

\$~15

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

%

Judgment delivered on: 21.11.2019

**+ RC.REV. 673/2015 & CM APP Nos.30983/2015, 17644/2016,
40463/2018 and 1394/2019**

ASHOK KUMAR

..... Petitioner

versus

VISHAL SHARMA

..... Respondent

Advocates who appeared in this case:

For the Petitioner: Mr.Parinav Gupta, Mr.Pradeep Gupta and Ms. Mansi Gupta, Advocates.

For the Respondent: Mr.Alok Kumar, Mr.Aakash Dubey and Mr.Vaibhav Dubey Advocates.

CORAM:-

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J. (ORAL)

1. Petitioner impugns order dated 28.07.2015 whereby the leave to defend application of the petitioner has been dismissed and an eviction order passed.

2. Respondent has filed the subject eviction petition seeking eviction of the petitioner from shop No.3, Plot No. 14, B block main market, Vivek Vihar, Phase-I, Delhi more particularly, as shown red colour in the site plan annexed to the eviction petition.

3. Petition was filed by the respondent on the ground of *bona fide* necessity under Section 14(1)(e) of the Delhi Rent Control Act, 1958, contending that the mother of the respondent was the owner of the subject property and she passed away on 27.02.2011 leaving behind her husband and two sons including the respondent. Subsequently, father of the respondent also passed away and accordingly, respondent and his brother became owners of the subject property having one half share each. Thereafter, the brother relinquished his undivided 50 per cent share in the subject property by relinquishment deed dated 12.09.2013 in favour of the respondent and accordingly, respondent became the sole and exclusive owner of the subject property.

4. It is contended in the eviction petition that the family of the respondent comprises of himself, his wife and two minor daughters. His wife had obtained a diploma in first class in Fashion Designing from India International Trade Centre, Mumbai and had started a boutique in part of their Residence. However, the Residents Welfare Association objected to business being carried out from a residential area and accordingly, she had to close her business.

5. It is contended that respondent was running a chemist shop bearing shop No. 2 in the same property and as the financial needs of the family were growing his wife wanted to start her own business of boutique and fashion designing and accordingly, subject eviction petition was filed. It is contended that another eviction petition has also been filed for the adjoining shop.

6. It is contended that the shops are measuring 10' x 10' each and both the shops were required for doing business of boutique and fashion design. It is contended that the shops are situated in busy affluent market of Vivek Vihar area and ideally located for the business of boutique and fashion designing.

7. It is further contended that there is no other business property available to the respondent other than the subject property for carrying on the business by the wife of the respondent.

8. It is further stated that the respondent is the owner of the business property being a basement measuring 10' x 10' in South Extension, Plaza-I, Masjid Moth, which is on rent.

9. It is in these circumstances, contended that the subject premises are required bona fide for occupation as a business premises by the wife of the respondent and respondent has no other reasonably suitable accommodation available or commencing the business of his wife.

10. Subject leave to defend application was filed by the petitioner contending that another petition was filed by the respondent against the petitioner for the adjoining shop bearing No. 4, for which leave to defend was granted and the same was at the stage of evidence.

11. It is contended that since leave to defend was granted in the other petition, leave to defend should also be granted in this petition.

Further, it is contended in the affidavit that respondent is running a chemist shop and he was maintaining his family very well and there was no need or *bona fide* need.

12. It is further contended that the wife of respondent does not depend on the respondent for any purpose and there was no purpose for running a separate business and it is the responsibility of the respondent to maintain his wife and family.

13. It is further contended that the wife of the respondent was looking after small children and was not even assisting her husband in his business and she is being maintained by the respondent and is not interested in running any business separately and the sole motive of filing the eviction petition was to evict the petitioner from the tenanted premises.

