

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

+ R.C.REV. 237/2012

Date of Decision: 27.09.2012

NARENDER KUMAR GUPTA

..... Petitioner

Through: Mr. Sanjiv Kakra, Advocate
with Mr. Vipin Bhaskel,
Advocate.

Versus

S.K.GARG & ORS.

..... Respondents

Through: Mr. Sonal Sinha, Advocate.

CORAM:

HON'BLE MR. JUSTICE M.L. MEHTA

M.L. MEHTA, J. (Oral)

1. This revision petition under Section 25-B(8) of the Delhi Rent Control Act (for short the 'Act') is directed against the order dated 4.4.2012 of the learned ARC, whereby the leave to defend application filed by the respondents in the eviction petition filed against them by the petitioner, was allowed.

2. The petitioner filed the petition against the respondents seeking their eviction from the tenanted shop on the ground floor of the property bearing No. 9984-85, Swami Ram Bihari Road, Sarai Rohilla,

New Rohtak Road, New Delhi on the ground of bona fide requirement thereof by the petitioner for himself and his family members dependent upon him. The suit shop was particularly stated to be required for running of diagnostic centre by his son Dr. Deepak Gupta. The petitioner's case was that his son Dr. Deepak Gupta is a qualified Radiologist and had been working at Jeewan Mala Hospital and intends to start his diagnostic centre. The wife of Dr. Deepak Gupta is also stated to be a qualified Microbiologist and working with G.B.Pant Hospital. The petitioner has two other sons namely Vikas and Dinesh. The back portion of the premises shown as marked 'D' is stated to be in possession of Dinesh, where he is running his business under the name of Krishna Medisurge. The portion on the ground floor of the premises in possession of R.K.Garg marked by letters R to R4 in the site plan, and another portion on the ground floor shown in the site plan by mark S to S3 in possession of M/s. Solar Enterprises is also sought to be required by the petitioner for the diagnostic centre of his son Dr. Deepak Gupta. In addition, the portion in possession of M/s. Pooja Process on the first floor, is also allegedly required for the same purpose. It is averred that the petitioner is taking steps to get all these portions vacated from these tenants. It is averred that he has got sufficient funds initially required for the part time running of the diagnostic centre by his son Dr. Deepak Gupta, who shall thereafter be running a full-fledged diagnostic centre.

3. In the leave to defend application, the respondents raised various issues disputing the bona fide requirement of the tenanted premises by the petitioner. The learned ARC found all these issues raised by the respondents to be triable, and thus, granted them leave to defend. It is this order of the ARC, which is under challenge in the instant petition.

4. The submissions which have been made by the learned counsel for the petitioner before me are the same, which were made on behalf of the petitioner before the ARC, and which have been adequately dealt with by him. However, before advertng to those submissions, I must reiterate that the power of this Court under Section 25–B (8) Act are not as wide as those of Appellate Court, and in case it is found that the impugned order is according to law and does not suffer from any jurisdictional error, this Court must refrain from interfering with the same. The power under this provision is limited and supervisory in nature. Only when it is evident that the Rent Controller has committed grave illegality or came to a conclusion which was not possible, based on the material produced, should this Court interfere in the orders passed by the Rent Controller.

5. Taking as it is that Dr. Deepak Gupta as also his wife Dr. Manisha are qualified Radiologist and Microbiologist, but, undisputedly, at the time of filing of the petition, Dr. Deepak Gupta was in service with Jeewan Mala Hospital and had resigned therefrom within 15 days of the filing of the leave to defend application by the

respondents. His wife Dr. Manisha, who was in service with G.B.Pant Hospital is, undisputedly, continuing to be in service in ESI Hospital. The plea that she also may assist her husband in the diagnostic centre, may not be doubtful, but, at the same time, this would require to be tested in due course of time. Dr. Deepak Gupta has started diagnostic centre in the same area on 5.3.2010 in the premises taken for the period of three years. His desire of setting up of his own diagnostic centre in the suit premises, may be genuine and not to be outrightly disbelieved, but, at the same time, having regard to the entire factual matrix to be noted hereinafter, the same would be required to be tested as regard their bona fide as also the petitioner not having any other reasonably suitable accommodation for the same.

