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HIGH COURT OF DELHI AT NEW DELHI

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RC. Revision No.558/2015

Decided on : 11th December, 2015

SUSHILA DEVI JAIN

..... Petitioner

Through: Mr. V.K. Ohri, Advocate.

Versus

RAJINDER KUMAR GUPTA

..... Respondent

CORAM:

HON'BLE MR. JUSTICE V.K. SHALI

V.K. SHALI, J. (ORAL)

1. By virtue of the present revision petition the petitioner has assailed the order dated 26.8.2015 passed by the learned ARC, South allowing the leave to defend application of the respondent on the ground that a triable issue is raised by the respondent/tenant with regard to availability of an alternative accommodation on the first floor.

2. Briefly stated the facts of the case are that the present petitioner filed an eviction petition against the respondent in respect of Shop No.2 of premises No.12/03, Yusuf Sarai, Main Market, New Delhi-16. It was stated in the petition that the petitioner is aged about 87 years suffering from various ailments and settled in Calcutta and because of the fact that

she is old, she is not able to take care of her properties and therefore she had issued a special power of attorney in favour of her son Devender Kumar Jain through whom the petitioner herself has instituted the petition setting up the requirement of Shubham Jain, son of Rajinder Kumar Jain, who happens to be the grandson of the petitioner as the ground for retrieval of the shop during the tenancy of the respondent. It was stated that Shubham Jain has completed his BBA and course for Chartered Accountancy and is around 26 years of age. The petitioner wants to settle her grandson by giving the said shop to him after retrieval of the possession from the respondent so that he is able to start his own office of Chartered Accountant. It was also alleged that Shubham Jain and his father, Rajinder Kumar Jain as well as the petitioner do not own any alternate commercial accommodation in Delhi.

3. On notice being served on the respondent/tenant, he has filed his leave to defend application and contested the plea of the petitioner for *bona fide* requirement. Various pleas were taken, out of which one was with regard to *bona fide* requirement. It was stated by the respondent/tenant that apart from the shop, the petitioner has accommodation available to her on the first floor of property No.12-B,

Yusuf Sarai, New Delhi which is a part of the tenanted property and can be used for the purpose of setting up the office of Chartered Accountant. It was also stated in the leave to defend application that apart from the aforesaid property, Rajinder Kumar Jain was the owner of half undivided interest in Plot No.103, Bharat Ram Road, Daryaganj and he also owns Property No.1056, Gali Hira Nand, Maliwara, Chandni Chowk apart from a flat in DLF, Phase-I, Gurgaon. It was further stated that grandson of the petitioner, Shubham Jain, is not professionally qualified and is yet to pass his final exam and he is gainfully employed at M/s. Accenture as a Senior Associate.

4. The petitioner/landlord in reply to the leave to defend application simply denied the averments in this regard but there was no denial with regard to employment of Subham Jain with M/s. Accenture. As regards the availability of the alternative accommodation on the first floor, it was stated by the petitioner/landlady that the said premises were being used for residential purposes by her other son, Devender Kumar Jain.

5. The learned ARC, after hearing the arguments of both the sides, granted leave to defend to the respondent/tenant on two grounds. Firstly, that the averments made by the respondent/tenant in the leave to defend

application with regard to availability of an alternative suitable accommodation on the first floor of property No.12-B, Yusuf Sarai, New Delhi with the petitioner raised a triable issue and thus, granted the leave to defend. The learned ARC dealt with the said issue and the submissions of the learned counsel for the petitioner in the following manner :-

“18. Whether the petitioner is having alternate vacant accommodation at First Floor of 12-B, Yusuf Sarai, New Delhi for proposed business of Shubham Jain. In leave to defend application the respondent have claimed that the First Floor of 12-B, Yusuf Sarai is lying locked, vacant and un-utilized being in possession of petitioner and which is sufficient and suitable for the purposed business of CA. It is also mentioned that the son of petitioner Sh. Devender Jain is residing with his family only on Second Floor of the said premises. In reply the petitioner has given a bare denial of the said claim and no detail whatsoever is being given as to usage or otherwise of First Floor of the suit premises. During arguments Ld. Counsel for petitioner has filed a bunch of photographs and claiming that the First Floor also is being used for the purpose of residential accommodation of Sh. Devender Kumar Jain and his family. Ld. Counsel for respondent has strongly objected to the said claim and argued that the photograph are manipulated and are not of the First Floor of said accommodation. He reiterated that the First Floor of said accommodation is vacant and lying unutilized. The petitioner has not denied that she is having possession of First Floor of the accommodation but its usage for the purpose of residence of Devender Kumar Jain and family was neither mentioned in the petition nor in reply to leave to defend application and therefore it becomes a triable issue whether the said First Floor is lying vacant and un-utilized and also whether same is suitable

