

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on :20.03.2014
Pronounced on :01.10.2014

+ RC.REV. 374/2013, CM Nos.15852/2013 & 1516/2014

SALAZAR LUIS ANTHONY MARQUES (SINCE DECEASED)
THR LRS. Petitioner

Through: Mr. Abhinav Vashisht, Sr. Adv.
with Mr. Abhinav, Adv.

Versus

MOHD. HAROON JAPANWALA & ORS. Respondents

Through: Mr. Sandeep Sethi, Sr. Adv. with
Mr. Mr. Anand Shanker Jha, Adv.
for R-8

CORAM:
HON'BLE MR. JUSTICE NAJMI WAZIRI

% **MR. JUSTICE NAJMI WAZIRI**

1. The present revision petition filed under section 25-B(8) of the Delhi Rent Control Act (the “Act”) assails an order dated 12.08.2013 passed by the Learned Additional Rent Controller, New Delhi whereby the eviction petition was allowed and consequently an eviction order was passed against the present petitioner .
2. The brief facts of the case are that the premises in question is a shop bearing No. G-41, Marina Arcade, Connaught Circus, New Delhi. The respondent (the “landlord”) filed an eviction petition under section 14(1)(e) read with Section 25B of the Act on the ground that he required the tenanted premises to establish his son’s business in a

more suitable location; that the son presently occupied a shop in Aurobindo Market which because of its small size and location was not commercially viable; that the son was dependent on him to open a shop in a more suitable location and that the tenanted premises was most suitable for his requirement. There is no dispute as to the landlord-tenant relationship between the parties and that the tenant has been paying a monthly rent of Rs 732/- excluding all incidental charges to the landlord. Acknowledging that a notice of the proceedings was received which was left in his office by the Process Server on 31.7.2008, the tenant – Mr. Salazar Luis Anthony Marquez, filed an application for leave to defend on 18.8.2008. The tenant passed away during the pendency of the proceedings and his legal representatives, the present petitioners were brought on record. His widow–present petitioner No.1 moved two applications dated 14.01.2010 and 01.05.2013 under section 151 CPC for bringing on record the duly attested copy of the affidavit dated 18.08.2008 which had been filed by the tenant. The affidavit attested by the Oath Commissioner was required to be filed alongwith the application seeking leave to defend, under section 25 B(4) of the Act. The former application of 14.01.2010 contended that the application filed by the deceased tenant under section 25-B(4) and (5) of the Act, inadvertently did not contain the attestation of the Oath Commissioner yet got filed, despite the clerical error, through the counsel representing the tenant. It was submitted that the error was on the part of the counsel for filing it without the Oath Commissioner's attestation. Therefore, the tenant should not suffer on account of

negligence of the counsel. In the second application dated 01.05.2013, filed on 03.05.2013 the applicant reiterated the reasons mentioned in the first application and further submitted that non-attestation of the affidavit by the Oath Commissioner was a curable defect which could be allowed by the Court by exercising its inherent power under section 151 of the Code of Civil Procedure, 1908 (CPC). It was submitted that under Section 7 of the Oaths Act, 1969 no proceedings could be invalidated simply because of omission of oath or such irregularity; that the absence of mentioning the name of the Notary or the absence of stamp and seal of the Notary in the application dated 18.8.2008 could not be considered as an omission which was fatal to the application and case of the tenant. The learned counsel for the tenant had argued that the non-attestation of the affidavit by the Oath Commissioner was curable and not a fatal defect. In furtherance of this point, the counsel relied on Section 7 of the Oaths Act and Section 139 of the CPC. The counsel further relied on judgments to show the Court that the affidavit of Mr. Salazar should be taken on record despite its curable defect. The counsel argued, before the Trial Court, that if the application requesting the affidavit to be taken on record is rejected, there would be substantial injustice to the tenant, especially when Court is vested with the power to cure a defect, which the tenant believes to be curable in nature, chooses not to exercise such power. The counsel for the tenant referred to section 83(1) of Representation of People's Act, 1950 to further contend the Court the nature of the defect an affidavit not having the required attestation. The learned counsel submitted that the judgment of *Vidya Sagar v.*

*Shakuntala Devi*¹ wherein the Court held that non-attestation of affidavit was not a curable defect was misplaced.

3. The Trial Court noted that the question for consideration before the Court was the treatment of an affidavit lacking the attestation of the Oath Commissioner. The impugned order took note of the abovementioned judgment, which held that there was a fundamental difference between the lack of verification of affidavit and filing a defective affidavit; that in a situation where verification of affidavit was defective, an opportunity can be granted for rectification of the defect, but filing of unattested affidavit cannot be said to be a technical defect or an irregularity in view of the provision of section 25 B(4) and (5) of the Act. The Trial Court held that the law required the application seeking leave to defend to be accompanied with an affidavit and it had been so held by this Court in *Vidya Sagar (supra)* that lack of attestation would mean the absence of an affidavit being filed with the application. The landlord's contentions were (i) that the tenant had failed to file an affidavit as required by law alongwith the application seeking leave to defend and (ii) that the tenant was barred by limitation as the application was not filed within the statutory period of 15 days. The counsel for the landlord relied on *Prithi Pal Singh v. Sat Pal Singh*² in support of this argument. The Learned ARC relied on the abovementioned judgment to hold that the power

¹ 1992(22) DRJ 123

² (2010)2 SCC 15

of the Rent Controller does not allow him to condone even one day's delay in filing the leave to defend application.

