

(1981) 03 DEL CK 0002

In the Delhi High Court

Case No : Civil Revision Appeal No. 1141 of 1980

Sulakhana Malhan and Others

APPELLANT

Vs

Shashi Kapoor and Another

RESPONDENT

Date of Decision : 06-03-1981

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 2(2), 115

Citation : (1981) 2 DRJ 232

Hon'ble Judges : S.B. Wad, J

Bench : Single Bench

Judgement

S.B. Wad, J.

(1) This is the revision application filed by the landladies.

(2) Petitioners No. 1 and 2 are real sisters and own the plot on which the building is constructed. The plot is in Panchsheel Park, one of the posh localities of Delhi. Petitioner No. 3 is the mother of Petitioners 1 and 2 who are the real sisters. They claim that Respondent No. 2 is the maternal uncle of petitioners 1 and 2. Respondent No. 2 is an elderly Advocate practicing in this Court. Respondent No. 1 is the son-in-law who is a tenant in the premises. Considering the relationship between the parties and the fact that Respondent No. 2 is a practicing Advocate of this Court, I thought that the matter could be amicably resolved between the parties. This was for another reason also. Respondent No. 1 is the present tenant of the single storeyed structure. Another storey can be easily constructed on it. Petitioner No. 2, who is a widow and who has recently come from England, wants to construct a first floor for her personal residence. Respondents initially took part in the construction. But they do not want that the first storey should be constructed as it might cause them inconvenience. Respondent No. 2, however, strongly opposed any idea of a mutual settlement. He, in fact, denied all relationship with the petitioners. I had. Therefore, to proceed with the hearing.

(3) Originally the plot was owned by Petitioner No. 1. A single storey structure

was constructed on it. Through the intervention of Respondent No. 2, Respondent No. 1, the son-in-law, was inducted as a tenant on 11-10-76. The lease deed was prepared by Respondent No. 2. In the earlier proceedings before this Court, this Court on going through the lease deed had found that Respondent No. 2 had a dominant role of a sole arbiter in the said lease deed. Respondent No. 1 moved in the premises in January, 1977. By this time petitioner No 2 was overcome by the tragedy of loss of her husband in England. The necessity of constructing the first floor then arose. But since the plot was in the Cooperative Society petitioner No. 2 could not have constructed the first floor unless she was occupied as a member of the Society and shared the said plot and the first floor as an owner. On February 7, 1977, Respondent No. 2 wrote the following letter for permission to transfer to the Chairman of the Society :

"NO.101/77 7th February, 1977 My Dear P. Sahib, Ref: Plot No. S/231 Panchsheel Park, New Delhi. Enclosed is the application from my niece (Mrs. Sulakhana Malhan) daughter of my sister, for transfer of the rights in the first floor of House No. 5/231, Panchsheel Park, New Delhi, in favor of her elder sister, Mrs. Mohini Puri who will construct the first floor at her own cost. The lady in whose favor the ownership in first floor of the house is to take place, is now working in U.K. and as she has income from her business she will be in a position to build the first floor of the house at her own cost. The two sisters can have one floor each. We propose to make provision that there will be no third floor except a Barsati. I shall be personally grateful if you kindly use your good office and have the matter sanctioned by your society and also by the D.D.A. and have your orders communicated to me. Thanking you and with best wishes. Yours sincerely, (B. Shiv Charan Singh) End: 1 Shri S.D, Burman, Chairman, Panchsheel Coop. Hs. Bldg. Society Ltd. Panchsheel Park, New DELHI.

(4) It is clear from this letter that Respondent No. 2 was directly involved with the petitioners in obtaining the permission for transfer and construction of the first floor. He has stated in the letter. "We propose to make provision that there will be no third floor except a Barsati". He has also stated. The two sisters can have one floor each". He has also stated that he would be "personally grateful" for the sanction of the Society. Not only that there was no objection or even a demur for the new construction but the respondents had positively and actively canvassed for the construction. The sanction for the transfer was duly made by the Society in favor of petitioner No. 2 and the construction of the first floor was started.

(5) It appears that the relations between the parties deteriorated thereafter and the respondents started creating impediments in the construction. They started saying that the premises were let out to Respondent No. 1 as a single storeyed structure and the landladies could never have a first floor as it would disturb the character of the premises as a single storeyed structure. They even questioned the ownership right of petitioner No. 2.

