

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

% *Judgment pronounced on: January 06, 2014*

+ **RC. Rev. No.444/2012 & C.M. No.15214/2012**

PRIT PAL SINGH Petitioner
Through Mr.Sidharth Joshi, Adv.

versus

RAMESH KUMAR DORA Respondent
Through Mr.Dinesh Agnani, Sr.Adv. with
Ms.Leena Tuteja, Adv.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The petitioner (respondent in the eviction petition) has filed the abovementioned revision petition under Section 25-B(8) of the Delhi Rent Control Act, 1958 assailing the order dated 3rd March, 2012 passed by the learned Addl. Rent Controller-01 (East), Karkardooma Courts, Delhi whereby the petitioner's application for leave to defend has been dismissed and the eviction order has been passed against the petitioner.

2. Admittedly, the respondent/landlord has filed the eviction petition against the petitioner/tenant in respect of the tenanted premises, i.e. Shop No.4 situated on the ground floor of the property bearing No.IX/1632, near New Post Office, Gandhi Nagar, Delhi-110031 as shown in red colour in the site plan filed along with the eviction petition. As per the respondent, he requires the suit premises for the use of his wife who is Insurance and

Investment Advisor as well as a LIC Agent and she is also an Income Tax Assessee. She wants to expand her business and since she has no other suitable commercial accommodation with him for running the said office for his wife and she is fully dependent upon the respondent.

3. After service of notice in the eviction petition, the petitioner filed the application for leave to defend, inter-alia, on the grounds that it is the son of the respondent who is working in some insurance company and is doing the business in the name of his mother. However, the respondent and his wife are owners of another property bearing No.F-14/19, Krishna Nagar, Delhi and have been doing business for the last more than 12 years from the said premises and they are already in possession of nine rooms in the said property, out of which one room is being used as office and three rooms are lying locked. Therefore, the accommodation in possession of the respondent and his wife is more than sufficient. The wife has a lien over all the properties of the respondent who is in possession of three rooms, one hall, toilet, kitchen on the ground floor of the property No.IX/1632, Gandhi Nagar, Delhi apart from Shop No.5 which is also lying vacant and is in possession of the respondent. The other portions of the said premises in possession of the respondent are lying locked and vacant.

4. The respondent filed the reply to the application for leave to defend by way of an affidavit wherein the respondent has admitted that he is the exclusive owner of the property bearing No.F-14/19, Krishna Nagar, Delhi. However, it was denied by the respondent that he is already having in his possession of 9 rooms in the said property and one room is being used as office or three rooms are lying locked. According to the respondent, the said

property No.F-14/19 consists of two rooms on the ground floor, two rooms on the first floor apart from kitchen, toilet etc. The respondent has also denied the averment made by the petitioner in his application for leave to defend that he is in possession of three rooms, one hall, toilet, kitchen on the ground floor of the property No.IX/1632, Gandhi Nagar, Delhi, apart from Shop No.5 which is lying vacant. However, it is admitted by the respondent that he is the owner of two shops bearing Nos.4 & 5 in property No.IX/1632, out of which Shop No.4 is in possession of the petitioner and the Shop No.5 is in possession of another tenant, namely, Sh.Om Prakash Kalra. The respondent is not the owner of any other portion in the said property.

5. While deciding the leave to defend, the controller is not expected to examine the success or failure of the plea raised but has to examine merely a tenable case. The controller is estopped in view of settled law from recording a finding as to disputed questions of fact. All the above stated propositions of law have been laid down in the case of *Charan Dass Duggal vs. Brahma Nand*, (1983) 1 SCC 301 speaking through Hon'ble Desai, J. observed thus:-

“5. What should be the approach when leave to defend is sought? **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, 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 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. If as it appears in this case, the landlord is staying at Pathankot, that a house is purchased, may be in the name of his sons and daughters, but there may not be an apparent need to return to Delhi in his old age, a triable issue would come into existence and that was sufficient in our opinion to grant leave to defend in this case.”

