

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

+ **CM(M) 432/2013**

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Reserved on: 12th March, 2015
Decided on: 20th April, 2015

KAMLESH (DECEASED) Petitioner
Through Mr. Ashwin Vaish, Adv.

versus

TAJUDDIN KHAN Respondent
Through Mr. Maroof Ahmad, Adv.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. By the present petition the petitioner challenges the order dated 31st July, 2012 whereby his eviction petition under Section 14(1)(a) and (j) was dismissed and the order dated 31st January, 2013 whereby the appeal against the said order was also dismissed. Though the eviction petition was filed under Section 14(1)(a)(c)&(j) of the DRC Act, however the petitioner subsequently gave up the prayer for eviction under Section 14(1)(c) DRC Act and confined the prayer of eviction under Section 14(1)(a)&(j) DRC Act.

2. The petitioner is the owner of shop bearing No.2, C-102, Mandawali (Unchepar) Delhi which was let out to the respondent on 1st January, 1999. On 14th August, 2003 the respondent filed a suit for permanent injunction

against forceful dispossession and the petitioner consented and undertook that the tenant would not be dispossessed except in accordance with law. Two demand notices dated 16th September, 2003 and 12th November, 2003 were sent to the respondent. Suit for eviction was contested on two grounds i.e. the same was barred under Section 13 of the DRC Act and the provisions of limitation Act. Trial Court framed the two issues on the said objections and it was held that the suit of the petitioner was not covered under Section 13 of the DRC Act, thus the jurisdiction of the Civil Court was not barred under Section 50 of the said Act. However, in appeal the judgment of the learned Trial Court was set aside and during the course of hearing the petitioner herein agreed that he would return the amount of ₹50,000/- received as security to the respondent on vacation of the suit property.

3. In the eviction petition, vide order dated 2nd September, 2006 the respondent was directed to deposit arrears of rent within one month. The respondent did not comply with the order and filed an appeal which was dismissed and thereafter approached this Court which petition was also dismissed vide order dated 1st February, 2007. The respondent deposited Rs.84,000/- with the learned ARC under Section 27 of the DRC Act on 23rd September, 2007 from July, 2003 to February, 2007 except August and September 2003 without filing an application for condonation of delay nor paying the interest as required under Section 26 DRC Act. Thereafter the petitioner filed an application to strike off the defence of the respondent which was allowed vide order dated 21st March, 2007 and the said order has also attained finality as the respondent after review petition preferred a petition before this Court which was also dismissed on 20th October, 2009.

On 23rd December, 2009 the respondent preferred an application seeking condonation of delay in deposit of rent which was withdrawn on 22nd November, 2010. Objection was raised by the respondent regarding the admissibility of the rent agreement which was declined by the learned ARC on 26th May, 2011 and it was held that the rent agreement could not be impounded. On 22nd November, 2011 the petitioner tendered his evidence by way of affidavit. Thereafter the petitioner tendered his additional evidence and was subjected to cross-examination. The learned Trial Court vide the impugned order dated 31st July, 2012 dismissed the eviction petition and the appeal against the same was also dismissed on 31st January, 2013 vide the impugned order.

4. The grievance of the petitioner is two-fold that despite the defence of the respondent having been struck off the petitioner was permitted to be confronted with the defence documents which could not have been looked into, which are the basis of dismissal of the eviction petition and that the learned Trial Court took adversely the fact that in the civil suit filed by the respondent, the petitioner did not file any written statement rather consented that the respondent would not be dispossessed without due process of law. As regards the second contention, the observations of the learned ARC in Para 14 of the judgment are as under:

“14. In the light of above testimonies, the present petition has been filed on the basis of first legal notice dated 16/9/03 and the applicant has claimed rent from 01/3/2003. PW1 has admitted that prior to the service of said notice, the respondent had filed a suit for permanent injunction against the applicant and in the said suit, he had made statement on 5/9/03 not to dispossess the respondent forcefully from the suit property. PW1 has also

admitted certified copy of the said proceedings. (Ex.PW1/R1) as correct. A perusal of the certified copy of Ex.PW1/R1 shows that on 05/9/03 on the statement of PW1 Shiv Nandan to the effect that he shall not dispossess the respondent herein from the suit property without due process of law, the case was disposed off but, there was no whisper of the allegations regarding non-payment of rent or causing damage to the suit property. In view of statement of PW1 Shiv Nandan in Ex.PW1/R1, the allegations regarding non-payment of rent or causing damage to the suit property seems to be highly improbable. Had there been any default in payment of rent or damage to the suit property PW1 Shiv Nandan would have stated so in the statement made by him in suit filed by the respondent herein. It was quite probable for Shiv Nandan to make statement in that suit either without prejudice to his rights and contentions or to make specific allegations regarding non-payment of rent and damage to the premises but he had not stated so.”