alternate accommodation for the purpose of business of Shubham Jain.”

6. Secondly, the triable issue was raised by the tenant with regard to the employment of Shubham Jain with M/s. Accenture, which fact was not denied by the petitioner/landlady in her reply to leave to defend. This contention of the respondent has been dealt with by the learned ARC in the impugned order.

7. Mr. Ohri, the learned counsel for the petitioner has stated that this is an erroneous finding returned by the ARC granting the leave to the respondent/tenant by assuming that it raises a triable issue in the light of the fact that the petitioner has filed her reply to the leave to defend application and stated specifically that her son and his family is using the aforesaid premises for residential purpose. He has stated that he has also annexed the electricity bills in this regard to show that the premises in question on the first floor are being used for residential purposes.

8. I have carefully considered this submission made by the learned counsel for the petitioner; however, I do not agree with the contention of the learned counsel for the petitioner. At the stage of grant of leave to the respondent, the court is to decide the question *prima facie* on the basis of

the evidence produced by the parties. More so, when two contrary affidavits are filed by the tenant and the landlord, the only method of ascertaining the truth would be if the parties are permitted to adduce evidence or testify and they are subjected to cross-examination during the course of trial. In the present case, the petitioner does not disclose that she is in possession of the first floor of another premises and the same is being used by her son for residential purposes tantamounts to withholding of information from the court and when the tenant files his leave to defend application bringing this aspect of the matter to the notice of the court that there is an accommodation available with the petitioner/landlady which can be used by her for the purpose of her *bona fide* requirement then she files reply to the same giving an explanation that the said alternative accommodation is being used in a particular manner. This becomes a debatable question in the sense that this issue can be decided only after the parties are permitted to adduce their evidence and in that sense it becomes a triable issue.

9. It is the contention of the learned counsel for the petitioner that in view of the settled law by the Apex Court in catena of judgments, it is not open to the tenant to dictate the terms to the landlord as to how he must

use particular premises in a particular manner or as to how he is to conduct his business. Reliance in this regard is placed on *Anil Bajaj & Anr. Vs. Vinod Ahuja; Civil Appeal No.5513/2014* and *Sohan Lal Gupta vs. Nand Kishore; R.C. Revision No.33/2012*.

10. There is no dispute about the fact that it is a settled proposition of law that the tenant cannot dictate the terms with regard to the *bona fide* requirement of the petitioner/landlord. But certainly once the tenant creates a hole in the *bona fide* requirement of the landlord to show that if tested objectively, it will non-suit the landlord from seeking retrieval of the possession then obviously it raises a triable issue and the leave to defend has to be given to the tenant. In the instant case, this is precisely what the respondent/tenant has done. He has specifically made an averment in the leave to defend not only about the accommodation available to the petitioner on the first floor but also stated that Shubham Jain, the grandson of the petitioner is employed with M/s. Accenture. Both these aspects have been denied by the petitioner. In respect of the first portion, an explanation is given in reply that the accommodation on the first floor of the suit property is not meant for commercial purposes

and is being used for residential purposes. In my view, both these aspects raise triable issue.

11. In totality of circumstances, I feel that the learned counsel for the petitioner has not been able to point out any illegality or impropriety or jurisdictional error in grant of leave to defend to the respondent by observing that triable issue is raised with regard to the *bona fide* requirement of the petitioner/landlord. This becomes all the more prominent when the petition is filed through special power of attorney and not by the petitioner herself, who is settled in Calcutta.

12. I, accordingly, feel that the present revision petition by the landlord is without any merits and the same is dismissed.

V.K. SHALI, J.

DECEMBER 11, 2015
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