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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 09th July, 2019

Pronounced on: 17th July, 2019

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EX.S.A. 2/2018, CM APPL No.54552/2018, 1396/2019

ATUL GULATI & ANR

..... Appellants

Through : Mr.Deepak K.Sharma, Mr.Ashish
Sharma, Advocates.

versus

VARSHA MEHRA & ORS

..... Respondents

Through : Mr.Sanjeev Sindhvani, Senior
Advocate with Mr.Aman
Nandrajog, Mr.Arjun Nanda,
Advocates.

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. This second appeal is against the judgment dated 01.09.2018 passed by the learned District and Sessions Judge, South-East District, Saket Courts, New Delhi in RCT/ARCT No.22/2018 whereby the order dated 21.07.2018 passed by the learned ACJ/CCJ/ARC, South-East District, Delhi was upheld.

2. The facts as alleged by the petitioner are as under:-

(i) Late father of the appellants and respondent Nos. 2 to 5 herein i.e. Shri Subhash Chander Gulati was the original tenant of the Shop No.12, Defence Colony Market, New Delhi-110024 (hereinafter referred as "demised shop") owned by the respondent No.1;

- (ii) after the death of Shri Subhash Chander Gulati and his wife Smt. Krishna Gulati, the appellants and respondent Nos. 2 to 5 herein became the tenants of the demised shop;
- (iii) respondent No.1 filed an Eviction Petition bearing No.E134/08/05 under Section 14 (1) (g) of the Delhi Rent Control Act, 1958 (hereafter referred as the 'DRC Act') against the appellants and respondents No.2 to 5 in respect of the demised shop;
- (iv) appellants and respondents No.4 & 5 were proceeded ex parte and the eviction petition was decreed vide judgment dated 27.05.2009 in favour of the respondent No.1 and against the appellants as well as respondents No.2 to 5 with the direction to respondent No.1 to reconstruct and complete the work of rebuilding within a period of 10 months and thereafter place the appellants and respondent Nos.2 to 5 herein in occupation of the basement;
- (v) respondents No.2 & 3 filed an appeal bearing No.27/2009 against the said judgment but it was dismissed vide judgment dated 09.11.2009, which allegedly is not in the knowledge of the appellants herein;
- (vi) the Execution Petition No.83031/2016 was thus filed for executing the judgment and decree dated 27.05.2009, however, proceedings therein were adjourned on appearance of the appellants to enable them to file an appeal for setting aside the judgment and decree dated 27.05.2009;
- (vii) thereafter an application under Order IX Rule 13 CPC was filed in the eviction petition No.E134/08/05 in the Court where the execution petition was also pending. In the meanwhile, on 03.05.2017 the learned executing Court directed the appellants and respondents No.2 to 5 to handover the peaceful possession to the respondent No.1 within two

months from the date of such order and thereafter the respondent No.1 was to reconstruct the property within ten months of receiving the vacant possession in terms of order dated 09.11.2011 passed by the learned appellant Court;

(viii) Execution First Appeal No.14/2017 was filed by appellants in this Court, but after brief arguments it was withdrawn by the appellants;

(ix) on 15.12.2017, the application under Order IX Rule 13 CPC was also dismissed by the learned trial Court. On 23.05.2018, the learned executing Court dismissed the objections filed on behalf of the respondents No.2 & 3; and

(x) on 21.07.2018, once again the objections were filed, but were dismissed by the learned ARC, Saket Courts, New Delhi. The appeal against the order was also filed before learned District and Sessions Judge, which was dismissed vide judgment dated 01.09.2018 and on 04.09.2018 the respondent No.1 received the physical possession of the demised shop with the assistance of the Bailiff and the execution petition was disposed of. The appellants are in appeal against the said judgment dated 01.09.2018.

3. In the appeal the foremost argument raised by the appellant is qua the user of basement. It is argued the basement being not allowed to be used for commercial purposes under the Master Plan 2021, the learned Courts below ought not to have directed the appellants to be put in possession of the basement to run their garment shop. It is alleged by the appellants as per the Municipal Bye laws, the basement can only be used for storage purposes as such the orders passed the learned Trial Court, the appellate Court as also of the learned executing Court(s) are void and

non est.

4. Prior to coming to this argument, I would like to refer to the relevant portions of the judgment dated 27.05.2009 passed in Eviction Petition No.E134/08/05 which notes as under:-

*“5. Respondent No.1 and 2 filed the detailed reply to the petition and strongly disputed the contention raised therein. Respondent No.3 to 6 were proceeded ex parte on 26.03.09. Respondent No.1 and 2 opposed the application on the ground that petitioner is not the owner of the demised property. Respondent No.1 and 2 stated in their reply that plan sanctioned by MCD does not permit commercial use of the first and second floor in the shopping area of Defence Colony market. **It was also stated that even the basement can be used for storage purpose as per the proviso of Delhi Municipal Corporation Act.** It was next contended in the reply that the estimate quoted by the respondent through its architect are false. The respondent no.1 and 2 further contended that the petition is bad for mis-joinder and non-joinder of necessary party. M/s Standard Stores is the tenant and respondent no.1 and 2 are the only partners and are in use, occupation, possession, dominion and control of the demised property. Hence it is contended that petition is liable to be dismissed for misjoinder and non-joinder of necessary parties. It was also stated that respondents will loose customers if the proposed construction is allowed. Respondent no.1 and 2 stated that application is liable to be dismissed as the petitioner has not chosen to file the petition u/s 23 of the Delhi Rent Control Act. It was also averred in the reply that petition is not possessed with sufficient funds to carry out this construction. It was finally stated in the reply that the real motive of the applicant is to get the respondent evicted from the tenanted premises. Applicant/petitioner filed the replication wherein the averment of the application were re-affirmed and reiterated.*

