

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

% **R.C.REV.NO. 184/2010**

+ **Date of Decision: 15th February, 2012**

PREM LATA **....Petitioner**

! **Through: Mr. Anil Kumar Aggarwal &
Mr. Abhay Kumar, Advocates**

Versus

\$ **PAWAN KUMAR KHURANA & ORS. Respondents**

**Through: Mr. B.K. Sood & Mr. Vipul
Sharda, Advocates**

CORAM:

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

JUDGMENT

P.K.BHASIN, J:

This petition under Section 25-B (8) of the Delhi Rent Control Act, 1958 (hereinafter called “the Act of 1958”) read with Sections 115 and 151 of the Code of Civil Procedure and Article 227 of the Constitution of India is at the instance of a landlady against the order dated 31.05.2010 passed by the learned Additional Rent Controller whereby her tenant in a shop belonging to her, the respondent no.1 herein, has been granted leave to defend the eviction petition filed against him by her under Section 14-D of the Act of 1958.

2. The relevant averments made in para no.18 (a) of the eviction petition are-produced below:-

earlier doing the business in that shop but for last one year the same was lying locked. It was also pleaded that the portion marked as 'H' in the plan, which had been projected as a drawing room, was also lying vacant and that portion also could be used by the petitioner for her residence.

4. The petitioner-landlady then filed a reply to respondent no. 1's leave to defend application all the allegations made in the leave to defend application were denied and she claimed that one shop on the ground floor was not lying vacant and was being used by her grandson, who is also a co-owner of the entire property after the death of his grandfather, petitioner's husband.

5. The learned Additional Rent Controller vide impugned order allowed the application of the respondent no.1 for grant of leave to defend the eviction petition. This is how the learned Additional Rent Controller dealt with the points raised by the respondent no.1 in his application for leave to defend and the case of the petitioner herein:

“ It is submitted by counsel for the respondent that the only ground taken by the applicant for eviction is illness which is disputed by the respondent. It is further submitted that medical certificate produced by the applicant to show her illness are of the date just before the filing of the petition. It is further submitted that the applicant is getting treatment from one hospital, however, the certificate has been issued by Dr. Mangla.

It is further submitted by counsel for the applicant that the premises in question is a shop on the main road from very beginning and it cannot be used for residential purpose more particularly for the residence of an old person.

It is further submitted that the applicant says one room as a drawing room, however, the respondent says it is lying vacant. Counsel for the

respondent having drawn my attention on the photographs of the shop submits that one more shop is lying vacant where son of the applicant was carrying on business.

Per contra, it is submitted by counsel for the applicant that the shop in photograph produced on behalf of the respondent itself shows that the shop is open and he cannot contend that the shop is lying vacant. It is further submitted that of the OPD cards produced on behalf of the applicant for showing illness is of government hospital and is reliable document. It is further submitted that in the day time there will be traffic on the road on which the premises is situated is to be seen by the petitioner and not by the respondent. it is further submitted that the applicant is correctly showing the drawing room on portion 'L' and it is not lying vacant. Counsel for the applicant having drawn my attention on record of payment of VAT and submits that the son of the applicant is carrying on business from the shop, however, the respondent is falsely claiming it to be vacant.

By way of present application, the respondent has alleged that the documents produced on behalf of the applicant to show her illness were issued just before the filing of present application for eviction. The respondent has also alleged that the premises in question is a shop situated on the main road which cannot be used for residential purpose. The respondent has also alleged that one drawing room in possession of the applicant is lying vacant. The respondent has further alleged that one shop is also lying vacant where the son of the applicant was earlier carrying out business. The contention of the applicant is that her son is running business therefrom. Statement of payment of VAT shows that only a sum of Rs. 459 has been paid as VAT by the son of the applicant and the same has been paid after filing of this petition. Merely from photograph it cannot be decided whether the shop where the son of the applicant was carrying out business is vacant or not.

In these circumstances, I am of the opinion that a fair opportunity to test the genuineness of requirement of the applicant be granted to the respondent. The application for grant of leave to defend is allowed."

6. Feeling aggrieved by the grant of leave to defend to the respondent no.1 the petitioner has approached this Court by filing this petition.

7. I have heard the learned counsel for the parties. Learned counsel for the respondent no.1 had raised a preliminary objection that this petition itself is not maintainable since under Section 25-B(8) of the Act of 1958 read with the proviso thereto, which has been invoked by the petitioner-landlady, 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. Reliance was placed on a decision of the Supreme Court in ***“Major D.N. Sood v. Shanti Devi”*; 1997 (10) SCC 428** in support of this preliminary objection. On merits, the learned counsel for the respondent no.1 had submitted that the trial Court has rightly come to the conclusion that the tenant has raised points which need to be proved and so he should be given a fair chance to establish the same. It was also contended that the petitioner-landlady has already more than sufficient accommodation in her possession on the ground floor which has been shown at points ‘L’ and ‘H’ in the site plan filed along with the eviction petition.

