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HIGH COURT OF DELHI AT NEW DELHI

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RC. Revision No.545/2015

Decided on : 11th December, 2015

SUSHILA DEVI JAIN

..... Petitioner

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

Versus

ADESH 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.12/04, 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 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 Vaibhav Jain, son of Devender 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 Vaibhav Jain has done a course in animation and graphic designing and is around 25 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 business of graphic designing and web designing. It was also alleged that Vaibhav Jain and his father 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 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 business of graphic designing and web designing. It was also stated in the leave to defend application that Devender Kumar Jain, son of the petitioner was running his business of electrical goods in Bhagirath Palace under the name and style of M/s. Jyoti Enterprises. It was further stated that grandson of the petitioner, Vaibhav Jain, is helping his father Devender Kumar Jain in the said business and therefore, is gainfully employed.

4. The petitioner/landlord in reply to the leave to defend application simply denied the averments in this regard especially with regard to the employment or the assistance rendered by Vaibhav Jain to his father but there was no specific denial. As regards the availability of the alternative accommodation on the first floor, it was stated by the petitioner/landlord that the said premises were being used for residential purposes by Devender Kumar Jain as family which included Vaibhav Jain also.

5. The learned ARC, after hearing the arguments of both the sides, granted leave to defend to the respondent/tenant on the ground 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 :-

“20. Whether the petitioner is having alternate vacant accommodation at First Floor of 12-B, Yusuf Sarai, New Delhi for proposed business of Vaibhav 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 Graphic Designing. 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 Vaibhav Jain.”

6. 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 his reply to the leave to defend application and stated specifically that he 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.

7. 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 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 the suit 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 and 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. 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*.

8. 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 Vaibhav Jain, the grandson of the petitioner is assisting his father Devender Kumar Jain in his business in Bhagirath Palace. 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.

9. So far as the second aspect is concerned with regard to Vaibhav Jain assisting his father, there is a simple denial. Though this denial has been accepted by the learned ARC erroneously by saying that the tenant ought to have produced some business card or some more evidence to show that Vaibhav Jain was assisting his father, I feel that this reasoning of the ARC on that aspect of the matter is erroneous. The very fact that the respondent/tenant, in the instant case, had specifically stated that

Vaibhav Jain was assisting his father Devender Kumar Jain in his business of electric goods at Bhagirath Palace, a simple denial by the petitioner/landlord was not sufficient and in any case, even if there would have been effective denial, it could have been only by producing some documentary evidence to show that he was not assisting his father because this is a fact specially within his knowledge, therefore, the onus is on him to prove the same. This has not been done and on that score also, it raises a triable issue.

10. 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.

11. 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/‘AA’