6. It is noted by the ARC, and rightly so, that in the eviction petition, the petitioner did not disclose about the accommodation available with him on the first and the second floor of the suit premises as also the accommodation acquired in the name of his son Vikas in premises 9985 A, which is a building adjoining the suit premises and also the accommodation, which was available with the petitioner on the ground floor of the suit premises.

7. In reply to the leave to defend application, the petitioner stated having acquired the vacant possession of the portion R to R4 from its tenant R.K.Garg and the same now being in his possession. This was stated by the petitioner to be not suitable and sufficient for running

diagnostic centre, inasmuch as it was on the side lane and the backside of the suit premises. It was alleged that the regular traffic could not pass from the side lane easily and for running the diagnostic centre, access from the front side was essential. Then, there is one room on the left back of the suit premises, which measures 20 feet x 12 feet. This was stated to be in possession of his son Dinesh where he is stated to running his business of surgical equipments under the name of Krishna Medisurge. In any case, it was submitted that entrance to this room being from the narrow passage from the front side, this could not be used for diagnostic centre. This was disputed by the respondents, alleging the same to be in possession of the petitioner. Undisputedly, Dinesh is having his shop of surgical equipments at shop No. 1, R.M.L.Hospital and this was the petitioner's own case that they never intended to give up that shop, which is with Dinesh at R.M.L.Hospital. It was however sought to be projected that this is a stall on license basis and not a shop. Be that as it may, it is undisputed that Dinesh is having his business of surgical goods at R.M.L.Hospital and if that is so, the contention of the respondents that this room is available to the petitioner, cannot be outrightly brushed aside. The plea that entry to this room is from the narrow passage from the front, is also a question which cannot be determined by affidavits and is a fact of determination by trial, when, admittedly, the passage and the verandah leading to the said room is shown in the site plan. Further, the petitioner also stated that one room on the first floor is in possession of Vikas where he is storing his stocks of medicines of Krishna Medicos. In this regard, the

plea of the respondents that Vikas is running his chemist shop at R.M.L.Hospital is also not disputed by the petitioner. Similarly, in his case, it was his plea that this was a stall on licence basis and they do not want to stop business from there. The plea that Vikas is running his chemist shop at R.M.L.Hospital and not from any portion of the suit premises as alleged by the respondents, cannot be brushed aside, and would require to be tested.

8. The petitioner has not disclosed that the adjoining premises 9985A has been acquired in the name of his son. In reply to the leave to defend application, it was stated that this has been acquired after the filing of the petition. The copy of the sale deed on record would show otherwise that this property was purchased on 01.09.2009, whereas the petition is filed on 16.12.2009. This would show that this premises, which is just adjoining the suit premises, was available with the petitioner and his family at the time of the filing of the petition and the same has not been disclosed and rather, concealed. This would certainly require the bona fide of the petitioner to be tested.

9. Further, it was the petitioner's case that he along with his three sons is living in the first floor of the suit premises, whereas in reply to the leave to defend application, he tried to set up a different case, stating that the accommodation available with him in the second floor

is of one bedroom, one drawing room and one store room and a tin shed and that the entire accommodation except the store room, is in possession of Dr.Deepak and his family for residence. The store room was stated to be in possession of Krishna Chemists of his son Vikas Gupta as discussed above. As against the earlier plea that Vikas was also residing with him on the first floor, now, his stand was that Vikas and his wife and two children are living in the accommodation acquired by them in the adjoining premises 9985 A.

10. With regard to one room on the ground floor which was also acquired by Vikas vide the aforesaid sale deed, the plea now taken in the reply was that it was being used as a staff room for residence of workmen of Krishna Chemists of Vikas Gupta. The non-disclosure of the accommodation in the suit premises as also in the adjoining premises, and also the incomplete disclosure of the use of different portions in the premises, makes it to call upon the petitioner to prove his bona fide, and not to discard the pleas of the respondents at the threshold.

