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Court : Delhi

Decided On : Jul-09-1979

Reported in : 16(1979)DLT158; 1979RLR553

Judge : Harish Chander J., J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 6, Rule 170 - Order 23, Rule 1(3); [Delhi Rent Control Act, 1958](#) - Sections 14(1)

Appeal No. : Second Appeal No. 305 of 1973 and Civil Miscellaneous Appeal No. 128 of 1978

Appellant : Kaila Devi

Respondent : Banarsi Das

Judgement :

Harish Chandra, J.

(1) This is appellant landlady's application under order 6 rule 17 and order 23 rule 1 (3) of Code of Civil Procedure filed 11 years after the filing of eviction petition.

(2) The eviction petition was filed in January, 1968 on the ground that the landlady bonafide required the premises for residence. The learned Rent Controller found that the premises had been let out for residential-cum-commercial purposes and dismissed the petition by order dated 29 9.1971. An appeal against the said order

was dismissed by the learned Rent Control Tribunal on 24.9.1973 after affirming the aforesaid finding. A second appeal was filed in the Court in December, 1973. The present application was filed in January, 1979.

(3) In order to understand the prayers mad.; by the applicant in proper perspective, it may be useful to recall the controversy between the parties in the present litigation.

(4) In the petition for eviction filed by the applicant landlady, the ground pressed in aid was the one set out in clause (e) of the sub-section I of section 14 of the [Delhi Rent Control Act, 1958](#). No averment was, however made in the petition that the premises were let out for residence or residence only. Parties led evidence on the pleadings but the landlady did not depose, during evidence, that the premises were let for residence only. On the other hand the tenant led evidence to prove that the premises were let for residence-cum-commercial purposes.

(5) In order to appreciate the significance of pleading and proving that the premises were let for residential purposes only, a background of legislative development on the subject and the case-law thereon may be looked into.

(6) The legislation with regard to the control of rents and eviction of tenants in Delhi dates back to 1939 when the New Delhi House Rent Control order 1939 was promulgated. The Punjab Urban Rent Restriction Act was applied to the province of Delhi on 15th October, 1942. In 1945 the Ajmer House Rent Control order 1943 was promulgated. This was followed by Delhi and Ajmer-Marwara Rent Control Act (Act No. 19 of 1947) which in turn was followed by the Delhi and Ajmer Rent Control Act, 1952. The legislation now in force in Delhi is the [Delhi Rent Control Act, 1958](#) (Act No. 59 of 1958).

(7) In the Act of 1947 the provision with regard to the eviction of tenants on the ground of bonafide requirement of the landlord was Section 9 (i) (e) which was in the following words :

'9 (1) (e)that purely residential premises are required bona fide by the landlord who is the owner of such premises for occupation as a residence for

himself or his family.....'

(8) In the 1952 Act the provision on this subject was 13(1)(e) which was as follows:

'13 (1) (e) that the premises let for residential purpose are required bonafide by the landlord who is owner of such premises for occupation as a residence for himself or his family and that he has no other suitable accommodation: Explanationn:-For the purposes of this clause 'residential premises' include any premises which having been let for use as a residence are, without the consent of the landlord) used incidentally for commercial or other purpose; The provision on the subject and relevant to the present proceedings is Section 14(1)(e) of the 1958 Act which is as follows :'

"14 (1) (e) that the premises let for residential purposes are required bonafide by the landlord for occupation as a residence for himself or for any member of his family dependent on him, if he is the owner thereof, or for any person for whose benefit the premises are held and that the landlord or such person has no other reasonably suitable residential accommodation. Explanationn:-For the purposes of this clause, 'premises let for residential purposes' include any premises which having been let for use as a residence are, without the premises being vacate; In R.B. P.C. Khanna v. Malak Ram, 1952 Plr 50 the Court noticed the expression 'purely residential premises' used in clause (e) of Section 9(1) of the Delhi and Ajmer-Merwara Rent Control Act, 1947 and observed that the phrase indicates the intention of the legislature to enable the landlords to recover from their tenants for the purpose of their own use for residence what might be called genuinely residential premises as different from premises constructed and used substantially for purposes other than residence. It was further observed that the word 'purely' could not be taken in its strict literal meaning and that an incidental user for business or profession could not cause the premises to lose this character.

(9) In Dr. Gopal Dass Verma v. Dr. SK. Bhardwaj and another, 1963 Sc 337 the Supreme Court had occasion to consider Section 13(1)(e) of the 1952 Act and it was held that the professional use of a substantial part of the premises with the consent of the landlord clearly takes the case outside the purview of the provision.

(10) In the above case the Supreme Court proceeded on the appreciation of the words 'let for residential purposes' as meaning 'let for residential purposes alone' and held:

'... ..Where premises are let for residential purposes and it is shown that they are used by the tenant incidentally for commercial, professional or other purposes with the consent of the landlord the landlord would not be entitled to eject the tenant even if he proves that he needs the premises bonafide for his personal use because the premises have by their user ceased to be premises let for residential purposes alone. The position cannot be seriously disputed.'