(6) Petitioners, Therefore, filed a suit for permanent injunction with an

application for interim injunction. Both the respondents filed their written statements. The trial court granted an injunction restraining the respondents from putting any obstacles in the construction of the first floor. The respondents preferred an appeal to the District Judge, against that order but the same was dismissed. A Revision Petition was preferred by the respondents in this Court which was also dismissed. A SLP was filed against the order by the respondents in Supreme Court. After some hearing the petition was withdrawn. The Supreme Court passed an order dismissing the petition as withdrawn but gave liberty to the parties to obtain necessary directions from the trial court in the course of actual construction. The respondents continued the litigation, now, by filing an application for review of the earlier order of this court rejecting the revision application. A new ground was now pleaded in the review application. It was stated that the dispute between the parties fell within the provision of Section 23 of the Delhi Rent Control Act and that the Civil Court had no jurisdiction to pass an order of interim injunction by virtue of Section 50 of the Act. The review application was dismissed by this Court after issuing notice and hearing both the parties.

(7) After failing to stop the construction through this long litigation or all possible levels the respondents move an application in the trial court under sub-rule (2) of Rule 2 of Order 14 read with Section 151 of the CPC . The grounds in the application were same as that of the review petition rejected by this Court. The prayer in the application was to frame a preliminary issue regarding jurisdiction in view of the bar of Section 23 of the Delhi Rent Control Act. The application was moved on 7-8-1980. The petitioners filed their reply to this application. By way of preliminary objection they stated that the bar of Section 23 was not even pleaded in the written statement and the question was new raised for the first time in the trial court. They also pleaded that the said plea was barred by principles of constructive resjudicata. On 22-9-1980, after hearing the parties the trial court framed the following issue:

"Whether the civil court has no jurisdiction to try suit ?"

(8) The issue looked to be an innocuous issue but being apprehensive that the respondents might argue the issue as if there was a bar of Section 23 the petitioner moved an application on November 12, 1980 praying the court to restrict the issue to the pleadings and particularly the written statements filed by respondents 1 and 2. The trial court by its order dated December 15, 1980 rejected the application of the petitioners. In substance it held that although the plea of Section 23 had been raised for the first time but the issue was wide enough to cover the bar of Section 23. The present revision petition is filed against that order.

(9) The order passed by the trial court on 22-9-1980 is thus further explained by the court by its subsequent order passed on 15-12-1980. In other words, the issue whether the civil court has no jurisdiction to try the suit would read as if the issue was "Whether the Civil Court has no jurisdiction to try the suit in view

of Section 23 of the Delhi Rent Control Act." In this sense the two orders cannot be separated.

The counsel for the petitioner submits as follows : (i) That on the facts of the case the issue regarding jurisdiction of the Civil Court in the light of Section 23 of the Rent Act cannot be decided as a preliminary issue under Order 14 Rule 2. It would be necessary to go into the entire evidence. (ii) That the order of the trial court under Order 14 Rule 2 has the effect of finally disposing of the suit and hence cannot be treated as a mere interlocutory order. (iii) The trial court has committed a grave error in quoting only the part of the statements in the written statement regarding jurisdiction and relying on the same. The trial court has not quoted the other part of the statement which makes it clear that the only challenge to jurisdiction raised by the respondents was in terms of Section 14(l) (g) of the Rent Act. (iv) Several jurisdictional facts before the application of Section 23 should be proved by the respondents and the trial court cannot decide preliminary issue unless the said jurisdictional facts are established on evidence. (v) The plea of bar of jurisdiction u/s 23 of the Act is barred by principles of constructive resjudicata.

(10) Counsel for the Respondent No. 1 opposed even the maintainability of the revision petition. He submitted that the order is an interlocutory order and the court should not interfere at this stage. He further submitted that the question of jurisdiction can be raised at any stage of the proceedings and there is no bar to raise the question of jurisdiction in spite of the fact that at earlier stage the jurisdiction on the ground of Section 23 of the Rent Act was not challenged, in all the proceedings. He further submits that the issue as framed by the trial court was wide enough to take in the lack of jurisdiction in the civil court in view of Section 23 of the Rent Act. Respondent No. 2 in a person argued that the revision petition is an abuse of process of law. He further submitted that it was the error of the junior Advocate in the trial court not to raise the objection in terms of Section 23 of the Rent Act and throughout the litigation which went up to Supreme Court, previous to the present application.

