landlord and even the extent of the family of the Petitioners/landlords since 1960 till date.” It is submitted that the extent of the family as at present is just four members i.e. Shri Jai Dayal Mehra Petitioner No.2, Shri Sanjay Mehra Petitioner No.1, his wife and his minor daughter. Reliance is placed on the judgment of the Supreme Court in *Mohd. Yusuf v. Sharifuddin* 2001 (5) JT (SC) 274 to urge that in view of the fact that there is no material change in the circumstances since 1960, the tenants are entitled to leave to defend the eviction petition.

34. Mr. Gupta submits that for establishing bonafide need, cogent evidence would have to be led by the landlord which in turn would require a full-fledged trial. Reliance is placed on the judgment of the Supreme Court in *N.R. Narayan Swamy*. It is submitted that the mere fact that the Petitioner No.1 was not a party to the eviction petition filed in 1976 makes no difference as “there is apparently nothing new in the story now set up.” Reference is made to Section 14 (6) of the DRCA to submit that in any event prior to 30th April 1976, the eviction proceedings could not have been initiated since a period of five years had not elapsed from the date of the decree dated 30th April 1971 which according to the *CM (M) No. 1518 of 2009*

Respondents could be construed as the date of “transfer” of the property in question to the co-owner in terms of Section 2(d) of the Transfer of Property Act, 1882. As regards protection afforded to the tenant under Section 19 of the DRCA, it is submitted that the requirement of a full-fledged trial to establish bonafide need cannot be avoided only because of such a provision. At the stage of granting leave to defend, resort to Section 19 is, according to the Respondents, misconceived.

35. It is submitted on behalf of the Respondents/tenants that the decree of declaration dated 30th April 1971 “was clandestinely secured so as to overcome the rigours imposed by the law of rent control.” As regards the procedure adopted by the learned ARC, reference is made to the judgment of the Supreme Court in *Manoj Kumar v. Bihari Lal* (2001) 4 SCC 655 to urge that if from perusal of the petition for leave to contest and the affidavit filed with it, the learned ARC finds that the tenant has pleaded a triable case then he shall not refuse leave to contest. Referring to the judgment of the Supreme Court in *Mattulal v. Radhe Lal* (1974) 2 SCC 365 it is submitted that the burden was upon the landlord to show that he required the premises in question for his bonafide use. The test was an objective one and the mere assertion by the landlord that he required the premises was not sufficient to prove that he required it bonafide. Reference is also made to the judgment in *Rahabhar Productions Pvt. Ltd. v. Rajendr K. Tandon* (1998) 4 SCC 49.

36. It is submitted by Mr. Gupta that in order to demonstrate that the decree of 30th April 1971 was secured in a clandestine manner, there has

to be a full-fledged trial. It is submitted that if the settlement dated 25th September 1968 is shown to be a sham transaction then it is apparent that the Petitioners have much more than the required accommodation. Reference is made to the judgment of this Court in *Sushila Devi v. A.C. Jain 1988 (1) RCJ 287* where it was held that if the partition decree was obtained only to defeat the rights of the tenant, it had to be ignored. It is submitted that the factum of partition has not been recognised even by the L&DO and in the records of the NDMC. Petitioners 1 and 2 are recorded as joint owners of the entire property. It is accordingly submitted that this raises certain doubts on whether the partition is a genuine one. Therefore, the learned ARC was justified in holding this to be a triable issue.

37. It is submitted by Mr. Gupta that the site plan appended to the declaratory decree makes it apparent that the terms of the perpetual lease deed have been violated and the partition has not been confined to the structure but also for specific portions of the leasehold land. Certain doubts are raised about the correctness of the site plan filed on record and reference is made to the additional affidavit dated 30th July 2009 filed by the Respondent No.1 before the learned ARC. It is denied that there is any family settlement or family arrangement reduced to writing which has been brought on record by the Petitioners.

Scope of proceedings under Section 25 B (4) DRCA

38. This Court has considered the above submissions. In considering an application filed by the tenant under Section 25 B(4) DRCA for grant of

leave to defend an eviction petition, filed on the ground of bonafide requirement under Section 14 (1)(e) DRCA, the learned ARC would certainly have to examine the said application as well as the affidavit filed by the tenant. Under Section 25 B (5), one essential requirement is that the affidavit filed by the tenant should disclose “such facts as would disentitle the landlord from obtaining an order for recovery of possession of the premises on the grounds specified in Clause (e) of the proviso to sub-section (1) of Section 14.” It is plain that it is not enough at the stage of granting leave to defend for the learned ARC to examine if the landlord has made out a prima facie case to seek eviction of the tenant on the ground of bonafide requirement. In other words, the tenant will have to make a positive case as to why the landlord is disentitled from obtaining an order for recovery of possession.