14. It is further contended that the respondent or his wife do not need any other premises as he already has two shops.

15. It is further contended by learned counsel for the petitioner that earlier an eviction petition was filed by the mother of the respondent propounding a need for her husband, herself, two sons and two daughters-in-law in which leave to defend was granted. Subsequently, since the mother and father of the respondent passed away and the brother has relinquished his share in favour of the respondent, the need has diminished and, in these circumstances, leave to defend ought to be granted to the petitioner.

16. Learned counsel for the petitioner further contends that the earlier eviction petition which was filed by the petitioner in the year 2008, in which leave to defend was granted, was withdrawn by the respondent without leave of the court and accordingly, respondent is precluded for filing another eviction petition on the same ground as it compels the petitioner to once again seek leave to defend and since leave to defend was granted in the first eviction petition leave to defend should be granted in this petition.

17. As noticed above, the ground propounded by the respondent is that respondent carries on his business from shop No.2 in the subject property and two shops are in possession of the petitioner, one subject matter of this petition and the other subject matter of another eviction petition in which, leave to defend was granted, however, after trial, eviction order has been passed.

18. The contention of learned counsel for the petitioner that since leave to defend has been granted in one petition, leave to defend ought to be granted in another eviction petition does not hold any merit.

19. Merely because leave to defend is granted to a tenant in one eviction petition does not imply that leave to defend is to be granted to another tenant in respect of another premises even though the ground for eviction may be the same.

20. Leave to defend is to be granted based on the affidavit filed by the tenant in support of the application for grant of leave to defend.

After consideration of the affidavit filed in support of the application seeking leave to defend, if the rent controller comes to a conclusion that tenant has disclosed facts which raise triable issues and which, if proved, would disentitle the landlord from an order of eviction, leave to defend the eviction petition is to be granted.

21. One has to be alive to the fact that needs of a family are fluctuating and change from time to time. Merely because in an earlier eviction petition leave to defend is granted would not *ipso facto* imply that leave to defend should be granted in a subsequent petition even if the affidavit filed by the tenant does not disclose grounds which, if proved, would disentitle the landlord from an order of the eviction.

22. The ground of bona fide necessity as pleaded by the landlord and the grounds raised by the tenant in his affidavit in support of the application seeking leave to defend have to be considered on their merit to ascertain as to whether such facts have been stated, which if proved, would disentitle the landlord of an order of eviction.

23. In the earlier case, the eviction petition was originally filed by the mother of the respondent in the year 2008. This petition has been filed by the respondent, in the year 2014, after the demise of his parents and after the relinquishment deed was executed by his brother relinquishing his undivided share in favour of respondent.

24. The respondent has categorically stated that the respondent is sole and absolute owner of the subject property. The need as

propounded by the respondent is that he carries on the business of chemists in one of the four shops. Two shops are in possession of the petitioner one being the subject matter of this petition and the other subject matter of another eviction petition.

25. It is contended that there are growing financial needs of his family comprising of his wife and two minor daughters. His wife has obtained diploma in fashion designing from India International Trade Centre, Mumbai and intends to start her business of fashion designing and boutique and she has no other alternative accommodation available.

26. Petitioner has not been able to show in the affidavit in support of his leave to defend application that there is any other shop available with the respondent wherefrom the wife of the respondent can start her business.

27. The only other commercial property which is mentioned by the petitioner is a commercial space, available in basement in South Extension Plaza, Masjid Moth, Delhi which the respondent himself has stated in the eviction petition is already occupied by a tenant and further with respect to which the respondent has stated that the same is not suitable for the business to be carried on by the wife of the respondent.

28. The tenanted premises as also the premises from where the husband carries on business are adjoining each other in Vivek Vihar

and the other property is in Masjid Moth. It would clearly not be suitable for the wife of the Respondent to run her business from a shop far away from where her husband is doing his business specially when there could be space available, after eviction of the tenant, right adjoining the shop of her husband.

29. Clearly, the shop at Masjid Moth in a basement and smaller in size to the two shops which are subject matter of this petition and the other eviction petition and cannot be said to be comparable and alternative or suitable for the requirement of the wife of the respondent. So, the contention of the respondent that the shop at Masjid Moth is not suitable cannot be faulted.