(11) There is no doubt that the decision on this preliminary issue will dispose of the entire suit. In fact the respondents intend that it should be so. In view of this the impugned order cannot be treated merely as interlocutory order and the petitioner is entitled to contest this by a revision application if he is able to satisfy the court of a patent illegality or material irregularity. It may be necessary at this stage to note the averments of the respondents in their written statement because the trial court has relied upon them. The relevant averments in the written statement filed by the defendant No. 1 (present Respondent No. 1, who is the tenant in the premises) are as follows:

Plaintiff no. 2 2 (present petitioner No. 2, who wants to construct the first floor) not being one of the Lessers and not being a party to the lease-deed, she has no locus standi to file the present suit that there is no privity of contract between the answering defendant and plaintiff No. 2".

"That the Civil Courts have no jurisdiction to entertain the suit and only the provisions contained in Delhi Rent Control Act can be invoked because the first floor of the premises in suit cannot be constructed without the ground floor is first got vacated and the ground floor cannot be got vacated in terms of the lease-deed dated 11-9-1975, wherein, as per clause 4 thereof the lessee has been given the option to renew the said lease, deed for a further term of five years on the expiry of the initial period of five years."

"PARA15 of the plaint is wrong and the same is denied. In view of the preliminary objections aforesaid, this Hon"ble Court has no jurisdiction".

(12) The trial court, it is clear, has quoted only half the sentence. From the statement quoted above it has omitted the portion of the sentence which gives the reason for denying the jurisdiction. That reason is given in terms of Section 14(l)(g) of the Rent Act. In other words, the reason given is that unless the tenant is evicted under Rule 14(l)(g) for the construction, the petitioners cannot carry out the proposed construction. The suggestion is that the petitioner should first file the proceeding u/s 14(l)(g) of the Rent Act and get the tenant evicted. What is implied in this averment is that the relief in the nature of eviction u/s 14(l)(g) of the Rent Act cannot be given by the civil courts and, Therefore, there is no jurisdiction in the civil court. Respondent No. 2 in his written statement has (also) not relied upon Section 23 of the Rent Act. I agree with the petitioners that they were taken by surprise when for the first time ground in terms of Section 23 of the Rent Act was taken in the present application without even amending the written statements. They are right in saying that both parties went to the trial on the supposition (ground) that the bar of jurisdiction, if any, is in terms of Section 14(l)(g) of the Rent Act and no other, The petitioners" replication also would illustrate this submission. The trial court has committed material irregularity in relying on only half of the averment of the respondents and omitting from consideration the other part of the averments. The trial court also erred in not appreciating the fact that the parties proceeded to trial on a certain assumption of the legal position as disclosed in the pleadings. This understanding of the parties continued even up to the stage of the Supreme Court. The impugned order cannot be sustained on this ground.

(13) In considering the question of its own jurisdiction the trial court will have to decide whether its jurisdiction is ousted by Section 23 of the Rent Act or not. Section 23 will not apply unless the parties are admittedly landlord and tenant. The respondents have denied that petitioner No. 2 is their landlord (landlady). They have said that there is no privity of contract between respondent No. 1 and petitioner No. 2. From the letter of respondent No. 2 written to the Chairman of the Cooperative Society it is clear that both the respondents were treating as if the construction of first floor was their own construction in common with the petitioner. After having consented expressly in writing, can the respondents be permitted to go back on that consent and raised the objection for the construction of first floor simply because the relations between the parties had

deteriorated. In other words, the question is whether the refusal of the tenant to allow the construction is bona fide refusal in face of the said latter ? Whether the roof of the ground floor on which the first floor is to be constructed, is a part of the building let out to the tenant within the meaning of Section 23 of the Rent Act is also a question. These are some of the questions in regard to the jurisdictional facts and implicit questions of law for which detailed evidence would be necessary. The evidence on the preliminary question would almost be same as the evidence in the main suit. The preliminary question is also as inextricably connected with the "other issues that they cannot be so easily separated. Considering these complexities of the matter I do not think that the trial court was right in exercising its discretion to try the said issue as a preliminary issue.

(14) For the reasons stated above, the impugned orders are set aside. The trial court is directed to proceed with the suit in a normal course after framing of the issues, recording evidence and pronounce the judgment on all the issues. The parties will appear before the trial court on 25th March, 1981. The Revision Petition is allowed. Since the petitioners were made to contest this simple matter in various courts up to Supreme Court and thrice in this Court, I order that costs of the petitioners should be paid by Respondent No. 1.

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