4. The Trial Court held that the affidavit filed by the tenant failed to meet the prescribed requirement under the Act and that the application was not filed within 15 days of the service of summons. Therefore, the applicant was not allowed to file any attested affidavit subsequently. Based on these reasons, the Trial Court rejected the leave to defend application and passed the eviction order.
5. In this revision petition, Mr. Abhinav Vashisht, the learned Senior Advocate for the tenant contends that (i) the Trial Court erred in holding that the tenant had not filed the leave to defend application within the statutory period of 15 days; (ii) that the Trial Court was wrong in holding that the lack of attestation by the Oath Commissioner is not a curable defect; (iii) reliance on *Vidya Sagar (supra)* by the Trial Court was misplaced and (iv) that there was no effective service of summons as mandated by the Act which the Trial Court failed to take note of.

LIMITATION

6. He argued that the application seeking leave to defend was filed well within the statutory period of 15 days from the date of the summons being served upon the tenant. The learned counsel referred to sequence of dates and events which he submits are vital in deciding the question of limitation. The eviction petition being Eviction Petition No. 20 of 2009 dated 12.05.2008 was filed by the

respondent/ landlord against the tenant, late Mr. Salazar Luis under section 14(1)(e) read with section 25B of the Act; that the service of summons was effected but was never received by Mr. Salazar himself; the summons addressed only to Mr. Salazar was left his office address; the Process Server's Report, however, records the service as "*unserved*"; the employee who was present at the time of the Process Server enquiring about Mr. Salazar informed the Process Server that Mr. Salazar would be unavailable for a few days and that the employee had no instructions to accept any such summons/ documents. It is submitted that despite having so informed the Process Server, he left behind the court summons and a copy of the paper book of the eviction petition at the office of the tenant. The employee, who refused to act without any instructions, later informed Mr. Salazar about the service of summons which prompted the latter to take steps towards filing the leave to defend application. The paper book was left by the Process Server on the 31.07.2008 and that Mr. Salazar was made aware about the summons on 1.08.2008. The leave to defend application was filed on 18.08.2008. So far as the date of filing the leave to defend application is concerned, there is no dispute that it was filed on the 18th August 2008. It is brought to the attention of this Court that the Learned ARC held that the leave to defend application was not filed within 15 days from the date of service. The impugned order addressing this issue notes:

"19. It is further to be noted that in his application filed under section 25 B (4) and (5) of DRC Act,

respondent late Mr. Salazar Louis Anthony Marques has himself stated that process server had delivered the copy of paper book on 31.7.2008 against endorsement on the summons from his staff and that he received information about summons on 1.08.2008. The application seeking leave to defend the eviction petition has been filed on record on 18.08.2008 and not within 15 days of receipt of notice of filing of eviction petition in form specified under Third Schedule of the Act.”

7. Reading of the impugned order on this point would clearly lead to an understanding that while the tenant came to know about the summons being served on the 1st of August 2008, the leave to defend application should have been filed within 15 days thereby meaning the period of limitation starts running against the tenant from the 1st of August, 2008. The impugned order held that since the summons was served upon the tenant on the 31st July, 2008; the 15 days expire on 15th August while the application seeking leave to defend was filed only on the 18th of August, 2008. Mr. Vashisht, the learned Senior Counsel submitted that even if it were to be assumed that the summons was served in accordance with law, the tenant had filed the application well within the period of limitation. It was brought to the attention of the Court that 15th of August, 2008, being Independence Day, 16th being Rakhi and 17th August being a Sunday, the tenant could not possibly have filed his application for leave to defend on any of those three days. Therefore, it was only the 18th of August when he possibly could have and indeed did file the application. He submitted that this

contention was raised before the Trial Court which, however, was not addressed it, instead it held that the 15 days period of limitation came to an end on the 15th thereby barring the tenant from filing the application any later.