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*19. Mr.Shailender Chopra Ld.Counsel for the respondent submitted during the course of arguments that the respondent no.1 and 2 have elected to be placed in occupation of the demised property from which they are to be evicted. Respondents are directed to hand over the vacant possession of the shop no.12, Defence Colony Market, New Delhi to the petitioner within a period of 2 months from the date of this order i.e. on or before 27.7.2009. The petitioner/landlord shall complete the construction within 10 months of receiving the possession. The petitioner shall on the completion of the work of renovation of the building or re-building **place the respondent no.1 and 2 in occupation of the basement of the shop no.12, Defence Colony Market, New Delhi** on agreed rental or on standard rent to be determined by this Court. File be consigned to record room.”*

5. The learned District and Sessions Judge, South East District in ARCT No.27/2009 against the judgment dated 27.05.2009 vide its judgment dated 09.11.2011 inter alia noted:-

*“19..... It has been argued that in the name of being reinducted in the demised premises after rebuilding the basement floor has been offered which is not fair as it would result in space available in the tenancy being **shortened on** account of stair case running within the ground floor.*

31. The next submission on behalf of the appellant is that the sanctioned plans on basis of which the impugned judgment was passed have since become invalid and, therefore, in absence of re-validation, the impugned order ought not be sustained.

*32. I do not think the landlady can be made to suffer on account of the validity of the sanctioned plans having come to an end on account of the construction on their basis having not commenced within the prescribed period for the simple reason such works could not have been undertaken by the landlady without the tenant making way for such purposes. **With the tenant continuing to hold the possession, construction in the nature of rebuilding is virtually impossible, what with such works including the earth to be dug out for a basement to be added. The appeal having been filed against the impugned judgment, the landlady chose to be patient** and let the legal proceedings run their course. The plans have been sanctioned. This itself shows that proper plans have been prepared within the meaning of Section 14(8) of DRC Act. It is only that the sanctioned plans would require to be revalidated for commencement of the construction to be carried on. The landlady **cannot be brought into a vicious circle wherein** she would first be called upon to get the plans revalidated and then come and press to the court for the eviction order to be passed.*

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34. In these circumstances, Hon'ble Supreme court held that a procedure can be devised to protect the interests of both the tenant and the landlord, specially by taking care of apprehension expressed by the tenant that the property may remain lying unreconstructed in spite of being vacated by the tenant and followed by demolition if the plans for proposed reconstruction are not sanctioned by the local authority. It was held by the Hon'ble Supreme Court that decree of eviction passed by the High court was to be sustained but a condition was added that the landlords shall submit the plans of reconstruction for the approval of the local authority. Only on the plans being sanctioned by the local authority, the decree of eviction would be available for execution. Such sanctioned or approved plans were to be produced before the executing court whereupon the executing court was to allow a reasonable time to the tenant for vacating the property and delivering possession to the landlord-decree holders.

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*36. The final submissions of the appellants are that it was not proper on the part of the Rent Controller to direct the appellants to be put in possession of the basement floor since **such portion would be dissimilar to the tenanted portion held by them at the ground floor.** It is further their grievance that the portion being offered at the ground*

floor would be lesser in size then the one held at the ground floor, on account of being stair cases added. They also submit grievance that the rent Controller has indicated in the impugned judgment that he might be fixing standard rent for such space in which the tenants are to be re-inducted. This, according to them, is not envisaged in the provisions governing such petitions as under Section 14(1)(g) of DRC Act.

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*38.Thus, the appeal is found devoid of merits and is dismissed, though with the rider that the order of eviction shall be put into execution, requiring the tenant to give up the possession temporarily for purposes of reconstruction, only upon the landlady showing to the satisfaction of the executing court that she **has obtained revalidation of the building plans** from the concerned authorities. For such purposes the landlady shall **approach the executing court after informing the tenant in writing at the suit premises, with advance copy of the application to be moved.** In the event of the Rent Controller recording satisfaction, the appellants would stand directed to hand over the vacant possession of the suit premises within two months thereof and the respondent no.1, in turn will be duty bound to complete the construction within 10 months of receiving the vacant possession.”*

6. So the contentions of the appellants viz the basement floor cannot be allowed to be given to them, as raised before the learned Rent Controller and before the learned RCT was duly addressed and hence now would operate as *res-judicata*.

