

(2009) 09 DEL CK 0422

Delhi High Court

Case No: I.A. No. 2028 of 1997 in C.S. (OS) No. 2565 of 1993

Smt. Chitra Garg

APPELLANT

Vs

Shri Surinder Kumar Bansal and
AnotherRESPONDENT

Date of Decision: Sept. 9, 2009**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 12 Rule 6, Order 7 Rule 11, 9
- Delhi Rent Control Act, 1958 - Section 14, 14(1), 14D, 50
- Transfer of Property Act, 1882 - Section 111

Citation: (2010) 2 ILR Delhi 129**Hon'ble Judges:** Rajiv Sahai Endlaw, J**Bench:** Single Bench**Advocate:** Arun Mohan and Arvind Bhatt, for the Appellant; N.K. Kaul Ashish Dholakia and Adarsh Priyadarshi, for the Respondent

Judgement

Rajiv Sahai Endlaw, J.

The defendant has applied for dismissal of the suit as barred by Section 50 of the Delhi Rent Control Act. This Court also on 6th November, 2008, on a preliminary hearing on various pending applications finding that the plaintiff's case is that the property, subject matter of the suit was let out to one school of which one Mr. Pires was the proprietor and the defendant is now in possession of the property and further finding that it is the admitted position that the tenancy of the school was protected by the Delhi Rent Control Act, 1958, called upon the counsels to first address on the maintainability of the suit. The senior counsels have been heard and the counsels have also filed detailed synopsis of submissions with plethora of judgments.

2. The plaintiff instituted this suit against two defendants, for the relief of possession of property No. R-96, Greater Kailash-I, New Delhi and for recovery of

arrears of and future mesne profits with interest etc. It is inter-alia the case of the plaintiff in the plaint that the said property was let out by predecessors in title of the plaintiff to "Mr. Pires's Private School" through its proprietors Mr. Pires at a monthly rent of Rs. 1,800/- w.e.f. 1st October, 1971 for three years; on expiry of three years the lease was extended and a deed dated 27th September, 1974 was extended. That the extended term of the lease also expired in 1977; that on the failure of Mr. Pires to vacate the premises, a petition u/s 14(1)(e) of Rent Act was filed in 1978; that Mr. Pires died on 19th November, 1980 leaving a son and a daughter; the predecessors in title of the plaintiff also died in 1982 and the property was inherited by his heirs who were substituted in the proceedings aforesaid u/s 14(1)(e) of the Rent Act; that the petition u/s 14(1)(e) of the Rent Act was dismissed on 8th December, 1985 finding the premises to have been let out for residential-cum-commercial purposes; that the revision petition preferred to this Court against the said order was dismissed in default and at the time of institution of the suit the application for restoration of the same was pending; that the heirs of the predecessors in title of the plaintiff also filed a petition for eviction on the ground of sub letting [Section 14(1)(b)] as well as another petition u/s 14D of the Rent Act; in the meantime "Pires" abandoned the premises - it was after 1984; that none of the Pires had been heard of for the last many years; that the defendant No. 2 was an employee of Pires's Private School who later on self styled herself as Principal and the defendant No. 1 was her husband and Legal Advisor of Mr. Pires; that the defendants found it convenient to unauthorizedly entered the house; during the lifetime of Mr. Pires the defendant No. 2 had access to the property as an employee and upon abandonment of the property by the Pires, the defendants entered into possession of the property unauthorizedly; that the defendant No. 2 had been alleging herself to be a partner of Pires's Private School and therefore a tenant in the premises; in view of the said plea of the defendant No. 2 the predecessors in title of the plaintiff had impleaded the defendant No. 2 as a respondent to the petition for eviction under the Rent Act filed with respect to the premises though without admitting her as a tenant; that on 19th February, 1992 the plaintiff acquired title to the said property and upon the refusal of the defendants to vacate the property, instituted the suit for possession.

3. The defendants contested the suit by filing a written statement. It was inter-alia pleaded that the defendant No. 1 had nothing to do with the property and had been wrongly impleaded; that the defendant No. 2 had become the owner of the property by adverse possession in October, 1989, her adverse possession having started w.e.f. October, 1977; with respect to the petition for eviction on the ground sub letting [Section 14(1)(b)] it was pleaded that the same had been filed on false averments and with respect to the petition u/s 14D of the Act it was informed that the same after the institution of the suit on 11th February, 1994 was dismissed on the statement of the counsel for the petitioner that he had no instructions; various other pleas were taken but with which we are not concerned at this stage.

