

Nirmal Singh Vs. Avtar Singh

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Court : Delhi

Decided On : Aug-30-1982

Reported in : 1983(4)DRJ49

Judge : Sultan Singh, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 3, Rule 2; [Delhi Rent Control Act, 1958](#) - Sections 14(1)

Appeal No. : Civil Revision Appeal No. 687 of 1980

Appellant : Nirmal Singh

Respondent : Avtar Singh

Advocate for Pet/Ap. : B.S. Sethi and; B.S. Malhotra, Advs

Judgement :

Sultan Singh, J.

(1) The petitioner-tenant in this revision under section 25B(8) of the [Delhi Rent Control Act, 1958](#) (here in after referred to as 'the Act') challenges the judgment and order dated 21st May, 1980 of the Additional Controller directing his eviction under Section 14(l)(e) of the Act. The main contention of the learned counsel for the petitioner is that the eviction petition was barred under Order 9 rule 9 of the Code of Civil Procedure (hereinafter referred to as 'the Code').

(2) Briefly the facts are that the respondent on 2nd February, 1977 had filed an application for eviction of the petitioner under Section 14(1) (e) read with Section 25B of the Act. Leave to defend was granted. On 21st September, 1977 the Rent Controller dismissed the same.

(3) The respondent on 2nd January, 1978 filed a fresh petition against the petitioner under Section 11(l)(c) read with Section 25B of the Act alleging that he was the owner of the premises, which were let to the petitioner for residential purposes, that he required the premises for the residence of himself and his family members and that he had no other reasonably suitable residential accommodation. The premises consist of one room with common bath and latrine of the property at Wz 93/1, Gurunanak Nagar, Tilak Nagar, New Delhi. The petitioner after the grant of leave to defend filed his written statement alleging that the eviction petition was barred under Order 9 rule 9 read with Section 11 of the Code as the earlier eviction case No. E-104 of 1977 was dismissed on 21st September, 1977 by the court of Shri P.S. Sharma, Additional Rent Controller, Delhi. The petitioner also challenged the bona fide requirement of the respondent. The Additional Controller by his judgment dated 21st May, 1980 held that the eviction petition was not barred under Order 9 rule 9 of the Code and the respondent was entitled to the order of eviction against the petitioner.

(4) Learned counsel for the petitioner submits that the present eviction petition is barred under Order 9 rule 9 read with Section 11 of the Code. Learned counsel for the respondent on the other hand, submits that the previous eviction case was withdrawn on account of some technical defect. He submits that the eviction petition was barred neither under Order 23 nor Order 9 of the Code. In the previous eviction case under Section 14(l)(e) of the Act the following order was passed on 21st September, 1977 :

'PRESENT: None for the petitioner. Shri B.S. Sethi, Advocate for the respondent. The case has been called many times. The petitioner nor his counsel is present. Sham Sunder who claims that he is clerk of the petitioner's counsel is present. He submits that this petition has to be got dismissed as withdrawn and so the petitioner is not present. Seemingly there is no interest in pursuing the eviction

petition. The same is, therefore, dismissed in default. Be consigned.'

(5) This order shows that the clerk of the respondent's counsel appeared before the Controller and submitted that the landlord wanted to get the eviction petition withdrawn. From the order it is also apparent that there was no appearance on behalf of the landlord. Neither he nor his counsel was present and the eviction petition was therefore dismissed for default of appearance of the landlord. Learned counsel for the respondent submits that from the order it is clear that a representation was made to the Controller that the landlord wanted to withdraw the same. Learned counsel for the petitioner on the other hand submits that this is no representation for withdrawal. The alleged representation was made by the clerk of the counsel representing the landlord. It is not disputed that the clerk of the counsel was not a recognised agent within the meaning of Order 3 rule 2 of the Code. A person without holding a power of attorney on behalf of the respondent had no power to make any representation before the judicial authority. It must therefore be held that the alleged representation by the clerk of the counsel on behalf of the respondent on 21st September, 1977 before the Rent Controller was no representation at all for withdrawal of the eviction petition. In other words it cannot be said that the previous eviction case was dismissed as withdrawn. Assuming that representation for withdrawal was validly made and eviction petition on such representation stood dismissed, even then the respondent has no right to institute a fresh eviction application on the same ground of eviction. It is not disputed that the previous eviction application was under Section 14(l)(c) of the Act and the present eviction application is also on the same ground. In other words, the two eviction petitions were based on the same subject matter and the same cause of action. Order 23 rule 1 of the Code in so far as it is relevant for the purpose of present controversy reads as under:

'1(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim ;

Provided that xx xxxx

(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 claim, 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 institute a fresh suit in respect of the subject-matter of such suit or such part, of the claim.

(4) Where the plaintiff- (a) abandons any suit or part of claim under sub-rule (1), or (b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(5) xxxxx x According to sub-rule

(1) a plaintiff is entitled to abandon his entire suit or a part of it. Under sub rule

(3) if the court is satisfied that a suit must fail by reason of some formal defect, or that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the same subject matter the court may grant the plaintiff permission to withdraw the suit with liberty to file fresh suit in respect of the same subject-matter. In the present case neither any permission to withdraw was sought nor any permission was sought to institute a fresh suit in respects of the same subject matter at a subsequent stage. Under subrule 4(a) if the plaintiff abandons his suit he is debarred from instituting a fresh suit in respect of the same subject matter. Under sub rule 4(b) if a plaintiff withdrawn his suit without permission to institute a fresh suit on the same subject matter he is debarred from instituting a fresh suit. In short it means that if once a plaintiff has filed a suit and he wants to withdraw the same on account of any formal defect or for any other reason he may withdraw the same. If he seeks leave to institute a fresh suit on the same cause of action he may be permitted to file a fresh suit. But if such leave is neither sought nor granted he is debarred from instituting a fresh suit on the same Subject matter. Thus it must be held in this case that as no permission was ever granted by the Controller to institute a fresh eviction petition with respect to the same subject matter, the present eviction petition would be barred under sub rule

(4) of rule 1 of Order 23 of the Code.

(6) Under order 9 rule 8 of the Code where the defendant appears and the plaintiff does not appear when the suit is called on for hearing the court is to dismiss the suit unless the defendant admits the claim of the plaintiff or a part thereof in which case the court is to dismiss the suit to the extent of the claim not admitted by the defendant. After the dismissal of the suit in the absence of the plaintiff and in the presence of the defendant the plaintiff is debarred from bringing a fresh suit in respect of the same cause of action as provided in Order 9 rule 9 of the Code. This rule states 'where a suit is wholly or partly dismissed under rule 8 plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. It is not disputed that the previous and present eviction petitions were based on the ground of eviction mentioned in Section 14(l)(e) of the Act. The respondent. landlord in the witness box admitted that the previous eviction petition was also filed on the same cause of action. Thus the present eviction petition is barred under Order 9 rule 9 of, the Code. The various observations to the contrary by the Additional Controller cannot be approved.

(7) It is not disputed that provisions contained in Order 9 are applicable to proceedings before the Rent Controller. Rule 23 of the Delhi Rent Control Rules, 1959 framed under Section 56 of the Act provides that the provisions contained in the Code of Civil Procedure 1908 shall be applicable to proceedings under the Act.

(8) Learned counsel for the petitioner also made his submissions on merits of the case. He argues that the respondent-landlord has failed to prove all the ingredients of Section 14(1)(e) of the Act. In view of the nonmaintainability of the present eviction petition under order 9 rule 9 of the Code, it is not necessary to express views on merits. The revision petition is, therefore, accepted and the eviction petition is filed by the respondent is dismissed with costs throughout.