The very first requirement to be satisfied before a landlord can avail of the facility provided by Section 14(1)(e) of the 1958 Act is that: the premises have been let for residential purpose.

(11) In order to ascertain whether this requirement is satisfied or not what is relevant is to ascertain the purpose for which the landlord let out the premises and not the use to which the tenant put it to. In the absence of a written document evidencing such purpose of letting or in the absence of an undenied averment about it, other factors like nature of building, previous user, user by the tenant etc. may be taken into account for coming to a conclusion about the purpose of letting but this would be wholly irrelevant otherwise.

(12) In the present case the petition for eviction filed by the landlady on the ground covered by Section 14(1)(e) of the Act was dismissed on the ground that the petitioner failed to prove the very first ingredient of the aforesaid provision, namely, that the premises were let for residence and the learned Rent Controller arrived at a definite finding that the premises were let for residential-cum-commercial purposes and therefore dismissed the eviction petition. The finding was affirmed by the learned Rent Control Tribunal and the dismissal of the petition was upheld in appeal.

(13) It is 'therefore', clear that a vested right has accrued to the tenant from this finding of fact and no amendment can be allowed the only purpose of which is to upset the apple-cart and divest the tenant of this valuable right by bringing about a

retrial.

(14) I am thereforee, unable to grant the first prayer of the applicant for amendment of the eviction petition.

(15) The applicant has then asked for the alternative prayer for being allowed to withdraw the evicton petition with. permission to file a fresh one under order 23 rule 1 (3) of Code of Civil Procedure. The prayer seeks to achieve the same objective by relying upon a different provisions of law. Sub-rule 3 of rule I of order 23 provides that: '1 (3) Where the Court is satisfied:

(a) That a suit must fail by reason of some formal defect, or (b) That there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a cliim, It may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institue a fresh suit in respect of the subject matter of such suit or such part of the claim. In order to grant the prayer I must be satisfied that the eviction petition has failed by reason of some formal defect or that there are sufficient grounds for allowing the landlady to file a fresh eviction petition after setting aside the result of the one that was filed in 1968. At the very outset I may say that the eviction petition did not fail due to any formal defect. Even if it was not pleaded that the landlady had let out the premises for residence only, parties chose to produce evidence resulting in a finding of fact about the letting purpose and it was on the basis of such a finding that the eviction petition was dismissed and the order of dismissal confirmed in appeal.

(16) It is then to be seen whether the prayer of the applicant can be granted on the basis of 'sufficient grounds' appearing in clause (b) of sub-rule 3 of rule 1. Numerous decisions of the courts of law have discussed whether the ambit of 'sufficient grounds' is controlled by the phrase 'formal defect' appearing in clause (a) or has to be understood independent of this phrase and much wider than it. Assuming for the present that 'sufficient grounds' appearing in a separate clause must be understood as grounds wider than the grounds of formal defect, I have to see whether any such grounds are available to the landlady to satisfy me to grant her prayer. I am afraid the answer is in the negative. I am clearly of the opinion

that where a valuable right has accrued to a party by a finding of fact, the effect of such a finding cannot be nullified and set at naught by allowing the withdrawal of a plaint with permission to file a fresh one. In *Beniide Behari Pati v. Chandhari & Co.*

(17) *Air 1919 Cal 129*, a Judgment remarkable for its brevity Tennon and Newbould JJ. held that the desire to produce additional evidence is not a proper reason for permitting the plaintiff/appellant to withdraw his suit with liberty to bring a fresh suit in respect of the same cause of action.

(18) In *Thakurpd.& another y.RasoolBuxand another*, 1950 All 489 Bind Basni Prasad J. considered a request made to the court at the end of arguments to be allowed to withdraw from the suit with liberty to bring a fresh suit on the same cause of action. The court considered, both sub-clauses (a) and (b) of order 23 rule 1 (2) of Code of Civil procedure and held as follows :

'There is no formal defect in the suit. The expression 'formal defect' connotes defects of various kinds not affecting the merits of the case. A defect which goes to the root of the plaintiffs' claim is not a formal defect. Defects such as omission to obtain permission if necessary of the necessary authority before bringing the suit misguide of parties or causes of action or erroneous valuation of the subject-matter of the suit or the institution of the suit in a court which has no Jurisdiction to entertain the suit, are defects of a formal nature. But where the suit has failed because the plaintiff failed to produce evidence which he was bound to produce in support of his claim, he cannot be permitted to withdraw the claim with liberty to bring a fresh suit in respect of the same subject-matter.