8. It is well settled that the power of the Rent Controller does not permit him to extend the period of filing the application to contest the eviction even by a day. This Court does not deem it necessary to cite those judgments again for the issue herein is not whether the Rent Controller has the power to extend the period of 15 days to file the application but whether the Rent Controller has correctly calculated the statutory period. It is not in dispute that the tenant's employee received the summons on 31.7.2008. It is not disputed that the application was filed on the 18.8.2008, as argued 15th, 16th, 17th August were days when it was impossible for the tenant to file his application, which leads one to the conclusion that the tenant either had the option to file before the 14th August, which had he done so, the issue of limitation would not have arisen or he had the option to file after the 17th August as it is in the present case. For computation the period of limitation, Section 10 of the General Clauses Act, 1897 might be of aid. The section reads as under;

“9. Commencement and termination of time.-(1) In any [Central Act] or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word “from”, and, for the purpose of including the last in a series of days or any other period of time, to use the word “to”. ”

The Supreme Court in *Tarun Prasad Chatterjee v. Dinanath Sharma*³ has brought clarity to the issue by holding that the first day in a series shall be excluded while the last day of the series will be included while computing the period of limitation. The Supreme Court held:

“12. Section 9 says that in any Central Act or regulation made after the commencement of the General Clauses Act, 1897, it shall be sufficient for the purpose of excluding the first in a series of days or any other period of time, to use the word “from”, and, for the purpose of including the last in a series of days or any period of time, to use the word “to”. The principle is that when a period is delimited by statute or rule, which has both a beginning and an end and the word “from” is used indicating the beginning, the opening day is to be excluded and if the last day is to be included the word “to” is to be used. In order to exclude the first day of the period, the crucial thing to be noted is whether the period of limitation is delimited by a series of days or by any fixed period. This is intended to obviate the difficulties or inconvenience that may be caused to some parties. For instance, if a policy of insurance has to be good for one day from 1st January, it might be valid only for a few hours after its execution and the party or the beneficiary in the insurance policy would not get reasonable time to lay claim, unless 1st January is excluded from the period of computation.”

Applying the aforesaid method, the date of receipt of intimation or knowledge of the court proceeding through the summons, i.e. 31st July, 2008, would need to be excluded from the period of limitation. The fifteen (15) days statutory period for filing the leave to defend

³ (2000)8 SCC649

application would expire on the 15th of August, 2008, which happened to be the Independence Day – a day when the court was closed. Section 4 of the Limitation Act, 1963 stipulates that when such period of limitation expires on a day when the Court is closed, the proceedings may be instituted on the day when the Court re-opens. It goes without saying that applying this section would necessarily lead to a conclusion that since 15th, 16th and 17th August 2008 were court holidays, the period of limitation had not yet extinguished. The learned Senior Counsel is correct, to this extent, in his submission that the tenant had indeed filed the leave to defend application within the statutory period of limitation. The intent of section 4 is based on the maxim “*lex non cogit ad impossibilia*”⁴. This Court holds that the Rent Controller erred in arriving at a finding that the tenant was barred by limitation in filing his leave to defend application.

AFFIDAVIT

9. It was submitted that the Trial Court erred in holding that non-attestation of the affidavit by Oath Commissioner is fatal to the entire leave to defend application. It was submitted that such defect was curable in nature. The affidavit accompanying the leave to defend application was not attested by the Oath Commissioner owing to certain clerical error and that the Learned ARC ought to have allowed the application filed under section 151 CPC for bringing the affidavit on record. The learned Senior Counsel submitted that Section 25-B(4)

⁴ Latin: The law does not compel a man to do the impossible

of the DRC Act requires an affidavit to be filed alongwith leave to defend application. Such an affidavit was indeed prepared by Late Mr. Salazar himself. Thus, the requirement under the section stood fulfilled. The administration of Oath by the Oath Commissioner is not a prerequisite mentioned in the section and that the Learned ARC ought not to have treated the absence of attestation as a defect going to the root of the validity of the leave to defend application. In furtherance of his submission, reliance was placed on ***T. Phungzathang v. Hangkhanlian & Ors***⁵. The counsel brought to the attention Justice R. C Lahoti's concurring opinion in the judgment, which held:

“The requirement of section 83(1) proviso is of an affidavit in prescribed form. An endorsement by the specified officer before whom the affidavit is sworn is not the requirement mentioned in the section....

....

The later requirement does not relate to form of affidavit; it prescribes the persons recognized by the Act and the Rules as competent to administer oath to the deponent of affidavit for the purpose of Section 83(1) read with Rule 94-A and suggests, for the sake of convenience and consistency, the manner of endorsement to be made by the magistrate, notary or commissioner of oaths administering oath to the deponent. Such endorsement made by the officer administering oath to the deponents is not an integral part of the affidavit. Preparing, signing and swearing an affidavit are acts of the deponent; administering

⁵ 2001 (8) SCC 358

oath and making an endorsement in proof thereof on the affidavit are acts of the officer administering the oath.”

The learned Senior Counsel further relied on ***T. M Jacob v. C. Poullose & Ors.***⁶ wherein the Supreme Court held:

“....the non- mention of the name of the notary or the absence of the stamp and seal of the notary in the otherwise true copy supplied to the appellant could not be construed to be omission or variation of a vital nature and, thus the defect, if at all it could be construed as a defect was not a defect of any vital nature attracting consequences of Section 86(1) of the Act.”