4. The plaintiff filed a replication in which with reference the petition for eviction u/s 14(1)(e) of the Rent Act, it was contended that in the pleadings therein Mr. Pires had not disputed that he was the tenant and had not pleaded that the defendant No. 2 was the partner or also a tenant in the premises; with respect to the petition for eviction on the ground of sub letting it was pleaded that the defendant No. 2 in her written statement therein had pleaded to be a partner of M/s Pires's Private School, tenant in the premises.

5. The statement of the defendant No. 2 was also recorded under Order 10 of the CPC on 15th May, 1995 wherein also the defendant No. 2 has stated that she and Mr. Pires were partners in the school which was a tenant in the premises and she bought the school from Mr. Pires and after the death of Mr. Pires she became the owner of the school as well as the property. She admitted that she had been depositing the rent of the property in the court and also stated that though her possession of the property was that of a tenant she was the owner because she was occupying the property for more than 12 years. She admitted that she had not paid any House Tax of the property but claimed to have become the owner by adverse possession. Perhaps on court query, she clarified that "my claim is only on adverse possession.

6. On the pleadings in the suit, on 31st July, 1995 the following issues were framed:

1. Whether the suit property has been properly valued for purpose of Court Fees?

2. Whether the suit is barred by time?

3. Whether the plaintiff is owner of the property? If not, to what effect?

4. Whether the defendant No. 2 has become owner by adverse possession?

5. Whether plaintiff is entitled to claim mesne profits or damages for use and occupation of the premises by the defendant? If so, at what rate and for what period?

6. Whether the plaintiff is entitled to recover possession?

7. Relief.

7. In spite of the issues having been framed 14 years ago, unfortunately the trial has not begun and the parties have remained embroiled in applications only. The defendant No. 1 died during the pendency of this suit and it has been held that his plea being that he has no interest in the property, his heirs need not be substituted. The suit as such survives against the defendant No. 2 only.

8. Besides the application under consideration, it is relevant to note that inter alia the following other applications are also pending:

a. IA No. 4932/1998 of the plaintiff for a decree for possession of admissions under Order 12 Rule 6 of the CPC;

b. IA No. 10486/1998 of the defendant, also under Order 7 Rule 11 of the CPC inter-alia on the ground of the suit being barred by time as well as u/s 50 of the Rent Act and Section 9 of the CPC;

c. IA No. 10487/1998 also of the defendant under Order 7 Rule 11 of the CPC, again on the ground of the suit being barred by Section 50 of the Rent Act;

d. IA No. 12804/2000 of the defendant for amendment of the plaint to take a plea in the written statement of the suit being barred u/s 50 of the Rent Act;

e. IA No. 1472/2001 of the defendant, again for amendment of the written statement.

9. That it will be clear from the above that the ground on which IA No. 2028/1997 under consideration is filed is not a plea in the written statement. In fact applications for amendment to incorporate the said pleas in the written statement are pending. Though, ordinarily the applications of the defendant for amendment of the written statement would have been considered prior to this application, but in view of the pleas sought to be taken therein being admitted by the plaintiff even in the plaint by filing the copies of the eviction petitions including on the ground of sub letting impleading the defendant No. 2 also, need is not felt to defer this order, especially considering the long history of the litigation.

10. On 6th November, 2008, this Court was prima facie of the opinion that once it was the admitted position that the defendants had come into possession of the property through the tenant in the premises, the remedy of the plaintiff was u/s 14 of the Rent Act and the jurisdiction of the Civil Court was barred u/s 14 r/w Section 50 of the Rent Act. Section 14 of the Rent Act starts with a non obstante clause and ousts jurisdiction of all courts other than of a Rent Controller to pass a decree for possession of any premises in favour of a landlord and against a tenant. Section 50 of the said Act expressly ousts the jurisdiction of the courts with respect to the reliefs which can be granted by the Controller.

11. The contention of the senior counsel for the plaintiff bereft of all details is that the plaintiff has not approached this Court with a plea of the defendant being a sub tenant or having come into possession of the premises through the tenant in the premises. It is argued that the case of the plaintiff is that the tenant has abandoned the premises and the defendants have unauthorizedly occupied the same. It is further the case that the tenant has by the act of abandonment of the premises, impliedly surrendered the tenancy, which is one of the modes prescribed in Section 111 of the Transfer of Property Act of determination of lease. It is also urged that in the written statement as existing as well as in the statement recorded in the court of the defendant No. 2, rights in the property are claimed only by way of adverse possession. It is thus contended that the questions arising for determination and on which issues have been framed could be adjudicated by this Court only and not by the Rent Controller.