(19) In *Thadi Kinda Veeriwamt v. Thulium Pada Lakashmudu & Other*, : AIR1951 Mad715, Panchapakesa Ayyar J. considered an order of the lower court dismissing an application of the plaintiff for permission to withdraw the suit with liberty to file a fresh one. The plaintiff had urged the following grounds in support of his application ;

'...HIS vakil, Mr. P. Chalapati Rao, had taken a portion of his (petitioners properties in advance in the name of his relative the second pitf. for conducting the suit, & had then filed a genealogical table which would not support his petnr's case & had

also refused to amend the plaint & the genealogical table suitably. The first deft, had attacked the genealogical table as false & maythical, & had contested the petnr's claim to be the nearest reversioner, besides asserting the truth & validity of his own adoption, The suit was filed in 1944. This 1.A. was filed on 9 11.1945 after giving up his vakil & revoking his vakalat On 9. 11. 1945 itself the lower Court passed the order as below:'

(20) The Court held:

'The petni, may withdraw the suit if he wants. This is not a case for which premission can be given to withdraw the suit with liberty to bring a fresh suit. Petition is dismissed.'

(21) In Civil Revision .-3 of 1969 ShriRamChander V. Shri Vishist Kumar decided by S. N. Andley J. on 21. 3. 1972 this court considered an order for the withdrawal of the suit with liberty to file a fresh suit made when the suti had been listed for arguments on an application urging 'non production of sufficient evidence' as the ground for praying for such an order. This court set aside the order and held that ;

'it can never be that after the parties have gone to full trial where pleadings have been filed; issues have been framed and evidence has been led by both the parties and the case is set down for arguments, a suit can be permitted to be withdrawn with liberty to file a fresh suit on the same cause of action on the ground that there is a locuna in the evidence produced by the plaintiff.....

(22) In Civil Revision 357 of 1970 Shri Amanat Rai Jain v. Smt.Lilwati, decided by T. P. S. Chawala J. on 11. 8. 1972, this court considered an order allowing the plaintiff to withdraw the suit with permission to file a fresh one on the same cause of action after evidence had been led and the case had been set down for arguments. The ground urged in support of the prayer for withdrawal of the suit was that the suit could not be decided conclusively without additional evidence. Relying upon the aforesaid judgments, this court held that :

'.....It is well settled that failure to produce evidence or the need for additional evidence will not justify an order under order 23 Rule 2 of the Code of Civil

Procedure. (Sec ; Benode Behari Pati v. Chaudhri & Co. Atr 1919 Cal 129 Thakur Parshad and another v. Rasool Butx and another, Air 1950 Aha 489 and Tandi Konda Veeraswami v. Thulium Peda Lakshmudu and others, : AIR1951 Mad715 . No other reason has been stated in the order sought to be revised for granting the permission prayed for and, consequently, in my opinion, the order cannot be sustained under order 23 Rule 2.'

(23) The learned counsel for the landlady applicant has, however, relied upon a decision of Rangarajan J. in Gopal Krishan v. Smt. Bimlesh Kumari, 1973, Rlr 555. The learned single judge had occasion to consider in this case an order of the first appellate court allowing the withdrawal of a suit with permission to file a fresh suit on the same cause of action. The suit had been filed for permanent injunction to restrain the defendant from using a particular portion of the house on the ground that the portion was not a part of the tenancy. The suit was dismissed on two grounds, namely, (1) that a suit for mere injunction without a prayer for possession, did not lie; (2) that the plaintiff had failed to prove that the same was not a part of the tenancy. During an appeal from the said decision the learned Senior Sub-Judge hearing the appeal considered that in view of the lack of a prayer for possession it was fit case where the respondent should be given permission to withdraw the suit with liberty to file a fresh suit regarding the subject-matter of the suit.

(24) The order of the learned Senior Sub Judge was attacked before this court on the ground that the failure to ask for the relief of possession was not a formal defect. The learned Judge proceeded to consider a number of decisions and came to the conclusion that the phrase 'sufficient grounds' in clause (b) is not confined to or required to be read ejusdem generis with the phrase 'formal defect' in clause (a). In the concluding paragraph of the judgment the learned Judge noted:

'It is also true that at the appellate stage leave would not be granted to withdraw a suit and file a fresh suit on the same subject-matter when the defendant had acquired any vested or substantive right.'

(25) The learned Judge then noted that there was no such feature in the case before him and proceeded not to interfere with the discretion exercised by the

learned Senior Sub Judge in granting permission under order 23 rule I.

(26) In my opinion this Judgment does not depart from the ratio of the Judgments referred to above and on the other hand affirms the principle that permission under the aforesaid rule cannot be granted if in doing so a vested or substantive right acquired by the defendant is taken away.

(27) In conclusion I re-iterate that permission to withdraw the eviction petition with liberty to file a fresh one on the same cause of action prayed for under order 23 rule I of Code of Civil procedure cannot be granted as doing so would take away the substantive right which has vested in their respondent by a finding of fact with regard to the letting purpose of the premises in question. The application is therefore dismissed with no order as to costs.

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