10. It was submitted that Section 83(1) of the Representation of People’s Act, 1950 was similar to the Delhi Rent Control Act in wanting an affidavit to be filed according to the provisions of the Code of Civil Procedure. The abovementioned judgments relied by the counsel dealt with the non-filing of an affidavit in a prescribed form under the Representation of People’s Act. Furthermore the counsel drew the attention of this Court towards Section 7 of the Oaths Act, 1963. A bare reading of the section shows that omission or failure to take any oath or failure to make an affirmation shall not invalidate the proceedings. The same section also holds that irregularities in affirmation or administration of Oath shall not lead to render the evidence as inadmissible. The learned counsel submitted that that being the settled position; the Trial Court erred in holding that a defect

⁶ (1999) 4 SCC 274

in the affidavit is not a curable thereby refusing to entertain the leave to defend application.

11. This Court is unpersuaded by the submissions made on behalf of the tenant. Section 25B of the DRC Act provides for summary nature of proceedings when eviction is sought on certain specified grounds, one such being section 14(1)(e) of the Act i.e. eviction for *bona fide* requirement for the tenanted premises and the section lists out the procedure that ought to be followed by both the tenant and the landlord. One such procedure required is the filing of an affidavit with the leave to defend application. The affidavit to be filed is as per the provisions of the Code of Civil Procedure. The affidavit filed in such summary proceedings is of importance as it aids in adjudicating the eviction petition in a summary manner. The legislative intendment for providing a clear process is to ensure that the landlord does not suffer owing to the length of the litigation. It is understood that when a landlord files an eviction petition under section 14(1)(e) of the Act, the landlord himself and/or his dependents are in dire need of the tenanted premises. If such eviction petitions are not treated as summary proceedings, the landlord may never have the opportunity to rightfully possess the tenanted premises in time. The landlord would have to wait till he sees the end of litigation until before he has the possibility of being able to meet his *bona fide* requirement. This could well mean that the need for which the landlord filed the eviction petition in the first place would diminish with time. In order to facilitate the landlord in being able to possess his tenanted premises before such need

extinguishes, the procedure is treated as summary in nature. The provision in the Act makes it amply clear that the tenant does not get an automatic right to put the eviction petition to trial. While the right of a landlord to gainfully possess his own premises is guarded by the Act, it does not imply that the tenant has no right to defend. The tenant is only put to restrictions to the extent of avoiding the need of the landlord diminishing with passage of time spent in trial. The tenant is required to file the leave to defend application stating the grounds which would disentitle the landlord from evicting him and such application shall be accompanied by an affidavit. When the tenant raises triable issues in his leave to defend application, the matter is put to trial. However, if the Rent Controller is of the view that the tenant has failed to raise any triable issues, the leave to defend application is rejected and the eviction order is passed. Since the procedure is summary in nature, the tenant is not required to produce all such evidence at the stage of entertaining the leave to defend application. Hence the affidavit is required alongwith the leave to defend application. The affidavit filed is to affirm that the statements made in the application are true to the best knowledge of the tenant.

12. Reliance was placed on *Vidya Sagar* by the counsel for the landlord to contend that an unattested affidavit is not an affidavit at all. This Court agrees with the reasoning of the Trial Court and its reliance placed on *Vidya Sagar* is not misplaced. In *Vidya Sagar*, while filing his leave to defend application the tenant filed an unattested affidavit; but later moved an application under section 151 CPC seeking for the attested

affidavit to be taken on record while ignoring the earlier one; his contention was that the lack of attestation of the affidavit is only a technical defect and that the affidavit though unattested should be taken on record. The learned ARC therein held that the affidavit lacking the attestation was not merely a technical defect that can be cured and accordingly rejected the leave to defend application. The tenant therein filed a revision petition in the High Court contending that the learned ARC erred in rejecting the leave to defend application. Counsel for the tenant submitted before the Court that section 7 of the Oaths Act, provided that no proceedings shall be invalidated owing to lack of attestation of the affidavit. The counsel further contended that the affidavit without the attestation was filed due to certain inadvertence and an application under section 151 CPC to this effect was moved. Yet the learned ARC did not take the affidavit on record. This Court dismissed the revision petition by holding that :

“(8) Filing an unattested affidavit cannot be said to be a technical defect or an irregularity keeping in view the provisions of Section 24 B(4) of the Act....unattested affidavit cannot be treated as an affidavit as is required to be filed under 25B(4). Not only that the affidavit should be attested but it should also be sworn before an attesting authority. It is mandatory requirement that application seeking leave to defend has to be filed along with an affidavit.”

13. An affidavit is a statement in writing, made on oath or affirmation. The administration of oath is, thus, an essential requirement of an affidavit. If an oath is administered, there may follow several legal consequences

of which the most important is the obligation of the deponent to speak the truth. The affidavit required to be filed with the leave to defend application is to affirm that the facts laid down in the leave to defend application are true to the best knowledge of the tenant. It is well settled that the summary nature of the proceedings do not mandate the tenant to produce all such evidence which would disentitle the landlord from evicting him. The purpose of the affidavit plays a vital role in determining the eviction petition. When such importance is placed on the leave to defend application and the affidavit, it is only logical to conclude that the affidavit has to be in the prescribed form. An Oath Commissioner's attestation is a validation of the affidavit. Without the attestation of the Oath Commissioner, Courts cannot rely on the document for it lacks that the required sanction affirming its authenticity. The Learned Single Judge in *Vidya Sagar* was correct to hold that an affidavit having no attestation is not an attestation in the eyes of the law.