12. During the course of hearing, I had drawn the attention of the senior counsel for the defendants to the dicta of the Division Bench of this Court in [All India Tibbi Conference and Another Vs. Haji Mohd. Shafi](#), That was an appeal from a decree for possession. The plaintiff in that case also had contended that the tenant on the first and second floor of the property had inducted the defendants in the first floor portion of the premises and parted with possession thereof to the defendant without the consent or permission of the plaintiff; that the defendants had trespassed into and occupied the second floor portion of the premises after the demise of the tenant. The defendant in that case also had contested the suit on the plea of adverse possession. The Trial Court decreed the suit. In appeal before this Court, it was contended that qua the first floor the suit was barred by the provisions of Section 50 of the Rent Act. The Division Bench of this Court held that since the plaintiffs had in the plaint nowhere used the expression sub tenant with regard to the status of the defendant, the jurisdiction of this Court was not barred. The pleas in the plaint of the tenant having inducted the defendants in the first floor of the property and having parted with possession without the consent or permission of the owner were not held to be attracting the provisions of Section 14(1)(b) of the Act. This Court also held that in the absence of any specific defence that the defendants were sub tenant in the premises, no case attracting the provisions of Section 14(1)(b) of the Rent Act or ousting the jurisdiction of Civil Court was made out.

13. The senior counsel for the defendant has sought to distinguish the aforesaid judgment by contending that in that case this Court found that the plaintiffs had not set up a case of Section 14(1)(b) of the Rent Act. It is argued that in the present case, the predecessor in title of the plaintiff had instituted a petition for eviction u/s 14(1)(b) of the Rent Act. Though the senior counsel for the plaintiff has with reference to the pleadings argued that in the plaint in the present case also there is no such plea but in my view, the plaintiff having made the petition filed u/s 14(1)(b) as an Annexure P-5 to the plaint is deemed to have pleaded so. This Court in K.K. Manchanda v. S.D. Technical Services Pvt. Ltd RA 320/2008 in CM(M) 1205/2007 and [Modern India Builders Vs. President, Super Bazar Cooperative Store Ltd. and Another](#), has held that annexures to the plaint are part of the pleadings. A perusal of Annexure P-5 to the plaint shows that the said petition was filed against the legal heirs of Mr. Pires as tenant and the defendant No. 2 was impleaded therein as a sub tenant. It was the express plea in the said petition that the tenant i.e. the legal heirs of Mr. Pires or their predecessors had sub let, assigned and parted with possession of the premises to the defendant No. 2.

14. The senior counsel for the defendant has next drawn attention to [South Asia Industries Private Ltd. Vs. S. Sarup Singh and Others](#), to buttress the proposition that Section 14(1)(b) of the Rent Act is applicable even when the tenant ceases to exist; in that case upon merger. It is urged that thus the factum of Mr. Pires or his heirs being not available or being unheard of as pleaded would not come in the way of the remedy, if any, of the plaintiff being by way of a petition u/s 14(1)(b) of the

Rent Act only and not by way of this suit.

15. Reliance is also placed on Bhairab Chandra Nandan v. Ranadhir Chandra Dutta (1981) 1 SCC 383 & S.A. Vengadamma v. Jitendra P. Vora (1977) 11 SCC 334 and finally on [Joginder Singh Sodhi Vs. Amar Kaur](#), to show that even in a case where the tenant is stated to be living elsewhere and the tenanted premises were in control and possession of the sub tenant, petition u/s 14(1)(b) was filed. It is argued that thus merely because the alleged tenant is not available will not be a ground to vest jurisdiction in this Court which otherwise is barred by Sections 14 & 50 of the Rent Act.