7. I would also like to refer to the order dated 03.05.2017 passed in Ex.Pet. No.83031/2016 by the learned executing Court which *inter alia* besides other contentions also notes as under:-

“Perusal of the order dated 09.11.2011 passed by the Ld. Appellate Court reveals that the DH/petitioner/landlord was directed that petitioner/DH shall obtain revalidation of building plan from concerned authority. Only on the plans being sanctioned by the local authority, the decree of eviction would be available for execution.

8. This order was also taken in appeal before this Court vide EFA No.14/2017 which was not pressed and was accordingly dismissed vide order dated 31.01.2017.

9. Yet again on 21.07.2018 objections were filed, but were again dismissed vide the order of same date. The operative portion of said order

passed by learned executing Court notes:-

*“Counsel for JD No.2 and 4 has submitted that he is pressing the objections solely on the ground that the **DH has failed to comply the conditions imposed by Ld. District & Sessions Judge Sh. R K Gauba, vide order dated 09.11.2011.** Perusal of said order shows that the appeal was dismissed but with a rider that execution shall be proceeded further only upon the landlady showing to the satisfaction of the Executing Court that she had obtained re-validation of the building plans from the concerned authorities.*

*However perusal of file, shows that vide order dated 03.05.2017, Ld. Predecessor of this court had taken on record the **fresh grant of sanction for reconstruction** by SDMC which is valid up to 03.10.2021 **alongwith the sanctioned plan** and the satisfaction has been recorded that there is no impediment for the execution of the judgment / decree dated 27.05.2009. Admittedly, the appeal filed by JD no.2 and 4 against said order has been dismissed. Therefore, there is no substance in objections. Moreover, the rejection of DH's earlier sanction plan in 2010 or 2012 by MCD authorities has no consequence as present sanction plan is of 2016. Further, no objections had been filed by JD No.2 & 4 despite entering appearance since December, 2016/March 2017. Objections were not filed even after the application of JD no. 2 and 4 filed under order under 9 rule 13 was dismissed on 12.02.2018. This shows that the objections are being filed just to delay the execution proceedings. Therefore, considering the aforesaid facts and circumstances, objections filed on behalf of JD no.2 & 4 stands dismissed.*

Let warrants of possession of the suit property be issued against the JD on filing of PF for next date.”

10. Thus, the appellants before the learned executing Court had limited their argument only qua compliance of conditions imposed in order dated 09.11.2011 vis-a-vis revalidation of the building plan. This order was yet again challenged before the learned RCT in appeal No.ARCT No.19/2018, but said appeal was also dismissed vide judgment dated 01.09.2018. Never a plea of fraud upon the Court was taken. Rather the arguments of the appellants before such Courts were restricted to shortening of space in basement instead of putting them in basement and hence now cannot again raise such a plea viz the basement cannot be allotted to them.

11. The appellants are joint tenant with their brothers viz respondents

No.2 to 5. Admittedly, some of the respondents filed appeal against the eviction order dated 27.05.2018 wherein the direction to put the appellant in basement was given. The said appeal was dismissed on 09.11.2011. Since their brothers had filed an appeal, the appellants being the joint tenants cannot now urge the factum of ignorance or non filing of appeal. The fact that the basement was given to the appellants, rightly or wrongly, was never agitated after 2011 either before this Court or before the Supreme Court, hence the judgment dated 27.05.2009 and 09.11.2011 to this effect have become final. Even the plea that the plan was never got revalidated is not available as the fresh grant of sanction was obtained by respondents from SDMC, valid till 03.10.2021.

12. Admittedly, the executing Court could not have travelled beyond the decree as held in *M/s.Brakewel Automotive Components (India) Private Limited vs P.R. Saelvam Alagappan* 2017 AIR SC 1577.

13. Further in *National Textile Corporation Ltd & Another vs Ashval Vadera* 2010 (167) DLT 602 the Coordinate Bench of this Court noted:-

"19.....The principle of res judicata, as is well known, would not only apply in different proceedings arising out of the same cause of action but would also apply in different stages of the same proceedings so that if an issue has been decided at an earlier stage against a party it cannot be allowed to be re-agitated by him at a subsequent stage in the same suit or proceedings."

14. This Court in *Shri Iresh Duggal vs Shri Virender Kumar Seth and Others* 2015(1) RLR 409 held as under:-

"6.Therefore, the decision taken at the stage of preliminary decree that the premises belong to the partnership firm and not only to the defendant nos.1 and 2 is res judicata against the respondent nos.1 and 2/defendant nos.1 and 2 and therefore at the stage of final decree proceedings, respondent nos.1 and 2/defendant nos.1 and 2 now cannot again re-agitate this issue."

15. Thus, to my mind the appellants have no right to agitate the factum

of being shifted to basement instead of the ground floor time and again and hence are precluded to raise such a plea per principles of *res-judicata*. Qua his submission that the respondent has not taken permissions from various authorities viz structural safety/fire safety etc, cannot be agitated herein before this forum since this is an appeal against orders under the DRC Act.

16. In view of above, the appeal has no merit and is accordingly dismissed. Pending application, if any, also stands disposed of. No orders as to costs.

YOGESH KHANNA, J.

JULY 17, 2019

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