14. This Court finds that the question attended to in *Vidya Sagar* is pertinent as the issue of unattested affidavit is covered by the judgment. Reliance on the Oaths Act or the Representation of People's Act is misplaced as the purpose of affidavit filed therein is at different footing. There is clear difference in the purpose for which an affidavit is filed under the Representation of People's Act from an affidavit filed under the Delhi Rent Control Act. This Court finds no error on the part of the Learned ARC relying on *Rakesh Gupta & Anr. v. Ashok*

*Dilwali*⁷ to hold that an affidavit filed without fulfilling the requirements as prescribed in the Act, is not a valid affidavit at all. This Court is of the view that an affidavit without the attestation of the Oath Commissioner is not an affidavit at all and the leave to defend application was rightly rejected in the present petition. The application filed by the tenant contained an incurable defect. The Learned ARC cannot be expected to extend the period of filing the application beyond 15 days and since the application filed was invalid, the Learned ARC rightly rejected the same. This Court shall not hold otherwise.

SUMMONS

15. The learned Senior Counsel for the tenant, Mr. Vashisht, argued that the service of summons by the landlord was not found in law and that the learned ARC erred in not considering the same. It was submitted by Mr. Vashisht that on 31.07.2008, the Process Server tried to serve summons for the third time since the earlier two times, the tenant was not available. An employee present in the given address informed the Process Server that the tenant is unavailable and that he has no authority to accept such summons on behalf of Late Mr. Salazar. It is submitted that despite these clear instructions given to the Process Server, a copy of the eviction petition was left at the office of the tenant. The employee informed Late Mr. Salazar on 1st August about such summons which prompted the tenant to file his leave to defend

⁷ RCR No. 62/2010

application. Mr. Vashisht argued that the time to file the leave to defend application starts running from the time when such summons is served in accordance with the provisions of the Delhi Rent Control Act. Since the landlord has resorted to a method for serving unfounded in law, the tenant cannot be faulted with. The learned Senior Counsel draws this Court's attention to section 25 B(3) of the Act which states:

25B(3)(a)-The Controller shall, in addition to, and simultaneously with, the issue of summons for service on the tenant, also direct the summons to be served by registered post, acknowledgment due, addressed to the tenant or his agent empowered to accept the service at the place where the tenant or his agent actually and voluntarily resides or carries on business or personally works for gain and may, if the circumstances of the case so require, also direct the publication of the summons in a newspaper circulating in the locality in which the tenant is last known to have resided or carried on business or personally worked for gain.

(b) When the acknowledgement purporting to be signed by the tenant or his agent is received by the Controller or the registered article containing the summons is received back with an endorsement purporting to have been made by a postal employee to the effect that the tenant or his agent had refused to take delivery of the registered article, the Controller may declare that there has been a valid service of summons.

It was submitted that when the Act makes it clear that summons are to be instituted in two methods, the landlord has failed to follow this requirement. Furthermore, the Process Server Report shows the summons to be “unserved” on 31st July when actually a copy of the

eviction petition was left behind. Under these circumstances, it is only logical to conclude that the tenant was not served with the summons at all and that the period of limitation to file the leave to defend had not yet begun. Learned Senior Counsel relies on *Devender Nath v. Mohd. Asim*⁸ to explain that the Rent Controller is to ensure that the summons was effected in both ways as mandated by the Act. The learned counsel further submitted that it is the pious duty of the Rent Controller to ensure that the tenant was served as per the prescribed procedure and that the Learned ARC has failed to do so in the present petition. Reliance was placed on *Prithipal Singh v. Satpal Singh*⁹ to show that the Section 25B of the Act is a complete code in itself and that the Rent Controller was required to ensure that every procedure was duly met with by the landlord. It was submitted that a mere knowledge of summons by the tenant will not cure the lacuna in following the procedure as set out in the Act and that the tenant is at liberty to raise the issue of service at any stage and not confined to raising such plea only before the Rent Controller.