16. Per contra, the senior counsel for the plaintiff has urged that a statutory tenant by parting with possession forfeits the protection of the Rent Act [The Calcutta Credit Corporation Ltd., and Another Vs. Happy Homes \(P\) Ltd.](#), that the protection of the Rent Act is not extended to a tenant who has abandoned occupation of the premises [Gurcharan Singh and Others Vs. Shri V.K. Kaushal](#), ; that if the tenant parts with possession of the premises the same would be treated as vacation [Jaspal Singh Vs. Additional District Judge, Bulandshahr and Others](#), that the protection of the Rent Act is meant for the original grantee only [Shri Amar Singh Trilochan Singh Vs. Smt. Jasoti](#), and contended that in the present case, the tenant has left the premises and the civil suit to remove the sub tenant is maintainable and no petition u/s 14(1)(b) of the Rent Act lies.

17. I may, at this stage, notice that the counsels have in their respective synopsis filed in this Court taken various other arguments/pleas which were not even orally made. On the said synopsis having been kept on record, need is not felt to burden this judgment with the same.

18. To my mind, the question raised is not free from doubt. As a proposition of law, a owner/landlord cannot be held entitled to approach the Civil Court on the plea of the premises being in occupation of a sub tenant and thus there being no need to approach the Rent Controller. The same can become a tool in the hands of unscrupulous litigants to obtain decrees for possession without impleading the tenant as a party and in pursuance thereto dispossessing the tenant from the premises.

19. However, in the facts of this case, need is not felt to go into that question as in my opinion the matter can be disposed of on another point. The senior counsel for the defendant had during the course of hearing handed over the copy of the order dated 17th May, 1996 (i.e. after the institution of the suit) made in the petition preferred by the predecessors in title of the plaintiff u/s 14(1)(b) of the Rent Act. In the said petition, the present plaintiff on purchase of the property applied for substitution. The defendant No. 2 herein however opposed the substitution of the plaintiff as petitioner/landlord in the petition u/s 14(1)(b) of the Rent Act, for the reason of having instituted the present suit. It was contended by defendant No. 2

that the plaintiff in the plaint in the present suit having taken a stand that the tenant had abandoned the premises and the defendant No. 2 was/is a trespasser therein, the right to continue the petition u/s 14(1)(b) of the Rent Act did not survive to the plaintiff. The Rent Controller on perusal of plaint in this suit held that the averments here did not constitute a case u/s 14(1)(b) of the Rent Act and the plaintiff could not be permitted to continue the petition for eviction on ground of subletting.

20. On perusal of voluminous suit record I also find it mentioned therein that the plaintiff herein preferred appeal being RCA 490/1996 against the order dated 17th May, 1996 (supra) of the Rent Controller and which was apparently opposed by the defendant No. 2; the plaintiff withdrew the said appeal on 25th February, 2003.

21. It is not the case that the plaintiff after purchasing the property instituted any petition on the ground of subletting or u/s 14(1)(b) or for that matter, under the provisions of the Rent Act, with respect to the property.

22. A perusal of the entire record has revealed to me two important aspects:

A. The defendants or defendant No. 2 neither in their written statement nor otherwise contested this suit as barred by the provisions of the Rent Act. The defendant No. 2 set up a title as owner of the property by adverse possession. Issues were accordingly framed. When the plaintiff, besides instituting this suit sought to also pursue the proceedings u/s 14(1)(b) of the Rent Act instituted by earlier owner/landlord, the defendant No. 2 opposed the same. The defendant No. 2 succeeded in stopping the plaintiff from proceeding against defendant No. 2 on the ground of subletting under the Rent Act - for the reason of plaintiff having instituted this suit;

B. However, after having so stopped the plaintiff from proceeding under the Rent Act, the defendant No. 2 now seeks to oust the plaintiff from this Court as well - for the reason of the plaintiff being required to proceed under the Rent Act. I have minutely combed the file and do not find any such plea having been taken by defendant No. 2 till 17th May, 1996 when the defendant No. 2 succeeded in obtaining dismissal of application of the plaintiff for substitution in 14(1)(b) proceedings (supra). The first application for amendment is dated 29th November, 1996.

23. To say the least, the said conduct of the defendant No. 2 appears to be malafide and inequitable. The question is, can the defendant No. 2 be permitted to take such stand in courts? The courts cannot be silent spectators to such practices. The defendant No. 2 by so approbating and reprobating and/or by so blowing hot and cold, cannot oust the plaintiff from proceeding for eviction of defendant No. 2, neither before the Rent Courts nor before the Civil Courts. The defendant No. 2 did not take the plea of proceedings before the Rent Court being the appropriate remedy for the plaintiff, till she succeeded in having the application of the plaintiff for substitution in Rent Court dismissed for the reason of institution of this suit.

