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

+ CM(M) 177/2016

LALIT KISHORE SHARMA & ANR Petitioners

Through Mr.Uday Gupta and Mr.
M.K.Tripathi, Advocate.

versus

KUSUM LATA JAIN Respondent

Through Mr.P.K.Rawal, Mr. Tarun Agarwal,
and Mr. Alok Pandey, Advocate.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

ORDER

% **22.02.2016**

C.M. No.6448/2016 (exemption)

Exemption is allowed subject to just exceptions. Application disposed of.

CAV157/2016

Respondent has put in appearance. Caveat is discharged.

CM(M) 177/2016 & C.M. No.6447/2016

Order impugned before this Court is the order dated 10.02.2016. The application filed by the plaintiff/non-applicant in the Trial Court seeking leave to withdraw his eviction petition had been allowed. At the same time he was also granted permission to file a fresh eviction petition. It is the second part of the order by which the petitioner is aggrieved. His contention is that under Order XXIII Rule

1 of the CPC, although the respondent is not in a position to oppose the prayer for the withdrawal of the petition but he has a right to object permitting the non-applicant/plaintiff to take recourse to the same remedy afresh.

Record shows that the present petition pending before the Trial Court was an eviction petition filed by the non-applicant under Section 14(1)(e) of the Delhi Rent Control Act (DRCA). In this eviction petition the landlord had arrayed one respondent namely Lalit Rai son of Late Shir Jagdish Rai. The eviction petition was on the ground of bona fide requirement of the landlord. In the application seeking leave to defend filed by the tenant, his contention was that Jagdish Rai had died leaving behind the other legal heirs and apart from Lalit Rai the other legal heirs were to be impleaded. The petition has also not been filed through the authority of Kusum Lata Jain and her signatures on the petition have also been disputed.

In the course of the proceedings before the Trial Judge, the present application under Order XXIII Rule 1 of the CPC had been filed seeking permission of the Court to withdraw the eviction petition. The eviction petition was accordingly disposed of. The impugned order had noted that non-joinder of the other legal heirs of late Jagdish Rai amounted to a “formal defect” within the meaning of Order XXIII Rule 1 of the CPC and accordingly also noting that no prejudice would be caused to anyone if the petitioner is permitted to withdraw the present petition and to file a petition afresh, the impugned order had been passed.

Learned counsel for the petitioner has placed reliance upon a

judgment of the of a Bench of Orrisa High Court reported as AIR 1986 Orissa 1 Khatuna and Anr. Vs. Ramsewak Kashinath to support his submission that a “formal defect” (under Order XXIII Rule 1 of the CPC) does not include a non-joinder of the parties. Per contra, learned counsel for the respondent has placed reliance upon a judgment of this Court reported as 2016 (154) DRJ 355 Microsoft Corporation & Anr. Vs. Sujan Kumar & Ors. to subvert this argument. In this case, a Bench of this Court had held that the mis-joinder of parties and mis-joinder of causes of action is a “formal defect” and accordingly while allowing the petitioner in that case to withdraw the petition, permission had been granted to file a suit afresh.

Learned counsel for the petitioner submits that this judgment is distinguishable as it relates to a mis-joinder of the parties which is distinct from a non-joinder of the parties. There is no doubt to this proposition; a mis-joinder of parties may be different from a non-joinder of parties but it is also trite to say that while dealing with the aspect of a “formal defect” as contained in the Order XXIII Rule 1(3) of the CPC and permitting a party to withdraw a suit and as a corollary also granting permission to the same party to file a fresh suit on the same cause of action, the principle of mala fides must also be considered and where no mala fide or a lack of bona fide is imputed to a party who is withdrawing a petition (under Order XXIII Rule 1) and the application seeking a withdrawal not being vexatious, the Court is not precluded from giving permission to such a party to institute a fresh suit.

This Court also notes that the present proceedings were the proceedings under Section 14(1)(e) of the DRCA i.e. on the ground of bona fide need of the landlord. A petition under Section 14(1)(e) of the DRCA is a recurring cause of action and as held by the Supreme Court in 2001 (6) SCC 473 N.R.Narayan Swamy Vs. B.Francis Jagan, the genuineness of the need of the landlord has to be seen on the date of the eviction petition; even if it is dismissed once, it cannot be held that once the question of necessity is discharged he will not have a bona fide and genuine necessity even in the future. The relevant extract of the aforementioned finding of the Apex Court reads herein as under:

“In our view, the high Court ought to have considered the fact that in eviction proceedings under the Rent Act the ground of bona fide requirement or non-payment of rent is a recurring cause and, therefore, landlord is not precluded from instituting fresh proceeding. In an eviction suit on the ground of bona fide requirement the genuineness of the said ground is to be decided on the basis of requirement on the date of the suit. Further, even if a suit for eviction on the ground of bona fide requirement is filed and is dismissed it cannot be held that once a question of necessity is decided against the landlord he will not have bona fide and genuine necessity even in future. In the subsequent proceedings, if such claim is established by cogent event adduced by the landlord, decree for possession could be passed. [K.S. Suderraju Chettair vs. M.R. Ramchandra Naidu (SCC para 10) and Surajnul vs. Radhe Shaym].”

In this background and the legal proposition enunciated supra,

this Court is of the view that the impugned order suffers from no infirmity. Petition dismissed with costs quantified at Rs.10,000/-

INDERMEET KAUR, J

FEBRUARY 22, 2016

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