5. The fact that the petitioner did not state regarding non-payment of rent or causing damages in the suit property cannot be viewed adversely for the reason the said suit was confined to dispossession of the respondent and a concession that the respondent will not be dispossessed without due process of law does not lead to the implication that the petitioner waived his claim to dispossess the respondent even by legal means or that in law he was required to speak about the allegations of non-payment of rent or causing damage to the suit property in the said suit by filing a written statement.

6. Regarding the first contention that once the defence of the respondent was struck off whether the respondent was entitled to confront the petitioner with the defence documents which are the very basis of the dismissal of the eviction petition, it is required to be analyzed whether the petitioner’s witnesses were cross-examined to demolish the case of the plaintiff or qua

defence case. Thus it would be appropriate to note the contents of the eviction petition and the written statement of the respondent which was struck off.

7. In the eviction petition it was stated that the petitioner had let out a shop bearing No.2 at C-102, Mandawali to the respondent at a monthly rent of ₹2000/- excluding electricity and other charges for a period of three years. The rent agreement was also enclosed. Tenancy of the shop was further extended for 11 months vide written rent agreement dated 1st April, 2002 on the same rent, however just after three months of the tenancy, the respondent constructed a cornice inside the shop by erecting iron angles without the permission of the petitioner. It is further stated that the respondent had not tendered the arrears of rent since 1st March, 2003 till the date of filing of the eviction petition except the rent for the period of July 2003 which was deposited in the Court. The respondent started running a service station for the purposes of washing scooter, motorcycle etc. in the said shop thus amounting to misuse of the premises and illegally and unauthorizedly installed a water pump by erection of iron pillars and by creation of holes in the walls of demised premises which diminished its value and utility. Due to the automobile work the respondent was causing nuisance in public place. The petitioner sent two legal demand notices dated 16th September, 2003 and 12th November 2003 through registered AD/ UPC to the respondent, however neither arrears of rent were paid nor any reply was sent. The respondent was under arrears of rent of ₹30,000/- approximately for 15 months with effect from 1st March, 2003 to July, 2004 except July 2003. The respondent promised in writing that after the expiry of the tenancy as

per the rent agreement dated 1st April, 2004 he would vacate the shop on or before 30th June, 2003.

8. In the written statement which defence has been struck off and the order has attained finality, the respondent stated that the petition was not maintainable as a wrong site plan was filed and that a forged and fabricated agreement of rent have been filed. The respondent stated that he paid rent for the month of April, May and June by cash, however no rent receipt was issued and he was tried to be dispossessed. Thus he filed a suit for permanent injunction which was disposed of on the statement of the husband of the petitioner by the learned Civil Judge. Thereafter the respondent deposited the rent under Section 27 of the DRC Act for the period of July, August, September 2003 before different Courts whereas rent for the months of October, November, 2003 @ ₹2000/- per month was sent by money order which was refused by the petitioner and thus returned back. It was further stated that the petitioner had received a security deposit of ₹50,000/- from respondent at the time of commencement of tenancy and thus there is no cause of action and the eviction petition be dismissed. The contents of the eviction petition were denied.

9. In the evidence by way of affidavit the petitioner reiterated the version in the eviction petition however the following cross-examination of the petitioner was conducted which would be relevant for the purposes of the decision of the present petition:

“E-142/04

PW1 Sh. Shiv Nandan recalled for cross-examination.

ON SA

XXXX by Shri M.L. Sharma, Learned counsel for the respondent.