In the same judgment, in para 7 it is further observed:-

“7. The genesis of our procedural laws is to be traced to principles of natural justice, the principal amongst them being that no one shall suffer civil or evil or pecuniary consequence at his back without giving him an adequate and effective opportunity to participate to disprove the case against him and provide his own case. Summary procedure does not clothe an authority with power to enjoy summary dismissal. Undoubtedly wholly frivolous defence may not entitle a person leave to defend. **But equally a triable issue raised, enjoins a duty to grant leave. Maybe in the end the defence may fail.** It is necessary to bear in mind that when leave to defend is refused the party seeking leave is denied an opportunity to test the truth of the averments of the opposite party by cross- examination and rival affidavits may not furnish reliable evidence for concluding the point one way or the other. It is not for a moment suggested that leave to defend must be granted on mere asking but it is equally

improper to refuse to grant leave though triable issues are raised and the controversy can be properly adjudicated after ascertainment of truth through cross-examination of witnesses who have filed their affidavits. **Burden is on the landlord to prove his requirements and his assertion is required to be tested more so when it is shown that for long he is staying outside Delhi, that he has a building albeit standing in the names of his sons and daughters where he is staying and at which place he receives his normal correspondence. If in such a situation one can say that a triable issue is not raised, one is at a loss to find out where, when and in what circumstances such an issue would arise. We are, therefore, satisfied that this is a case in which triable issues were raised and both the learned Rent Controller and the High Court were in error in refusing to grant the leave.”** (Emphasis Supplied)

6. In the case of *Precision Steel and Engineering Works and Anr. vs Prem Deva Niranjana Deva Tayal*, 1983 SCR (1) 498, the Hon’ble three judges of the Supreme Court speaking through Hon’ble Justice Desai (as his lordship then was) has clearly laid down the scope and nature of enquiry permissible in law while deciding the question of grant or non grant of the leave to defend in the eviction proceedings approving the view of *Charan Dass* (supra). In the words of Hon’ble Justice Desai, it was observed thus:

“Undoubtedly the procedure prescribed in Chapter IIIA of the Act is materially different in that it is more harsh and weighted against the tenant. **But should this procedural conundrum change the entire landscape of law?** When a landlord approaches Controller under section 14(1) proviso (e), is the court to presume every averment in the petition as unchallengeable and truthful? The consequence of refusal to grant leave must stare in the face of the Controller that the landlord

gets an order of eviction without batting the eye lid. This consequence itself is sufficient to liberally approach the prayer for leave to contest the petition. **While examining the question whether leave to defend ought or ought not to be granted the limited jurisdiction which the Controller enjoys is prescribed within the well defined limits and he cannot get into a sort of a trial by affidavits preferring one set to the other and thus concluding the trial without holding the trial itself.** Short circuiting the proceedings need not masquerade as a strict compliance with sub-section (5) of section 25B. **The provision is cast in a mandatory form. Statutory duty is cast on the Controller to give leave as the legislature uses the expression 'the Controller shall give' to the tenant leave to contest if the affidavit filed by the tenant discloses such fact as would disentitle the landlord for an order for recovery of possession. The Controller has to look at the affidavit of the tenant seeking leave to contest. Browsing through the affidavit if there emerges averment - of facts which on a trial, if believed, would non-suit the landlord, leave ought to be granted. Let it be made clear that the statute is not cast in a negative form by enacting that the Controller shall refuse to give to the tenant leave to contest the application unless the affidavit filed by the tenant discloses such facts as would disentitle the landlord from obtaining an order etc. That is not the mould in which the section is cast. The provision indicates a positive approach and not a negative inhibition.** When the language of a statute is plain, the principle that legislature speaks its mind in the plainest language has to be given full effect. No canon of construction permits in the name of illusory intendment defeating the plain unambiguous language expressed to convey the legislative mind. And the **legislature had before it order 37, an analogous provision where leave to defend is to be granted and yet avoiding the phraseology of the Code of Civil Procedure, namely,**