39. In the instant case, this Court finds the criticism of the learned counsel for the Petitioners of the impugned order of the learned ARC for not adopting the above approach to be justified. In examining the application for leave to defend, the learned ARC was required to examine if the Respondents/tenants had made out a case that the landlord would be disentitled from seeking recovery of possession. The learned ARC was, therefore, required to examine if there was a change in circumstances. In the instant case, the learned ARC has not discussed the application for leave to defend at all rather has analysed the eviction petition. This Court finds that the basic approach adopted by the learned ARC in the present case is erroneous. A reading of the impugned order shows that the learned ARC took up the eviction petition and decided it

as if it was an application seeking an interim mandatory injunction under Order XXXIX Rules 1 and 2 CPC and doing so in examining whether Petitioners have made out a prima facie case. The scheme of Section 25 B of the DRCA read with Section 14(1) (e) thereof required a different approach. The burden was on the tenant to show that the landlord is disentitled to seek possession on the ground of bonafide need. In the considered view of this Court, the Respondents/tenants have not discharged that burden.

Challenge by the tenants to the settlement and the 1971 decree

40. If one turns to the application for leave to defend filed by the Respondents/tenants in the instant case, it is apparent that tenants accepted the whole property to be the joint property of Petitioners 1 and 2. Para 18 of the affidavit of Shri Sunil Malhotra filed in eviction petition E-1661 of 2006 reads as follows:

“18. It is absolutely false and frivolous to contend that the Petitioner No.1 has no right, title or interest in the premises forming part of the rear side of 34, Hanuman Road [i.e. the premises beyond the tenanted portion]. The whole property is the joint property of the Petitioners No. 1 and 2. In any case it is the absolute property of the Petitioner No.2 alone and that the Petitioner No.1 is stooge set up to evict the Respondents from the premises in suit. Even otherwise, the Petitioner No.1 is the sole heir of Petitioner No.2. The Petitioner No.2 is totally dependent for all his daily needs and requirements on the Petitioner No.1 and the latter's wife. They are living in commensuality

ever since the Petitioner No.1 was born.”

41. This completely contradicts the stand now sought to be taken that the declaratory decree of 30th April 1971 was clandestinely secured only to subvert the rent control law and that it is only a “paper” decree that has not been accepted by the L&DO. The challenge laid to the locus of Petitioner No. 1 to seek eviction of the tenant from the tenanted premises rests on a very weak foundation. It lacks factual basis and is therefore legally untenable.

Finality of the 1971 declaratory decree

42. This Court finds that the Respondents/tenants are conveniently not referring to the fact that earlier a suit had been filed by Shri T.R. Malhotra to question the decree dated 30th April 1971. The said suit was dismissed as withdrawn on 22nd September 1981. At no stage thereafter did the tenant raise the plea except when resisting the present eviction petition.

43. Reference was made by Mr. Gupta to the decisions in ***Gajpat Singh v. Sudhan AIR 1985 P&H 135***, ***Devi Dass v. Mohan Lal AIR 1982 SC 1213*** and ***Sushila Devi v. A.C. Jain 1988 (1) RCJ 287*** to urge that the mere fact that the tenant’s suit in 1976 stood dismissed as withdrawn did not preclude the tenant from raising a challenge to the 1971 declaratory decree as a defence in a subsequent eviction petition. Reference was also made to the judgment in ***Sk. Sattar Sk. Mohd. Choudhari v. Gundappa Amabadas Bukate (1996) 6 SCC 373*** to urge that it will be open to the

tenant to show that the partition was not bona fide and was a sham transaction to overcome the rigours of the rent control law.

44. The following observations of the Supreme Court in *Sk. Sattar Mohd Choudhari* are relevant:

“37. The tenancy cannot be split up wither in estate or in rent or any other obligation by unilateral act of one of the co-owners. If, however, all the co-owners or the co-lessors agree among themselves and split by partition the demised property by metes and bounds and come to have definite, positive and identifiable shares in that property, they become separate individual owners of each served portion and can deal with that portion as also the tenant thereof as individual owner/lessor. The right of joint lessors contemplated by Section 109 comes to be possessed by each of them separately and independently. There is no right in the tenant to prevent the joint owners or co-lessors from portioning the tenanted accommodation amount themselves. **Whether the premises, which is in occupation of a tenant, shall be retained jointly by all the lessors or they would partition it among themselves, is the exclusive right of the lessors to which no objection can be taken by the tenant, particularly where the tenant knew from the very beginning that the property was jointly owned by several persons and the, even if he was being dealt with by only one of them on behalf of the whole body of the lessors, he cannot object to the transfer of any portion of the property in favour of a third person by one of the owners or to the partition of the property.** It will, however, be open to the tenant to show that the partition was not bona fide and was a sham transaction to overcome the rigours or Rent

Control laws which protected eviction of the tenants except on specified ground set out in the relevant statute.”