30. Further, contention of learned counsel for the petitioner that since an eviction petition was filed earlier in which leave to defend was granted and thereafter, the same was withdrawn without liberty or leave the court and the subject eviction petition was filed and accordingly, leave to defend should be granted is also meritless.

31. The first eviction petition was filed in the year 2008 when the parents of the respondent were alive and the mother was the sole owner of the property. Said petition was withdrawn after the parents passed away and the needs of the respondent have further grown. Clearly, there are changed circumstances.

32. Merely because an earlier eviction petition is filed and withdrawn does not preclude the landlord from filing a fresh eviction

petition if the *bona fide* necessity continues to subsist.

33. It is a settled position of law that bar of *res judicata* does not apply to an eviction petition filed on the ground of *bona fide* necessity. *Bona Fide need must be considered with reference to the time when a petition for eviction is filed and it cannot be assumed that once the question of necessity is decided against the Petitioner, it has to assumed that he will not have a bonafide and genuine necessity in future.*¹

34. The Supreme Court of India in *N.R. Narayan Swamy v. B. Francis Jagan*, (2001) 6 SCC 473 has held 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, the 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 a *bona fide* and genuine necessity ever in future.

35. The Supreme Court in *N.R. Narayan Swamy v. B. Francis Jagan*, (2001) 6 SCC 473 further held that even Order 23 Rule 1(4)(b) would have no application in a proceeding initiated for recovering the

¹ *Surajmal Versus Radheyshyam* (1988) 3 SCC 18

suit premises on the ground of bonafide requirement which is a recurring cause.

36. Clearly, this argument of learned counsel for the petitioner is not sustainable.

37. Further, in the present case, it has been brought on record by the petitioner himself that one of the shops adjoining the shop i.e. shop No. 1 is in the possession of the brother of the respondent.

38. The contention of learned counsel for the petitioner is that the respondent should have asked his brother to vacate and should not disturb the petitioner from the tenanted premises. He submits that since the brother has already relinquished his share, he has no right title or interest to continue in the subject shop No.1 and the respondent should have sought eviction or vacation from his brother rather than asking the petitioner to vacate the premise.

39. This submission of learned counsel for the petitioner is also not sustainable. Clearly, it would be imprudent for a brother to seek eviction of his brother from a property and so as to accommodate a tenant.

40. Merely because the brother of the respondent does not have any right title or interest in the shop does not imply that respondent should spoil her family relations and seek eviction of his brother from shop from which the brother is carrying on his business so as to

accommodate a tenant.

41. The Rent Controller has rightly held that the objection taken by the petitioner with regard to the wife of the respondent not being dependent upon him could not be restricted to financial dependency and has to be seen in the light of prevailing social circumstances. The Rent Controller has rightly held that the petitioner has not been able to show that the respondent has any other reasonably suitable accommodation available wherefrom the wife of the respondent could start her business.

42. Landlord is the best judge of his requirement and tenant cannot dictate to the landlord as to how he has to put to use the available accommodation.

43. Further contention of petitioner that the respondent's wife is a house wife and only taking care of his children is again without any substance. In today's day and age, it is quite common for women to go out and commence/run their businesses. Merely because the Respondent is running his own shop is no ground to deny his wife an opportunity to start her own business and become independent. Especially, in view of the fact that she is educated and holds diploma in Fashion Designing from India International Trade Organisation, Mumbai and that also in first class.

44. I find no infirmity in the view taken by the Rent Controller that petitioner has not able to show any triable issue and the affidavit filed

in support of leave to defend does not raise any ground which, if proved, would disentitle the Respondent/landlord from an order of the eviction.

45. I find no merit in the petition. The petition is accordingly dismissed.

46. Order *dasti* under the signature of the Court Master.

NOVEMBER 21, 2019
neelam

SANJEEV SACHDEVA, J.

नित्यमेव जयते