'substantial defence' and 'vexatious and frivolous defence', the legislature used the plainest language, 'facts disclosed in the affidavit of the tenant'. The language of sub-section S of section 25B casts a statutory duty on the Controller to give to the tenant leave to contest the application, the only pre-condition for exercise of jurisdiction being that the affidavit filed by the tenant discloses such facts as would disentitle the landlord from obtaining an order for the recovery of 13; possession of the premises on the ground mentioned in section 14(1) (e). Section 14(1) starts with a non obstante clause which would necessarily imply that the Controller is precluded from passing an order or decree for recovery of possession of any premises in favour of the landlord against the tenant unless the case is covered by any of the clauses of the proviso. The proviso sets out various enabling provisions on proof of one or the other, the landlord would be entitled to recover possession from the tenant. One such enabling provision is the one enacted in section 14(1) proviso (e). Upon a true construction of proviso (e) to section 14(1) it would unmistakably appear that the burden is on the landlord to satisfy the Controller that the premises of which possession is sought is; (i) let for residential purposes; and (ii) possession of the premises is required bona Fide by the landlord for occupation as residence for himself or for any member of his family etc. and (iii) that the landlord or the person for whose benefit possession is sought has no other reasonably suitable residential accommodation. **This burden, landlord is required to discharge before the Controller gets jurisdiction to make an order for eviction. This necessarily transpires from the language of section 14(1) which precludes the Controller from making any order or decree for recovery of possession unless the landlord proves to his satisfaction the conditions in the enabling provision enacted as proviso under which possession is sought. Initial burden is thus on the landlord.” (Emphasis Supplied)**

“But what happens if the tenant appears pursuant to the summons issued under sub-sec. 2 of section 25B, files an affidavit stating the grounds on which he seeks to contest the application. **As a corollary it would transpire that the facts pleaded by the landlord are disputed and controverted. How is the Controller thereafter to proceed in the matter. It would be open to the landlord to contest the application of the tenant seeking leave to contest and for that purpose he can file an affidavit in reply but production and admission and evaluation of documents at that stage has no place. The Controller has to confine himself to the affidavit filed by the tenant under sub-section 4 and the reply, if any. On perusing the affidavit filed by the tenant and the reply if any filed by landlord the Controller has to pose to himself the only question: Does the affidavit disclose, not prove, facts as would disentitle the landlord from obtaining an order for the recovery of possession on the ground specified in Clause (e) of the proviso to section 14(1). The Controller is not to record a finding on disputed questions of facts or his preference of one set of affidavits against other set of affidavits. That is not the jurisdiction conferred on the Controller by sub-sec. S because the Controller while examining the question whether there is a proper case for granting leave to contest the application has to confine himself to the affidavit filed by the tenant disclosing such facts as would prima facie and not on contest disentitle the landlord from obtaining an order for recovery of possession.** At the stage when affidavit is filed under sub-section (4) by the tenant and the same is being examined for the purposes of sub-section (5) the Controller has to confine himself only to the averments in the affidavit and the reply if any and that becomes manifestly clear from the language of sub-section (S) that the Controller shall give to the tenant leave to contest the application if the affidavit filed by the tenant discloses such facts as would

disentitle the landlord from recovering possession etc. **The jurisdiction to grant leave to contest or refuse the same is to be exercised on the basis of the affidavit filed by the tenant. That alone at stage is the relevant document and one must confine to the averments in the affidavit. If the averments in the affidavit disclose such facts which, if ultimately proved to the satisfaction of the Court, would disentitle the landlord from recovering possession, that by itself makes it obligatory upon the Controller to grant leave. It is immaterial that facts alleged and disclosed are controverted by the landlord because the stage of proof is yet to come. It is distinctly possible that a tenant may fail to make good the defence raised by him. Plausibility of the defence raised and proof of the same are materially different from each other and one cannot bring in the concept of proof at the stage when plausibility has to be shown.**” (Emphasis Supplied)

7. During the course of hearing of the present petition, the respondent has also filed an affidavit before this Court, stating that the tenanted shop is not being used by the petitioner and the electricity has already been disconnected by the BSES on account of non-payment of electricity dues since long. With regard to shop No.5, the eviction petition is already pending before the Court of Sh.Sunil Chaudhary, learned Addl. Rent Controller, Karkardooma Courts, Delhi.