45. It appears to this Court that it is no longer open to the Respondents/tenants to challenge the decree dated 30th April 1971. Clearly way back in 1976 it was within the knowledge of the predecessor-in-interest of the Respondents/tenants that there was a declaratory decree which recognised the settlement dated 25th September 1968. There was a site plan enclosed with the plaint and which formed the basis of the decree dated 30th April 1971. The said site plan clearly shows two portions-one in red and the other in yellow. Para 3 of the plaint in Suit No. 181 of 1971 states that “the portion marked red in the plan was to be enjoyed separately by the Plaintiff and the portion marked yellow to be enjoyed separately by the Defendant.” The plaint also adverts to the fact that the settlement deed dated 25th September 1968 was registered on 4th October 1968 and there was a letter dated 26th November 1968 of the L&DO which showed that the parties i.e. Shri Devi Dayal Mehra and Shri Jai Dayal Mehra were co-lessees from 23rd November 1968 onwards. The above facts were not disputed in the written statement filed in the suit. On that basis the suit was decreed. The decree drawn up also clearly mentions that the portion “marked red in the plan belongs to the Plaintiff and portion marked yellow belongs to the Defendant.” It is, therefore, not open to the Respondents to contend nearly four decades later, that the settlement deed was a sham document or that the decree dated 30th April 1971 was clandestinely secured. In any event, the withdrawal of the suit filed in 1970 by the predecessor-in-

interest of the Respondents/tenants to challenge the said decree and the consequent dismissal of the said suit on that basis on 22nd September 1981, rendered the said decree final.

46. In *Kamal Tanan v. M.L. Vashishta (2001) 9 SCC 263* it was held that once the partition decree had attained finality, it is not open for the Rent Controller to permit a challenge to the said decree in collateral proceedings at the instance of a third party. It was observed in para 6 of the said judgment as under:

“6. That the partition suit had been decreed on 19-9-1977 by the High Court is not in dispute and since that judgment and decree had acquired finality, both the learned Additional Rent Controller and the High Court while dealing with the eviction proceedings under the Delhi Rent Control Act, exceeded their jurisdiction in pronouncing upon the partition decree as “sham transaction”. The finality of the judgment and decree in the partition suit could not be questioned in any collateral proceedings by a third party to the partition suit. The learned Rent Controller had no jurisdiction to pronounce upon the correctness, or otherwise of the judgment and decree of the High Court dated 19-9-97 in the partition suit. The High Court, while hearing the revision petition in the eviction proceedings, also fell into a similar error and committed a jurisdictional error in agreeing with the learned Additional Rent Controller to hold that the partition decree was “a sham transaction”. The very basis for non-suiting the appellant, therefore, was erroneous.”

47. A fresh challenge cannot be permitted time and again as and when the tenant faces eviction proceedings. In any event, no credible challenge has been raised by laying any factual foundation. A mere allegation made more than three decades later that the settlement deed of 1968, and a decree of 1971 are sham documents will not *per se* give rise to triable issues.

48. The judgments in *Gajpat Singh, Devi Dass* and *Sushila Devi* are distinguishable inasmuch as they were rendered in a different set of facts. They do not come to the aid of the Respondents/tenants.

Bonafide need to be adjudged in presenti

49. It is not possible to accept the contention of the Respondents that there is absolutely no change in the circumstances since the dismissal of the previous eviction petition filed against the predecessor-in-interest of the Respondents/tenants. It is clearly not open to the tenant to dictate to the landlord how much of the premises can be claimed for the landlord's own use. As long as the landlord is able to show that he has no other premises for his residential use, it is not open to the tenant to question such need. It is also not open to the tenant to challenge a partition decree. In *Rajinder Pershad*, this Court recognised the right of a co-owner to seek a home for himself and his family separately from his father.

