

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **R.C.R.NO. 62 OF 2010**

Date of Decision: 12th March, 2012

RAKESH GUPTA & ANR. Petitioners

Through: Mr. Ramji Srinivasan, Sr. Advocate
with Mr. P.K. Jha, Mr. P.K Saini &
Ms. Alka Srivastava, Advocates

Versus

\$ **ASHOK DILWALI** Respondent

Through: Mr. Anoop Choudhary, Sr. Advocate
with Mr. Rishi Malhotra, Advocate

CORAM:

* **HON'BLE MR. JUSTICE P.K.BHASIN**

ORDER

P.K.BHASIN, J:

This petition under Section 25-B(8) of the Delhi Rent Control Act, 1958(hereinafter called 'the Rent Act') has been filed by the petitioners-landlords against the order dated 15.01.2010 passed by the learned Additional Rent Controller whereby the application filed by the respondent-tenant seeking leave to defend the eviction petition filed against him and his brother Mr. Kailash Dilwali by the petitioners-landlords under Section 14(1)(e) of the Rent Act for their eviction from property no.A-2 Connaught Place, New Delhi

(hereinafter referred to as ‘the tenanted premises’) was allowed and he was permitted to contest the eviction petition.

2. The eviction petition was filed against the respondent and his brother as the legal heirs of their father late Shri B.K.Dilwali who had been initially let out the tenanted premises by the grandfather of the petitioners. The relevant averments made in para no.18 (a) of the eviction petition on the basis which eviction of the respondent and his brother was sought are reproduced below:-

“That the petitioners are the owners and the landlords of the premises, and require the premises for their own use. The premises were let out to Late Shri B.K Dilwali, father of the respondents at a monthly rent of about Rs. 389.10, about 65 years ago.

That, as stated above in para 8, the premises comprise an area of 1800 sq. ft on ground floor + 500 sq. ft. On mezzanine floor + 400 sq. ft. of open space as courtyard and are located in a central and prestigious commercial area and are most suited for resto-bar.

The petitioners submit that Ishan Nath, son of Shri Rakesh Gupta, petitioner no.1 has just finished his education and requires the premises to run business of bar-cum-restaurant, which is well suited to the premises. He is dependent on the petitioner for accommodation to run the business. The demised premises is located in the heart of the metropolis, in a sought after area and is ideal for this business. Offices and showrooms of multinationals, airlines and foreign banks are located in the vicinity and metro station just abutts the premises. Ishan Nath requires the said premises since he has no other suitable place for this venture. The petitioner can finance the business.”

3. The eviction petition was filed under Section 14(1)(e) of the Rent Act which had to be dealt with in accordance with the special procedure prescribed under Section 25-B of the Rent Act and the two respondents-tenants were required to seek permission of the

Additional Rent Controller to contest the eviction petition as per the requirement of Section 25-B(4) of the Rent Act within fifteen days from the date of receipt of the summons.

4. The respondent herein had filed an application seeking leave to defend the eviction petition and the Additional Rent Controller granted him the leave sought for vide impugned order.

5. Feeling aggrieved by the grant of leave to contest to the respondent-tenant the petitioners filed the present revision petition.

6. Learned senior counsel for the respondent had raised an objection that this revision petition itself is not maintainable in view of the proviso to Section 25-B(8) under which a revision petition would lie only at the instance of a tenant if an order for eviction is passed by the Rent Controller in an eviction petition which has been dealt with in accordance with the procedure prescribed under Section 25-B of the Rent Act. On merits, learned senior counsel fully supported the decision of the learned Additional Rent Controller and submitted that the trial Court has rightly come to the conclusion that the respondent-tenant had raised triable issues and so he should be given a chance to establish the same during trial.

7. Learned counsel for the petitioners-landlords had argued that this petition is very much maintainable in view of the decision of a Division Bench of this Court in the case of **“R.S.Bakshi vs H.K.Malhari & anr.”**, 2002(62) DRJ 272 wherein it had been held

by the Division Bench, after noticing the two Judge Bench decision of the Apex Court in “***Major D.N. Sood vs. Shanti Devi***”; **1997 (10) SCC 428**, which has been strongly relied upon by the learned senior counsel for the respondent in support of the submission that a revision petition at the instance of a landlord is not maintainable, that a revision petition at the instance of a landlord who is aggrieved by the grant of leave to defend the eviction petition to a tenant, is also maintainable. That view was taken by the Division Bench relying upon an earlier three Judge Bench decision of the Supreme Court in “***Vinod Kumar Chaudhary vs. Smt. Narain Devi***”; **AIR 1980 Supreme Court 2012**, wherein it had been held that a revision petition even at the instance of a landlord is also maintainable under Section 25-B(8) of the Rent Act. This decision of the Division Bench has been followed by a Single Judge Bench of this Court in the case of “***Sanjay Mehra v. Sunil Malhotra***”; **2010, DRJ (117) 654**.