Before filing the present suit I have served two notices upon the respondent dated 16.09.2003 and 12.11.2003. It is correct that prior to service aforesaid notice the respondent had filed a suit for permanent injunction against me. It is correct that in the said suit I made a statement on 05.09.2003 not to dispossess the respondent forcefully from tenanted suit property. It is correct that certified copy of the said proceedings is bears my signature at point X and now the same is Ex.PW1/R1. It is correct that the rent was tendered by the respondent for the month of August on 03.09.2003 and for August and September 2003 on 13.12.2003 as the rent sent for August was returned as refused. I do not know whether the rent was refused by my wife sent by respondent through money order. It is correct thereafter the rent was deposited with Rent Controller Court for the month of August and September 2003. The original receipt of money order as well as refusal receipt is Ex.PW-1/R-2 & R-3. The original deposit challan are Ex.PW-1/R-4 & R-5. I have filed the present petition on basis of 1st legal notice dated 16.09.2003. It is wrong to suggest that I have not filed present eviction petition on the basis of 1st legal notice. I have never issued any rent receipt to the respondents against the rents paid by him. I was getting electricity charges as per consumption of sub meters. It is correct that I used to issue a bill toward consumption charges mentioning therein the consumed units. I also prepared the bill in my own handwriting. The same are Ex.PW-1/R-6 (Colly). It is wrong to suggest that whatever the rent was due the same was already sent by the petitioner though MO and no rent was due when I served the legal notice. It is correct that the shop was let out for commercial purpose and same was used as commercial purpose. It is correct that at point A there is overwriting in Ex.PW1/1. Vol. The cutting was made by Notary Public. It is correct that Ex.PW1/1 is not a registered document and similar reply regarding Ex.PW1/2. It is correct that Ex.PW-1/4 is the photocopy and similar reply is regarding Ex.PW1/5. It is wrong to suggest that present suit is without cause of action

because prior to sending legal notices, the respondent had already sent the rent through Money Order for August 2003 and subsequently for August and September 2003 on my refusal. It is wrong to suggest that I am deposing falsely as no notice have been served on my behalf by the counsel as there was no arrears of rent upon the respondent.”

10. In Modula India Vs. Kamakshya Singh DEO (1988) 4 SCC 619 the Supreme Court held that even if the defence is struck off the defendant is still entitled to cross-examine plaintiff’s witness and address arguments on the basis of plaintiff’s case. It was held:

“18. We agree that full effect should be given to the words that defence against ejection is struck off. But does this really deprive the defendant-tenant of further participation in the case in any manner? While it is true that, in a broad sense, the right of defence takes in, within its canvass, all aspects including the demolition of the plaintiff’s case by the cross-examination of his witnesses, it would be equally correct to say that the cross-examination of the plaintiff’s witnesses really constitutes a finishing touch which completes the plaintiff’s case. It is a well-established proposition that no oral testimony can be considered satisfactory or valid unless it is tested by cross-examination. The mere statement of the plaintiff’s witnesses cannot constitute the plaintiff’s evidence in the case unless and until it is tested by cross-examination. The right of the defence to cross-examine the plaintiff’s witnesses can, therefore, be looked upon not as a part of its own strategy of defence but rather as a requirement without which the plaintiff’s evidence cannot be acted upon. Looked at from this point of view it should be possible to take the view that, though the defence of the tenant has been struck out, there is nothing in law to preclude him from demonstrating to the court that the plaintiff’s witnesses are not speaking the truth or that the evidence put forward by the plaintiff is not sufficient to fulfil the terms of the statute.

19. To us it appears that the basic principle that where a plaintiff comes to the court he must prove his case should not be whittled down even in a case where no defendant appears. It will at once be clear that to say that the court can only do this by looking at the plaintiff's evidence and pleadings supplemented by such questions as the court may consider necessary and to completely eliminate any type of assistance from the defendant in this task will place the court under a great handicap in discovering the truth or otherwise of the plaintiff's statements. For after all, the court on its own motion, can do very little to ascertain the truth or otherwise of the plaintiff's averments and it is only the opposite party that will be more familiar with the detailed facts of a particular case and that can assist the court in pointing out defects, weaknesses, errors and inconsistencies of the plaintiff's case.

20. We, therefore, think that the defendant should be allowed his right of cross-examination and arguments. But we are equally clear that this right should be subject to certain important safeguards. The first of these, is that the defendant cannot be allowed to lead his own evidence. None of the observations or decisions cited have gone to the extent of suggesting that, in spite of the fact that the defence has been struck off, the defendant can adduce evidence of his own or try to substantiate his own case.

21. Secondly, there is force in the apprehension that if one permits cross-examination of the plaintiff's witnesses by the defendant whose defence is struck off, procedural chaos may result unless great care is exercised and that it may be very difficult to keep the cross-examination within the limits of the principles discussed earlier. Under the guise of cross-examination and purported demolition of the plaintiff's case, the defendant may attempt to put forward pleas of his own. To perceive quickly the difference between questions put out to elicit a reply from the plaintiff which may derogate from his own case and questions put out to substantiate pleas in defence which the defendant may have in mind and to restrict the cross-examination to its limits will be not an easy task. We think, however, that this is a difficulty of procedure, rather than

substance. As pointed out by Ramendra Mohan Dutta, J. this is a matter to be sorted out in practical application rather than by laying down a hard and fast rule of exclusion.