50. As rightly pointed out by the learned counsel for the Petitioners/landlords, in eviction proceedings under the rent control law,
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the ground of bonafide requirement is bound to be a recurring one depending on changed circumstances with the passage of time. Therefore, there is no question of the subsequent eviction proceedings on the same ground being barred by the principles of *res judicata*. Indeed, in *N.R. Narayan Swamy* it was observed in para 6 as under:

“6. In our view, the High Court ought to have considered the fact that in eviction proceedings under the Rent Act **the ground of bona fide requirement or non-payment of rent is a recurring cause and, therefore, landlord is not precluded from instituting fresh proceeding. In an eviction suit on the ground of bona fide requirement the genuineness of the said ground is to be decided on the basis of requirement on the date of the suit.** Further, even if a suit for eviction on the ground of bona fide requirement is filed and is dismissed it cannot be held that once a question of necessity is decided against the landlord he will not have bona fide and genuine necessity ever in future. In the subsequent proceedings, if such claim is established by cogent evidence adduced by the landlord, decree for possession could be passed.” (emphasis supplied)

Reference may also be made to the decision of this Court in *Jagdish Chander Gulati v. Kanta Devi 1996 (36) DRJ 654*.

51. The reasoning adopted by the learned ARC and the conclusion reached contradict each other. As regards the bonafide requirement, there was no means for the learned ARC to comment that the stand of the

Petitioner required the portion for their own occupation, “does not appeal good to judicious mind.” If the Petitioner No.1 and his wife do not find it convenient to live in the portion owned exclusively by Petitioner No.2, they cannot be compelled to live with the Petitioner No.2. Significantly these averments are made by both Petitioners 1 and 2. It cannot be said that this is no change in the circumstances since the previous eviction proceedings. There are no means to doubt the above statements of the Petitioners. The need for a grown up son and his family to live in separate premises may arise at any stage with the passage of time. It is not enough for the tenant to simply doubt the correctness of the above assertions by the landlord and ask for a full-fledged trial on that basis. It cannot be said that no such need was expressed by the landlord on an earlier occasion i.e. in 1976. The Petitioner No.1 was not even a party to those proceedings. He could not have possibly expressed such need at that point in time. Further even if he had joined his father in seeking to evict the Respondents/tenants in 1982 on the ground of bonafide need and had failed, it cannot be said that he is precluded once and for all from asserting such need 24 years later, in changed circumstances.

52. In the judgments cited by the learned counsel for the Respondents, the situation of repeated attempts by different generations of landlords to seek eviction was not encountered. The negating of a bonafide need expressed by a grandfather cannot be used to deny the bonafide need of a grandson when it is asserted 30 years later. As regards the landlords’ bona fide need for the tenanted premises constituting a ground for eviction, there is no intra generational or even inter generational ‘*res* CM (M) No. 1518 of 2009

judicata’, to insulate not only the original tenant, but successive generations of tenants from future eviction proceedings on the same ground, as long as it can be shown that the need has changed with the passage of time.

53. The approach of the learned ARC in the matter is inconsistent with the very object of introducing Section 25 B in the DRCA and mandating a summary procedure. It is indeed ironical that even at the stage of leave to defend the proceedings have gone on for over four years. Unless the tenant is able to bring forth a credible challenge to the assertion of the bonafide need of the landlord, readily granting the tenant leave to defend has the danger of reducing every summary proceedings intended to facilitate expeditious disposal, into a regular trial, thus defeating the very object of the provision.

Challenge to title/locus of Petitioner No. 1 should fail

54. Merely because the specific portions belonging to Petitioners 1 and 2 have not been earmarked did not mean that they were not co-owners. The learned ARC also noted that the tenants acknowledged Petitioners 1 and 2 to be their landlords and drew the rent cheques in favour of both of them. Indeed the learned ARC has observed to that effect in the following paragraph:

“Undisputedly Petitioner No.1 and 2 have accepted till October 2006 the rent from the Respondents through cross cheques drawn in favour of “Shri Jai Dayal Mehra and Shri Sanjay Mehra” which is being presented by Petitioner No.1 & 2 through

their joint account. It is alright that for partition of the superstructure over and above the leasehold property/plot, partition of the leasehold plot/land as such may not be required. **But the fact that the leasehold land/plot underneath the superstructure stands in the name of both the Petitioner No. 1 & 2 without earmarking their specific portions in the land/plot suggest that it cannot be said that either of them have no right/title/interest in a particular portion of the said plot/land.** Right/interest in the superstructure cannot be separated altogether from the right/interest in the land/plot beneath the superstructure.” (emphasis supplied)

55. After making the above observation, the learned ARC has concluded that “there exists a triable issue as regards right of the Petitioner No.1 qua the portion of property No.34, Hanuman Road, New Delhi, coming to share of the Petitioner No.2 as per Declaratory decree dated 30/4/71.” This conclusion, in the view of this Court, does not flow from the observations extracted hereinbefore.