8. Learned counsel for the respondent, while responding to the submissions made by the learned counsel for the petitioner regarding the maintainability of this petition in view of the Division Bench decision of this Court in R.S.Bakshi’s case(supra), had submitted that though the Division Bench has held the Supreme Court’s decision in Maj. Sood’s case (supra) to be *per incuriam* because of the fact that earlier three Judges Bench judgment of the Supreme Court in “***Vinod Kumar Chaudhary vs. Smt. Narain Devi***”; **AIR 1980 Supreme Court 2012** was not brought to the notice of the two Judges Bench which had

given the judgment in Major Sood's case, but that could not be said by the Division Bench of the High Court in respect of a judgment of the Apex Court.

9. After having heard learned counsel for the parties I am of the view that as far as the objection raised on behalf of the respondent – tenant that revision petition at the instance of the landlord is not maintainable is concerned, the same is liable to be rejected since after taking note of the two conflicting judgments of the Hon'ble Supreme Court on this aspect, one of which was rendered by a three Judges Bench in “*Vinod Kumar Chowdhary vs. Narain Devi Taneja*”, 1980 SC 2012 and the other one was rendered in the year 1997 by a two Judges Bench in “*Major D.N. Sood v. Shanti Devi*”; 1997 (10) SCC 428, a Division Bench of this Court in “*R.S.Bakshi vs H.K.Malhari & anr.*”, 2002(62) DRJ 272 has already concluded that the judgment of the Hon'ble Supreme Court in Maj. D.N. Sood's case was *per incuriam* since the earlier three Judges Bench judgment of the Hon'ble Supreme Court in Vinod Kumar Choudhary's case(supra) had not been brought to the notice of the two Judges Bench which had heard Maj. D.N.Sood's case. That decision of the Division Bench was, as noticed already, later on has been followed by a Single Judge Bench of this Court in the case of “*Sanjay Mehra & Ors. Vs. Sunil Malhotra & Anr.*”, 2010 (117) DRJ 654. Learned counsel for the respondent had submitted that the Division Bench of this Court could not have held the judgment of the Hon'ble Supreme Court in Major D.N.Sood's

case(supra) to be *per incuriam*. Alternatively, it was also suggested that this legal controversy should be got resolved by recommending to the Hon'ble Chief Justice constitution of a Full Bench to decide whether the Division Bench could have held the judgment of the Supreme Court in Maj. D.N.Sood's case(supra) to be *per incuriam* or not.

10. However, I am of the view that it is not necessary for me to make a recommendation for the constitution of a Full Bench in view of the fact that a Division Bench of this Court has already considered this very controversy regarding the maintainability of a revision petition at the instance of a landlord and has also taken note of the two conflicting judgments of the Supreme Court and has come to the conclusion that a revision petition at the instance of an unsuccessful landlord is also maintainable under Section 25-B(8) of the Rent Act. So, judicial discipline requires this Single Bench to follow that decision of the Division Bench and judicial consistency also requires this Bench to follow the Single Judge Bench judgment of this Court in Sanjay Mehra's case(supra) . So, I reject this preliminary objection of the respondent-tenant.

11. Now I come to the petitioners' challenge to the impugned order of the learned Additional Rent Controller granting leave to defend the eviction petition to the respondent. At the outset, learned senior counsel for the petitioner had submitted that the learned Additional Rent Controller should not have entertained the prayer of the

respondent for leave to contest the eviction petition since he had not filed any affidavit disclosing the facts which would have entitled him to the leave sought for and so this revision petition deserves to be allowed on this short ground alone. He drew my attention to the following observations of the learned Additional Rent Controller made in the impugned while rejecting the same plea which was raised there also:-

“I have perused the affidavit filed along with application for leave to contest. The affidavit find mention name of the deponent as Kailash Dilwali but, the signature of swearing person, who has sworn this affidavit, are of Ashok Dilwali. The name of Kailash Dilwali in the starting of the affidavit may be mentioned due to typographical mistakes. It is established law that disputes between the parties must be adjudicated on merits and technicalities must not be come in the way of merits of the case. So, to my mind, the objection taken by the petitioner is not sustainable.....”