8. Learned counsel for the petitioner had argued that this petition is very much maintainable in view of the decision of a Single Judge Bench of this Court in the case of ***“Sanjay Mehra v. Sunil Malhotra”* ; 2010, DRJ (117) 654** in which reliance was placed by the learned Single Judge on a Division Bench decision 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 decision of the Apex Court in Maj Sood’s case(supra) strongly relied upon by the

counsel for the respondent no.1 herein, that a revision petition at the instance of a landlord who is aggrieved by the grant of leave to defend to the tenant is also maintainable. My attention was drawn specially to the following paras from the judgment of the learned Single Judge:-

“ 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 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.”*

9. Learned counsel for the respondent no.1, while responding to the submission made by the learned counsel for the petitioner regarding maintainability of this petition in view of the Division Bench decision of this Court in R.S.Bakshi's case(supra), had submitted that the Division

Bench could not have distinguished the Supreme Court's judgment in Maj. D.N.Sood's case(supra), wherein it had been held that a revision petition at the instance of a landlord is not maintainable, from the earlier judgment of the Apex Court in the case of "Vinod Kumar Chaudhary vs Smt. Narain Devi", 1980(1) All India Rent Control Journal 524, wherein it had been held that revision petition was maintainable even at the instance of a landlord, for the reason that the decision in Maj. Sood's case was *per incuriam* as a High Court cannot declare any decision of the Supreme Court to be *per incuriam*. In support of this argument the learned counsel placed reliance on two judgments reported in **144(2007) DLT 81** and **2006 (II) Apex Decisions (Delhi)89**.

10. After having heard learned counsel for the parties I am of the view that this revision petition deserves to be allowed. As far as the objection raised on behalf of the respondent no. 1 – tenant that revision petition at the instance of the landlady is not maintainable is concerned, I do not find any merit in the same in view of the fact that after taking note of two judgments of the Hon'ble Supreme Court on this aspect, one of which was rendered in the year 1980 in "**Vinod Kumar Chowdhry vs. Narain Devi Taneja**", **1980 SC 2012** and the other one was rendered in the year 1997 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** had concluded that subsequent judgment of the Hon'ble Supreme Court in Maj. D.N. Sood's case was *per incuriam* since at that time the earlier three Judges' Bench judgment of the Hon'ble Supreme Court in Vinod Kumar Choudhary's case 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 later on followed by a Single Judge Bench of this Court in the case of ***"Sanjay Mehra & Ors. Vs. Sunil Malhotra & Anr."***, 2010 (117) DRJ 654. Although learned counsel for the respondent no. 1 had submitted that the Division Bench of this Court could not have held the judgment of the Hon'ble Supreme Court in the case of Major D.N. Sood's case to be *per incuriam* and in support of that submission he had cited some judgments also reported as ***"Indian Council of Agricultural Research & Anr. Vs. Bidesh Singh & Ors."***, 144 (2007) DLT 81; ***"Colgate Palmolive Co. Limited & Anr. Vs. Mr. Patel & Another"***, 2006 II AD (Delhi) 89 and ***"Common Cause (A Regd. Society) vs. Union of India and others"***, AIR 2001 Delhi 93, but in my view that submission cannot be accepted in view of the fact that a Single Judge Bench is not expected to ignore the decision of the Division Bench. That would be contrary to the judicial discipline as well as judicial consistency and, therefore, relying upon the judgment of the Division Bench of this Court in R.S. Bakshi's case(supra) I reject this preliminary objection of the tenant.

11. As far as the merits of the case are concerned, the learned Additional Rent Controller has allowed the leave to defend application moved by respondent no. 1 – tenant on the ground that the points raised by him to the effect that the petitioner – landlady had in her possession another shop which was adjoining to the shop under the tenancy of respondent no. 1 herein and that was lying vacant also and further that she also has in her possession some portion on the ground floor, which in

the site plan filed with the eviction petition had been shown as a drawing room, and whether she was actually sick or not were required to be established by the respondent no. 1 – tenant and for that purpose he deserved to be given a fair opportunity. Same reasoning was adopted by learned counsel for the respondent no. 1 during the course of hearing of this petition.

12. As far as the petitioner – landlady's claim that she was old and sick is concerned, it was not disputed by the respondent no. 1 – tenant that she was 85 years old and, therefore, even if the medical papers, which had been placed on record by her, were recently obtained by her, as was noticed by the Controller in the impugned order, that would not show that her claim that she was suffering from various ailments was false. The fact that she is 85 years of age by itself was sufficient to accept her need for accommodation on the ground floor and that need cannot be said to be *mala fide*. As far as the availability of one shop adjacent to the shop in question in the possession of respondent no. 1 is concerned, it is respondent no. 1's own case that the grandson of the petitioner was using the same as a shop though for one year he was not using the same. Since, the grandson of the petitioner is also one of the co-owners of the entire property of which the shop in question forms a part, just because he was not using the shop in his possession for some time, even if it is accepted to be so, that would not mean that that part of the property is available to the petitioner – landlady for being occupied by her. Similarly, as far as the other area shown in the site plan as a drawing room is concerned, even if it is said to be available to the petitioner –

landlady for being occupied by her that would not make her requirement for the shop in question to be not *bona fide*. So, in my view, the respondent no. 1 had not raised any triable issue justifying grant of leave to defend to him by learned Additional Rent Controller.

13. This petition is accordingly allowed. The impugned order passed by the learned Additional Rent Controller is set aside and consequently, the application of respondent no. 1 for leave to defend the eviction petition filed against him by the petitioner – landlady stands dismissed. Consequently, an eviction order also stands passed against respondent no. 1 in respect of the shop in question. However, he is granted six months' time to vacate the same.

P.K. BHASIN, J

February 15, 2012