11. It is settled law that the at the stage of granting leave to defend, the test that is applied is whether in the facts disclosed in the affidavit, filed seeking leave to defend, *prima facie* shows that the landlord would be disentitled to obtain an eviction order and not, where at the end, the defence taken by the tenant may fail. If the application filed

under Section 25B disclosed some substantial triable issues, then it would be grave injustice to brush them outrightly, without testing the veracity of the claims made by the tenant/applicant. The law in this regard has been well settled in various pronouncements and reference can be made to **Inderjeet Kaur Vs. Nirpal Singh**, (2001) 1 SCC 706, wherein it was held as under:

“A landlord, who bona fiddly requires a premises for his residence and occupation should not suffer for long waiting for eviction of a tenant. At the same time, a tenant cannot be thrown out from a premises summarily even though prima facie he is able to say that the claim of the landlord is not bona fide or untenable and as such not entitled to obtain an order of eviction. Hence the approach has to be cautious and judicious in granting or refusing leave to defend to a tenant to contest an eviction petition within the broad scheme of Chapter IIIA and in particular having regard to the clear terms and language of Section 25B(5).

With this background, we now turn to the facts of the case in hand. It is clear from the reading of the order of the Addl. Rent Controller that he has taken pains to write an elaborate order as if he was writing an order after a full-dressed trial of eviction petition he has considered merits of the respective contentions at the stage of granting leave to defend under Section 25B(5) without keeping in mind the scope of the provisions and statutory duty cast on him. He exceeded the jurisdiction vested in him in refusing leave to defend to the appellant. It appears to us that he did not focus his attention to the scope and content of Section 25B(5). Having regard to the facts stated and grounds raised in the affidavit filed by the appellant seeking leave to defend which we have already narrated above, it is not possible to take a view that no triable issue arose for consideration. The facts stated in the affidavit of the appellant in support of his application seeking leave to defend prima facie do disclose that the respondent would be disentitled to obtain an order for the recovery of possession of the premises from the appellant particularly when other cases are pending between the parties and defence does not appear to be frivolous or untenable on the face of it. The Addl. Rent Controller has acted with material irregularity and committed a manifest error in accepting the case of the respondent-landlord when the facts were seriously disputed and the correctness or otherwise of the documents required to be examined. Whether the suit premises was used for residential-cum-commercial purposes from the inception and whether the respondent and his son and other members of the family are

permanently and comfortably settled in U.K. and whether the requirement of the premises by the respondent was bona fide, are the matters which could not be adjudicated as has been done by the Addl. Rent Controller at the stage of dealing with the application to grant leave to defend. In this view of the matter, we have no hesitation to say that the order passed by the Addl. Rent Controller refusing leave to defend to the appellant cannot be sustained. Unfortunately, the High Court also has affirmed it without taking into consideration the correct legal position indicated above having regard to the facts of the case. We are of the view that the Addl. Rent Controller and the High Court both were in error in refusing to grant leave to the appellant to contest the eviction petition.”

12. Further, in ***Charan Dass Duggal vs. Brahma Nand***, (1983) 1 SCC 301, while dealing with the issue of leave to defend the Apex Court has held thus:

“5. What should be the approach when leave to defend is sought for? There appears to be a mistaken belief that unless the tenant at that stage makes out such a strong case as would non-suit the landlord, leave to defend cannot be granted. This approach is wholly improper. When leave to defend is sought for, the tenant must make out such a prima facie case raising such pleas that a triable issue would emerge and that in our opinion should be sufficient to grant leave. The test is the test of a triable issue and not the final success in the action (see Santosh Kumar v. Bhai Mool Singh). At the stage of granting the leave parties rely in support of their rival contentions on affidavits and assertions and counter-assertions on affidavits may not afford such incontrovertible evidence to lead to an affirmative conclusion one way or the other. Conceding that when possession is sought for on the ground of personal requirement, an absolute need is not to be satisfied but a mere desire equally is not sufficient. It has to be something more than a mere desire. And being an enabling provision, the burden is on the landlord to establish his case affirmatively”.

13. In view of my above discussion, I am of the view that substantial and important triable issues have been raised by the respondents, which could not be prematurely decided. I do not see

any infirmity or illegality in the impugned order calling for interference by this court. The petition has no merit and is hereby dismissed.

M.L. MEHTA, J.

SEPTEMBER 27, 2012

akb