Learned senior counsel submitted that this view of the learned Additional Rent Controller is contrary to the judgment of this Court in **“Vidya Sagar vs Smt. Shakuntala Devi”, 1991 All India Rent Control Journal 660** in which it was held that an unattested affidavit is no affidavit in the eyes of law and cannot be considered while considering the prayer of a tenant for grant of leave to contest, while in the present case there was no affidavit at all of the respondent filed with the leave to contest application but still the respondent has been granted the leave to contest. This judgment, counsel submitted, had not even been referred to in the impugned order even though its copy is a part of the trial Court’s record.

12. Learned senior counsel for the respondent, on the other hand, maintained that the defect in the affidavit in question, though there was none and it is a case of only a typographical mistake as observed by the Controller also, was a curable defect and had been rightly not given any importance by the Additional Rent Controller. It was also submitted that the respondent has in any case now placed on record in this petition a fresh affidavit of the tenant and so the defect, if at all there was any, stands cured and this Court should accept that affidavit and in that way this Court would be doing substantial justice in the matter instead of rejecting the case of the respondent only due to this technical defect.

13. In order to appreciate the rival submissions on this aspect of the matter I have perused the trial Court record and find that alongwith the application filed by the respondent seeking leave to contest the eviction petition he had also submitted an affidavit. In the two paragraph affidavit the first page reads as under:-

“ I Kailash Dilwali S/o Late B.K.Dilwali R/o 22, Jor Bagh, New Delhi, do hereby solemnly affirm and declare as under:

- 1. I am the respondent no.1 and as such well conversant with the facts and circumstances of the case; hence I am competent to swear this affidavit.*
- 2. That the accompanying application for leave to defend has been drafted by my counsel under my instructions and the same has been read over to me in vernacular, the contents of the same are true and correct to my knowledge and belief.”*

The second page of the so-called affidavit of the respondent has only the verification para and the same is re-produced below:-

“Sd/-
DEPONENT

VERIFICATION:

I, the abovenamed deponent, do hereby verify, at Delhi on this 04 Aug. 2008 that the contents of the above affidavit are true and correct to my knowledge and belief and no part of it is false and untrue and nothing material has been concealed there from.

Sd/-
DEPONENT”

The stamp of the Oath Commissioner also shows that the deponent who had appeared before him was Kailash Dilwali and not Ashok Dilwali, the respondent herein. The Additional Rent Controller did not notice the Oath Commissioner’s endorsement to the effect that he was attesting the affidavit of Kailash Dilwali.

14. It is thus clear that the respondent herein had not filed any affidavit at all seeking leave to contest the eviction petition. The learned Additional Rent Controller thus went totally wrong in rejecting the plea of the petitioners-landlords that this affidavit should not be considered to be an affidavit of the respondent-tenant and committed a serious illegality in accepting the same and giving leave to contest to the respondent-tenant. This was not a case of a curable defect at all. Instead, there is a fatal infirmity in the respondent’s case. A tenant is supposed to seek permission from the Controller to contest the eviction petition filed under Section 14(1)(e) of the Rent Act by filing an affidavit within fifteen days from the date of receipt of

summons pleading such facts as would disentitle the landlord from obtaining an eviction order. That period of fifteen days within which the affidavit of the tenant is to be filed is not extendable even for a day and failure to file the affidavit has to result in the passing of an eviction order against the tenant. This Court in Vidya Sagar's judgment(supra) relied upon by the petitioners-landlords had not accepted the affidavit which was not attested by the oath commissioner while in the present case there is no affidavit at all of the respondent-tenant filed within the prescribed period. Therefore, by placing on record now the affidavit of the respondent, and that too without any permission of the Court, the respondent cannot escape the consequence of his not filing an affidavit along with his application for leave to contest within the prescribed period. The mandate of the Legislature that the affidavit of the tenant has to be filed within fifteen days of the receipt of the summons of the eviction petition filed a landlord on the ground of *bona fide* requirement cannot be set at naught even by this Court by considering the affidavit which has now been filed by the tenant in this revision petition. I am thus in full agreement with the submission made on behalf of the petitioners-landlords that this petition deserves to be allowed on this ground alone without going into any other aspect and an eviction order has to be passed against the respondent also, as had been passed against his brother on 03-09-2008 for not seeking leave to contest the eviction petition.

15. This revision petition is, therefore, allowed and the impugned order passed by the learned Additional Rent Controller granting leave to contest to the respondent herein is set aside. Consequently, an eviction order is also passed against the respondent in respect of the tenanted premises but he is granted six months time to vacate.

P.K. BHASIN, J

MARCH 12, 2012