16. On the other hand learned Senior Counsel for the landlord, Mr. Sandeep Sethi, argued that the tenant has raised the contention of service of summons for the first time now. The contention regarding the lack of proper service was not raised by the tenant before the ARC and the only issue requiring the attention of the Learned ARC was the non-attestation of affidavit by the Oath Commissioner. He submitted

⁸ RC. REV 507/2012

⁹ JT 2009 (15) 423

that service was construed to be complete when the tenant became aware of such summons being served upon him. The tenant has also taken the necessary steps to file his leave to defend application when the landlord served the summons which only goes to show that the purpose for which summons are issued stand satisfied. The tenant is not at liberty to claim that summons was not served after having filed the leave to defend application immediately after acting on the knowledge of summons. He refers to the Trial Court order of 22.9.2008 wherein after the filing of the application for leave to defend, time was granted to the landlord to file his reply thereof and a rejoinder thereto, if any, to the tenant. But no argument or objection was raised or leave sought to file another application for leave to defend or for extension of time on the ground that the summons was either improperly served or not deemed to be served in law. The record of proceeding reads as under:

“Copy of the application for leave to defend has been received by the petition. However, reply is not ready. Adjournment is made for tendering the same. Original reply be filed and advance copy be supplied to the other side.

Put up for rejoinder, if any, on the next date of hearing i.e. on 10.12.08.”

17.He further argued that the tenant’s submission that an argument regarding service of summons was raised but the Rent Controller did not record is untenable. The purpose of summons is to inform the tenant about the eviction proceeding instituted against him. When the tenant acts on such information received, he cannot claim that he was not served at all at a later stage. The learned counsel submitted that the

Learned ARC was correct in rejecting the leave to defend application as it contained a defect which was not curable and that the impugned order suffers from no material irregularity.

18. This Court again finds itself unable to agree with the contention of the tenant. There is no dispute that the tenant was not available for the third time when the Process Server tried to serve upon the tenant. Admittedly, on receiving the information about the summons, the tenant filed a leave to defend application, which this Court has held, was within the period of 15 days. However, such application failed to contain the vital attestation of the Oath Commissioner because of which the application was rejected. The contention of the tenant that the landlord is required to follow the procedure as prescribed in Section 25B of the Act is valid. However, the contention cannot succeed when such procedure would delay the process of litigation or might dissolve the intention of the summary nature of the proceedings. This Court in *Devender Nath* held that service of summons ought to be effected through in both ways and that such summons ought to be addressed to the tenant or his agent. The principle laid down in the above mentioned judgment will hold valid when such summons was not issued and that the tenant or his authorized agent had no knowledge about the same. In those circumstances, it would cause grave injustice to the tenant if he had no knowledge or that he was never given the opportunity to defend himself in Court.

19. The legislative intent of Section 25B of the Act is to ensure the summary nature of the proceedings, initiated for bona fide requirement for the tenanted premises, enable a landlord in genuine need to be able to possess the tenanted premises. At the same time, Courts are to ensure that the tenant gets his fair opportunity to defend himself in Court. The Courts do not *ipso facto* pass an order for eviction when an eviction petition is filed under Section 14(1)(e) of the Act. The tenant is summoned to show why the landlord should not be evicting him. When the tenant is not aware of such summons being issued on him, it would be contrary in law to say that the tenant was given due opportunity. The tenant's reliance on ***Devender Nath*** is misplaced as the circumstances under which the Court held there was a necessity for effecting service by both methods are different from the present petition. In ***Devender Nath***, the service was effected but on a person who was neither the tenant nor his agent. The tenant was unaware of the service of summons and hence not in a position to file the leave to defend application within 15 days and appear before the Rent Controller. The Court therein was right holding that both methods of service ought to be effected. The facts in the present case are however of a different complexion and this Court is of the view that the decision in ***Devender Nath*** would not apply.
20. This Court is of the view that a decision taken by any Court without affording an opportunity to the other party is contrary to the principle of natural justice. In the present petition, the tenant was aware of the service and he has taken the necessary steps to file an application. His

actions indicate his due knowledge and the actions by him thereafter taken are sufficient to show that there was service of summons. The issue of non-service was never raised or pursued, either in the previous proceedings by the tenant before this Court in the writ petition challenging the applicability of the Act to an eviction proceeding apropos a commercial space or the subsequent Special Leave Petition file before the Supreme Court, both of which resulted in dismissal on 19th March, 2013. This Court would consider the observation of the Division Bench in WP (C) No.1801/2013 titled ***Olive Marques & Anr. V. Union of India & Ors.*** decided on 19.3.2013, of much relevance wherein the Court had dismissed the petition with the costs of Rs.50,000/-. The Court therein observed:

“2 Record shows that an eviction petition under Section 14 (1)(e) read with Section 25-B of the said Act has been filed by the landlord Mohd. Haroon Japanwala (respondent No. 4) seeking eviction of his tenants/petitioners from shop No. G-14, Marina Arcade, Connaught Circus, New Delhi (hereinafter referred to as the ‘said premises’). The original tenant was Mr. Salazar Luis Anthony Marques and petitioners No. 1 & 2 are his widow and daughter. The tenancy was commercial. The business being run in the said premises was under the name and style of ‘M/s. Marques & Company’.