56. If the learned ARC had examined the plaint in Suit No. 271 of 1971 in which the decree dated 30th April 1971 was passed, it would have been apparent that the red portion belonged to Shri Devi Dayal Mehra and the yellow portion to Shri Jai Dayal Mehra. There was absolutely no ambiguity as to which portion fell to the share of which of the Petitioners. The Will dated 12th May 1976 made it abundantly clear that the red portion which belonged to Shri Devi Dayal Mehra was bequeathed to

Petitioner No.1. The finding to the contrary in this regard by the learned ARC is therefore not supported by the record.

No justification to doubt the Will

57. The learned ARC appears to have laid too much stress on the “left approach” mentioned in the Will. This was not a suit for declaration of title filed by the landlords. All that the landlords were required to show was that the tenants were occupying the portion of the suit property which belonged to the landlords. In the present case, out of abundant caution both co-owners joined in filing the eviction petition. The tenants clearly admitted in the affidavit in support of the leave to defend that both Petitioners 1 and 2 were joint owners of the entire property. It was, therefore, wholly unnecessary for the learned ARC to have gone by the “left approach” as mentioned in the Will. It was not open in any way for the Respondents/tenant to challenge a Will left by the erstwhile landlord in favour of any of his legal representatives. The tenants really have no concern with such matters.

No basis for doubting the site plan

58. The learned ARC also appears to have proceeded on the footing that the site plan produced was required to be further proved by way of evidence. As long as the tenants did not produce any site plan to contradict the site plan produced by the landlords, the bare denial that the certified copy of the site plan which was appended to the plaint filed in Suit No. 271 of 1971 was not consistent with what was described in the Will and therefore not genuine, did not give rise to a triable issue. Even

if the settlement deed does not refer to any site plan, the plaint does refer to the site plan and in fact encloses it. The suit stands decreed on that basis. The decree has attained finality. It must be recalled that there is no site plan appended to the Will either. Therefore, there was no legal basis to question the site plan on the ground of alleged inconsistency of the said site plan with the settlement deed or the Will. In the above circumstances, the certified copy of the site plan that was enclosed with the plaint had to be acted upon. This Court concludes that the certified copy of the site plan as produced by the petitioners, which formed part of the judicial record, by itself did not raise any triable issue.

Nothing turns on whether Settlement was contrary to the terms of the lease

59. Learned ARC has in the impugned order observed:

“The mere fact that partition of superstructure may not amount to violation of terms of the lease deed with regard to land beneath the superstructure, as was held in case law reported as *Ram Lal Sachdev V/s Smt. Sneh Sinha* (supra) is to no benefit to the Petitioners in the facts & circumstances of this case.”

60. This Court is unable to agree with the above observation. Nothing turns on the fact that the settlement deed entered into may have violated any of the conditions of the lease. It is not in any event open to the tenant who was not even a party to the settlement to question such transaction on that basis. It is possible that the settlement gets recognised under the

conversion policy of the Government. In such event, the objection to the settlement as being inconsistent with the terms and conditions of the lease will no longer survive. So also the carrying out of the mutation of names in the records of the NDMC. Not having disputed the joint ownership of the tenanted premises by the landlords, these objections by the tenants are not only not germane to the eviction proceedings but certainly do not give rise to triable issues. The fact remains that the unity and integrity of the tenancy can never be split and, therefore, the eviction petition is required to be filed in respect of the entire premises and not only in respect of a part thereof. In the instant case, both the co-owners have joined in filing the petition and the tenants admit that they are the co-owners of the entire premises. They have satisfactorily explained their bona fide need. The tenants on the other hand have not produced any positive evidence to show even prima facie that the landlords are not entitled to seek eviction on the said ground.

Conclusion

61. For the aforementioned reasons, this Court finds no merit in any of the contentions advanced by the learned counsel for the Respondents. This Court is satisfied that the reasoning and the conclusion arrived at by the learned ARC in allowing the Respondents' application for leave to defend is erroneous in law. The impugned order is accordingly hereby set aside. The Respondents' application for leave to defend is rejected. However, in terms of Section 14 (7) of the DRCA, the Petitioners/landlords will not be entitled to obtain possession of the tenanted premises for a period of six months from the date of this order.

62. The petition is accordingly allowed with costs of Rs.20,000/- which will be paid by the Respondents to the Petitioners within a period of four weeks.

S. MURALIDHAR, J.

July 12, 2010
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