22. A third safeguard which we would like to impose is based on the observations of this Court in *Sangram Singh case* [AIR 1955 SC 425 : (1955) 2 SCR 1 : 10 ELR 293] . As pointed out therein, the essence of the matter in all such cases is that the latitude that may be extended by the court to the defendant in spite of his having filed a written statement, should not cause prejudice to the plaintiff. Where the defendant does not file a written statement or where he does not appear to contest the case the plaintiff proceeds on the basis that there is no real opposition and contents himself by letting in just enough evidence to establish a prima facie case. Therefore, the court should ensure that by permitting the defendant at a later stage either to cross-examine the witnesses or to participate in the proceeding the plaintiff is not taken by surprise or gravely prejudiced. This difficulty however can be easily overcome in practice, because there is a wide discretion with the court and it is always open to the court, where it believes that the plaintiff has been misled, to exercise its discretion to shut out cross-examination or to regulate it in such manner as to avoid any real prejudice to the interests of the plaintiff.

24. For the above reasons, we agree with the view of Ramendra Mohan Datta, Acting C.J., that, even in a case where the defence against delivery of possession of a tenant is struck off under Section 17(4) of the Act, the defendant, subject to the exercise of an appropriate discretion by the court on the facts of a particular case, would generally be entitled:

- (a) to cross-examine the plaintiff's witnesses; and
- (b) to address argument on the basis of the plaintiff's case.

We would like to make it clear that the defendant would not be entitled to lead any evidence of his own nor can his cross-examination be permitted to travel beyond the very limited objective of pointing out the falsity or weaknesses of the plaintiff's case. In no circumstances should the cross-examination be permitted to travel beyond the legitimate scope

and to convert itself virtually into a presentation of the defendant's case either directly or in the form of suggestions put to the plaintiff's witnesses.”

11. In Niranjan Kumar Vs. Poonam Chawla 135 (2006) DLT 39 this Court keeping in view the fact that this Court does not sit as a Court of appeal proceedings under Article 227 of the Constitution of India and the object is only to ensure that a Court or Tribunal confines itself to its own jurisdiction noted that the Trial Court is the master of how the evidence is to be recorded and it is not the function of this Court to interfere in the evidence. It also noted the undisputed proposition of law that if the witness denies the document of the defendant then those documents certainly cannot be exhibited and the occasion to exhibit those documents would only arise if the witness admits those documents. This is so since in cross-examination, opposite party has a right to practically pull out a document out of its pocket and confront the witness with that document, which relates to that witness. Following Modula India (supra) it was held that there was nothing which precludes the defendant from confronting the witness of the plaintiff in cross-examination with the documents which are not on record.

12. Thus the trial Court after striking off the defence is required to analyze and see that the cross-examination of the plaintiff is conducted carefully and only and only that portion whereby the defendant seeks to demolish the case of the plaintiff can be permitted and not rebut the evidence of the plaintiff by leading his defence evidence. However to demolish the case of the plaintiff the defence is entitled to confront the witness with any document including

its defence document, however if the witness of the plaintiff denies the said document then the same cannot be proved.

13. A perusal of the cross-examination would show that the petitioner was confronted with Ex.PW-1/R1 to R5 which were defence documents however since the petitioner has already admitted these documents, the respondent is not required to prove the same. The respondent has been able to prove that rent for the months of August and September, 2003 was sent by money order which was refused. The legal demand notices Ex.PW1/4 and Ex.PW1/5 are dated 16th September, 2003 and 12th November, 2003. A perusal of the evidence would show that the petitioner admitted having received the rent from July 2003 to February, 2007 except for August and September, 2007 which he admitted that the money order was sent and was refused. Further PW-1 admitted that he had never issued any receipt to the respondent against the rent paid by him and thus has not been able to prove that rent from March, 2003 to June, 2003 had not been tendered.

14. Even though the finding of the learned ARC and the appellate Court took into consideration adversely the fact that the petitioner did not state anything about the rent having been paid in the suit for dispossession filed by the respondent which was unwarranted, however even on the merits of the case the petitioner has not been able to prove non-payment of rent by the respondent.

15. As regards the plea of rejection of eviction under Section 14(1)(j) DRC Act, there is no illegality or perversity in the impugned order as no evidence was led by the petitioner to establish substantial damage to the tenanted premises and that the value and utility of the shop had decreased.

16. Consequently, the petition is dismissed.

(MUKTA GUPTA)
JUDGE

APRIL 20, 2015
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