3 Summons were served upon the petitioners on 12.05.2008 which were received through their employee. On 18.08.2008, an application seeking leave to defend was filed by the petitioners under Section 25-B (4) and (5) seeking leave to contest the eviction petition. Respondent No. 4 filed his reply to the said application taking an objection that the affidavit filed by the tenants was unattested. On merits also, the stand set” up by the petitioners was disputed. Meanwhile since the

original tenant (S.L.A. Marques) had expired on 10.04.2009, an application seeking substitution of his legal heirs was filed which was followed by another additional application. On 14.01.2010, the petitioners filed an application under Order 6 Rule 17 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'said Code') seeking permission to amend their affidavit to the extent that it was not attested or in the alternate to file a fresh affidavit in support of their application seeking leave to defend. A reply was filed by respondent No. 4 objecting to the same to which a rejoinder was filed. Written submissions were thereafter filed by the petitioners.

4. On the last date of hearing before the ARC which was 02.03.2013 since the Presiding Officer was on leave, the matter was adjourned to 27.04.2013. Submission of the petitioners is that in this interregnum period they were legally advised to file the present writ petition challenging the constitutional validity of Chapter III-A of the said Act and since the vires could only be challenged before a writ Court, the present petition was accordingly filed.

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12 In Gian Devi Anand (supra) which was decided by the Supreme Court in 1985 the moot question before the Apex Court was whether a commercial tenancy is liable to be inherited; the question was answered in the positive; tenancy rights even in commercial premises do not come to an end with the death of the tenant but they devolve upon their legal heirs and legal representatives. The law has evolved since then. In Kewal Singh (1980-supra) the classification on the class of landlords under Section 14 (1)(e) and the procedure applicable and as contained in Section 25-B of the said Act had been questioned; submission was that the classification is not in consonance with the object sought to be achieved by the said Act. The Supreme Court had answered this question

in the following words:-

“We would, therefore confine ourselves to the validity of Section 14(1)(e) and the procedure prescribed to give relief mentioned in the aforesaid Section in Section 25B. Before discussing the relevant provisions of the Act it may be necessary to observe that the Rent Control Act is a piece of social legislation and is meant mainly to protect the tenants from frivolous evictions. At the same time, in order to do justice to the landlords and to avoid placing such restrictions on their right to evict the tenant as to destroy their legal right to property certain salutary provisions have been made by the legislature which give relief to the landlord. In the absence of such a legislation a landlord has a common law right to evict the tenant either on the determination of the tenancy by efflux of time or for default in payment of rent or other grounds after giving notice under the Transfer of Property Act. This broad right has been curtailed by the Rent Control Legislation with a view to give protection to the tenants having regard to their genuine and dire needs. While the rent control legislation has given a number of facilities to the tenants it should not be construed so as to destroy the limited relief which it seeks to give to the landlord also. For instance one of the grounds for eviction which is contained in almost all the Rent Control Acts in the country is the question of landlord's bonafide personal necessity. The concept of bonafide necessity should be meaningfully construed so as to make the relief granted to the landlord real and practical.”

13 After quoting the provisions of Section 25-B, the Court returned the following finding:-

“We have already pointed out that the classification made by Section 25B is a reasonable classification and cannot be said to be in any way discriminatory or arbitrary. Even though a summary procedure has been evolved the tenant has been afforded full opportunity to defend the application provided he can disclose good grounds for negating the case of the

landlord. No litigant has a right to protract the legal proceedings by taking frivolous, irrelevant, irrational or uncalled for pleas. This is what the Section seeks to prevent.”

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17 This petition is nothing but an abuse of the process of the Court. The petitioners have used all dilatory tactics available at their command to forestall the hearing which is fixed for 27.04.2013 on his application seeking leave to defend. These tactics can be described as nothing short of an abuse of the process of the Court and wastage of its precious time.”

21. In eviction petitions, wherein the tenant had no knowledge about service of summons and has therefore failed to file the leave to defend application within 15 days from the date of service, the tenant cannot be put to the disadvantage of an eviction order. Mr. Vashisht relied on the judgement in ***Frank Anthony Public School v. Amar Kaur***¹⁰ to submit that summons was mandatorily required to effected in both ways and the computation of period for limitation begins from the date of second service. This Court in ***Frank Anthony (supra)*** held that the period of limitation starting the date of second service did not mean it wiped out the effect of the first service but that both services were equally important in law. Facts in the abovementioned judgment relied on is very different from the circumstances under which the present contention is being entertained. In the present petition, it is certainly not that case that the tenant had no knowledge about the summons till the period of 15 days elapsed. It is not the situation wherein the tenant was served on two different dates and the tenant

¹⁰ (1984)6 DRJ 47

chose to compute his period of limitation from the date of second service. The tenant herein may not have been physically present to receive the summons but he was made aware of its existence at the very earliest, which caused him to move an application seeking leave to defend. At this juncture, it might be pertinent to note that while the tenant may have filed an application seeking leave to defend within the period of 15 days, the Rent Controller rejected the application because the affidavit lacked the Oath Commissioner's attestation. Needless to say, such an affidavit is not an affidavit as per law and hence there was no valid application for leave to defend filed.