8. The petitioner also filed a counter-affidavit to the affidavit filed by the respondent and has also made an oral statement to the effect that the petitioner is still carrying on business from the tenanted premises. He has also filed certain photographs and documents to show *prima-facie* a proof thereof. In the said affidavit, the petitioner has also stated that the respondent has also not disclosed the important fact that few months prior to

the filing of the eviction petition, the respondent got an area measuring about 60 Sq. Yards in the same premises vacated from one Sh.Mahabir Prasad Sharma and after getting the same vacated, the same was sold by the respondent at a higher price. The said premises vacated by Sh.Mahabir Prasad Sharma comprised of one shop, two rooms and open veranda and the tenancy was being used for commercial purpose. In support of his submission, the petitioner has filed the copy of the sale deed dated 28th March, 2011 which *prima-facie* shows that the respondent has sold a built up property No.499/1-A (old) and new No.IX/1632, measuring area 191 Sq. Yards, i.e. 159.69 meters consisting of its whole of the structure built thereon with terrace/roof as well as with rights of upper construction up to the last storey, fitted with electricity, tap water with meters, to Sh.Hari Prasad Rathi, Sh.Madan Lal Rathi and Sh.Kailash Rathi, R/o B-199, S.F., Vivek Vihar, Phase-1, Delhi-110095. Under these circumstances, it appears *prima facie* to the Court that on 28th March, 2011, the respondent had sold one of the portions of the tenanted premises which was also not disclosed by the respondent in the eviction petition.

9. The fact of the matter is that the respondent has not disclosed the property No.F-14/19, Krishna Nagar, Delhi in the eviction petition. This fact was admitted by the respondent in his reply to the application for leave to defend for the first time. The petitioner made the specific statement in the application for leave to defend that the respondent and his wife have been doing the business for the last more than 12 years from the said premises and they are already in possession of 9 rooms in the said property, out of which one room is being used as office and three rooms are being locked.

Although, the respondent has denied the factum of existence of 9 rooms as well as one room which is allegedly being used by the respondent as office or the three rooms which are allegedly lying vacant, but it is the respondent who failed to disclose the said property in the eviction petition.

10. Law mandates that when a party approaches the Court in order to seek relief, it is presumed that the party would always disclose the true facts. No litigant can derive benefit from a Court of law of his own wrongs. No litigant should be encouraged to invoke the jurisdiction of the Court by concealing material fact. If such attempt is made, normally such a party would not be entitled to relief as truth is an integral part of the justice delivery system.

11. Thus, non-disclosure of the relevant fact in the eviction petition is a serious issue. In the absence of any such disclosure in the eviction petition, this Court is of the view that the averments made by the petitioner in his application for leave to defend have to be tested at the time of trial as to whether the respondent has got in his possession of 9 rooms in the property No.F-14/19, Krishna Nagar, Delhi or one shop is being used as office or three rooms are lying locked. There is a reason in the present case as the respondent has not specifically denied that his wife is not carrying on any business in the said property and three rooms are lying locked. If the statement of the petitioner is found correct after the trial, then it would be a case of additional accommodation.

12. Where there is a doubtful case whether a particular accommodation can or cannot act as reasonably suitable accommodation in such cases too, the court seized of the eviction proceedings should postpone the decision

making of reasonableness and suitability of accommodation as a fact finding to the trial rather than to evict the tenant by granting the leave to defend.

13. It is also evident from the record that the respondent earlier filed the petition for eviction against the petitioner bearing No.E-492/95 under Section 14(1)(d) and (h) of the DRC Act which was also dismissed as per the copy of the judgment placed on record by the petitioner.

14. Therefore, the said ground raised by the petitioner is a triable issue in nature. The learned Rent Controller ought to have considered the ground raised by the petitioner in the leave to defend application in this regard. Thus, the order suffers from error in law apparent on the face of the record which has resulted in miscarriage of justice.

15. The learned Controller legally erred in not testing the case of both the parties on the objective standards which is the requirement of the law. The projected requirement would be required to be tested objectively by the Controller. It is necessary to bear in mind that when leave to defend is refused, the party seeking leave to defend would miss an opportunity to test the truth of the averments of the opposite party by cross-examination.

16. In my view as per discussion, the petitioner has been able to raise *prima facie* triable issues, which seem to have been ignored by the learned ARC and eviction order could not be passed at the stage of application for leave to defend, the petitioner cannot be thrown out of the tenanted premises at the threshold without adjudication by way of evidence and not merely on the affidavits of the parties. The impugned order is suffering from infirmity. Thus, the impugned order is liable to be set aside.

17. The petition is allowed and the leave to contest is granted to the petitioner and four weeks' time is granted to file written statement. The parties shall appear before the learned Addl. Rent Controller on 17th February, 2014 who will decide the matter expeditiously.

(MANMOHAN SINGH)
JUDGE

JANUARY 06, 2014