Thereafter the defendant No. 2 wants to oust the plaintiff from this Court also, this time on contradictory plea of jurisdiction of this Court being barred because of availability of Rent Court.

24. The courts have always frowned upon such conduct of litigant and not allowed the same. The Supreme Court recently in [City Montessori School Vs. State of Uttar Pradesh and Others](#), reiterated the doctrine that a person cannot be permitted to approbate or reprobate at the same time. In that case in an earlier proceeding the appellant before the court had not protested to a notification being issued. It was held that the appellant must be deemed to have accepted the suggestion for issuance of such notification without any demur whatsoever; the appellants were held disentitled to subsequently challenge the same.

25. The Division Bench of this Court in [Umrao Singh Vs. Man Singh and Others](#), also held that once a party had got proceedings of the other before authorities under the Delhi Land Reforms Act dismissed on the ground that the same was not applicable, that party upon the other instituting the suit in the Civil Court could not be heard to say that the jurisdiction of the Civil Court was barred and the proceedings lay before the authorities under Delhi Land Reforms Act. It was held that to allow the party to take up such inconsistent pleas and to blow hot and cold and to play fast and loose according to his convenience would result in a situation which is not only anomalous but is also manifestly inequitable and unjust and such a situation cannot be countenanced by the Courts. It was held that consistency of proceeding is required of all those who come or are brought before the court and that one who has taken a particular position deliberately in the course of a litigation must act consistently with it.

26. Reference must also be made to [Amritlal N. Shah Vs. Alla Annapurnamma](#), There upon proceedings under the Rent Act being filed, the party contended that he was not a tenant of a building within the meaning of the Rent Act but thereafter upon a suit for arrears of rent and eviction on the ground of expiry of lease being filed, took a stand that he was protected under the Rent Act. He was held not entitled to do so. Bigelow on "Estoppel" was quoted with approval as:

If parties in Court were permitted to assume inconsistent positions in the trial of their causes, the usefulness of Courts of justice would in most cases be paralysed, the coercive process of the law available only between those who consented to exercise, could be set at naught by all. But the rights of all men, honest and dishonest, are in the keeping of the Courts and consistency of proceedings is therefore required of all those who come or are brought before them. It may accordingly be laid down as a broad proposition that one who, without mistake induced by the opposite party, has taken a particular position deliberately in the course of litigation must act consistently with it; one cannot play fast and loose. The principle under consideration will apply to another suit than the one in which the action was taken where the second suit grows out of the judgment of the first. It is

laid down that a defendant who obtains judgment upon an allegation that a particular obstacle exists cannot in a subsequent suit based upon such allegation deny its truth.

Similarly, *Hemantha Kumari Devi v. Prasanna Kumar* AIR 1930 Cal. 52 was also cited with approval as laying down:

It is well settled that a party litigant cannot be permitted to assume inconsistent positions in Court, to play fast and loose, to blow hot and cold, to approbate and reprobate, to the detriment of his opponent; and that this wholesome doctrine applies not only to the successive stages of the same suit, but also to another suit other than the one in, which the position was taken up, provided the second suit grows out of the judgment in the first.

The court in that case also considered whether this principle will apply on a question of jurisdiction of court, since there can be no estoppel against a statute or on a question of law and no amount of consent can confer jurisdiction on a court. The Division Bench held that the principle of estoppel arising out of parties taking inconsistent positions will override.

27. In this regard, the following judgments cited by the senior counsel for the plaintiff may be noticed:

i) *Delhi Cantonment Board v. S.N. Sahni* RSA No. 74/2007 decided on 2nd January, 2008 holding that bar of jurisdiction of civil court created by Rent Act would come into force only upon proof of tenancy and not of sub-tenancy;

ii) [S. Makhan Singh Vs. Smt. Amarjeet Bali](#), holding that the moment a person refuses title of the landlord and claims title in himself, he loses the protection of the Rent Act.

28. I thus hold that the defendant No. 2 is not entitled to and estopped from contesting the jurisdiction of this Court to entertain the suit. IA. No. 2028/1997 is dismissed. Similar plea taken in various other pending applications is also dismissed. The defendant No. 2 by taking such plea, found to be misconceived and malafide has derailed the trial of the suit and perpetuated her possession of valuable property subject matter of suit. In the circumstances, the defendant No. 2 is also burdened with costs of Rs. 50,000/- The parties to appear before the Roster Judge for directions in this respect on 22nd September, 2009.