22. The object of service is to give notice to the party against whom the suit/ petition is instituted so that he might be aware of the same and is able to contest the suit if he so desires. There is no doubt in saying that the service of summons is a matter of primary importance in order to provide a fair and reasonable notice to the parties to enable them to defend the legal proceedings against them. The underlying object of service of summons stems from a sense of justice and fair play. While this Court agrees that the summary procedure under section 25B ought to be followed mandatorily, the purpose of the section will be defeated if Courts were to hold that the tenant was not served in according with law even when such tenant acquires knowledge about the service and files his leave to defend application on time. It is pertinent to note that Courts proceed on the basis *actus curiae neminem gravabit*¹¹. In

¹¹ Latin: An act of Court harms none

*Sangram Singh v. Election Tribunal*¹² the Supreme Court has held that the purpose of service of notice is to inform the addressee and once so informed, there can be said to be no infirmity in the process. In the present case the tenant had acknowledged receipt of the summons in his office on 31.7.2008, of which he became aware very next day and filed an application for leave to defend within the 15 days prescribed. The objective of the law to intimate the addressee was sufficiently met. Mr. Vashisht's argument that the said judgement would not be apply to the present case since it was dealing with service under the CPC is untenable because it is the principle subserving and the purpose of service which is discussed by the Supreme Court. The stipulation of the dual mode of service under Section 25B is to ensure that the tenant is duly served. As in the present case when the noticee/tenant had acknowledged receipt of notice or intimation thereof and filed a response thereto seeking extension of time for being served by the second mode too, would be an empty exercise in formality. There would be severe injustice to the landlord if the Court would extend time to the tenant to file the leave to defend especially when he was aware of the service of summons and had already taken the necessary steps to file the leave to contest application. The purpose of summons stood accomplished when the tenant took active steps to file his application within 15 days. The High Court of Allahabad in *Nathu Ram v. Salim Abdul Karim*¹³

¹² AIR (1955) SC 425

¹³ AIR 1933AII 165

while addressing the issue of service of summons under the Code of Civil Procedure noted:

“I.....An ex parte decree cannot be set aside merely on the ground of irregularity in the service of summons, if the Court is satisfied that the defendant knew or but for his wilful conduct, would have known, of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim.”

While it could be contended that the Code of Civil Procedure is separate and distinct from the Delhi Rent Control Act, the purpose of summons and the object is seeks to achieve are at par with each other. The legislative intent is identical- to apprise the other party of a proceeding being instituted against him.

23. This Court is of the view that the actions of the tenant have proved that there was effective service of summons. The tenant cannot go behind his acknowledgement on admission of receipt of the court notice and copy of the eviction petition. It would be contrary to the Evidence Act. Furthermore, when such acknowledgement by tenant is established, the clock cannot be turned back to the detriment of the eviction-petitioner due to the long pendency of the case and also because of wastage of judicial time. It would be contrary to the purpose of section 25B if this Court were to hold that such speedy, effective steps taken by the tenant are insignificant at this stage. This Court also notices that oddly enough this contention has not been argued in depth before the Rent Controller with the same vigour as it is presently done so. This Court is of the view that there would be

great injustice if it were to agree with the contention raised on behalf of the tenant and grant him another opportunity to file his leave to defend application, when he has already exhausted the opportunity. There is a fundamental difference between a tenant who had no opportunity to file his leave to defend application, as he was unaware about the summons from a tenant who acquires knowledge and acts on the same immediately. In ***Puwada Venkateswara Rao v. Chidamana Venkata Ramana***¹⁴ while addressing the issue of conduct of parties amounting to service of summons and reconciling the divergent opinions of the Calcutta High Court and the Bombay High Court, MH Beg J. (as he then was) in his *obiter dictum*, observed:

“10. The two decisions are reconcilable. The Calcutta High Court applied a rebuttable presumption which had not been repelled by any evidence. In the Bombay case, the presumption had been held to have been rebutted by the evidence of the defendant on oath so that it meant that the plaintiff could not succeed without further evidence. The Andhra Pradesh High Court had applied the ratio decidendi of the Bombay case because the defendant-appellant before us had deposed that he had not received the notice. It may be that, on a closer examination of evidence on record, the Court could have reached the conclusion that the defendant had full knowledge of the notice and had actually refused it knowingly. It is not always necessary, in such cases, to produce the postman who tried to effect service. The denial of service by a party may be found to be incorrect from its own admissions or conduct....”

¹⁴ (1976) 2 SCC 409

24. Clearly the issue of non-service is an afterthought and yet another futile endeavour by the tenant to prolong the eviction proceeding and to defeat the very objective of the speedy disposal of petition seeking eviction of tenanted premises on *bona fide* need, which is always pressing, as envisaged under Section 25B of the Act. The tenant cannot claim the shield of lack of service when his conduct indicates otherwise. For the abovementioned reasons, this Court finds no reason to interfere with the impugned order. The petition is without merit and is accordingly dismissed. No order as to costs.

NAJMI WAZIRI
(JUDGE)

OCTOBER 01, 2014/d/acm