

(1977) 09 AHC CK 0005

In the Allahabad High Court

Case No : Civil Miscellaneous Writ No. 1441 of 1976

Beopar Sahayak Pvt. Ltd. and Others

APPELLANT

Vs

Vishwa Nath and Others

RESPONDENT

Date of Decision : 12-09-1977

Acts Referred:

Constitution of India, 1950 — Article 134, 136, 141, 226, 227
Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 —
Section 21, 21(1), 22, 3
Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Rules, 1972
— Rule 16, 16(2)

Citation : (1977) AWC 607

Hon'ble Judges : Amitav Banerji, J

Bench : Single Bench

Advocate : Vinod Swarup, G.P. Bhargava and A.N. Bhargava, for the Appellant;
Rajesh Tandon and S.C., for the Respondent

Final Decision : Dismissed

Judgement

Amitav Banerji, J.—This writ petition is directed against an order of the Second Addl. District Judge, Kanpur in an order passed u/s 22 of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, hereinafter referred to as the Act.

2. The first three opposite parties Sri Vishwanath, Sri Jagdish Narain and Sri Kailash Nath, hereinafter referred to as the landlords, made an application u/s 21 of the Act for the release of the portion of the premises No. 58/3 Birhana Road which was under the tenancy of the Petitioners in January 1975. The Petitioners were the tenants of the back portion of the ground floor excluding the garde and of a half portion of the first floor in the above premises. The landlords' case was that they had insufficient residential accommodation in their possession and they wanted additional accommodation for the expansion of their business and for fresh business in cloth. The Petitioners denied the case set up by the landlords and pointed out their difficulties both in respect of residential and non-residential

accommodation. The Prescribed Authority by his order dated 19th August, 1975 allowed the application and ordered the release of the accommodation in the occupation of the Petitioners in favour of the landlords. An appeal was filed u/s 22 of the Act. It was heard by the Second Additional District Judge, Kanpur. The appeal was dismissed by the order dated the 30th August, 1976 and a month's time was granted to vacate the premises.

3. The present writ petition was filed against the above order on the 14th September, 1976. Notice was accepted immediately by the counsel for the landlords who prayed for three days' time to file a counter affidavit. The Petitioners were granted a week's time to file a rejoinder affidavit thereafter and the stay application was directed to be listed for orders on September 27, 1976. It appears that before any stay order could be passed by this Court the Petitioners were dispossessed by the landlords. Thereafter an application was made by the Petitioners for being put back in possession. The case was ordered to be listed for hearing but for some reason or the other it could not be heard on those dates and ultimately the writ petition was taken up for hearing on 19-8-1977. It will be necessary to mention here that during the pendency of the writ petition learned Counsel for the Petitioners filed an application in this Court for amending the writ petition by adding grounds (xx) and (xxi) and relief (ii-A). The amendment sought to raise a question that the Prescribed Authority, Shri S.S. Sengar did not have the requisite qualification as required u/s 3(e) of the Act as it then stood and consequently, the entire proceedings before him and the order passed by him was a nullity. It was further sought to be urged that the above order could not be cured by the appellate order of the Additional District Judge and as such it was also a nullity. In the preferred relief the prayer was that an order or direction be issued directing the opposite parties to restore back the possession of the premises to the Petitioners. I had by my order dated 5th July, 1977 permitted the amendment as prayed.

4. When the matter came up for hearing Mr. Jagdish Swarup, learned Counsel for the Petitioners sought to argue that the order of the Prescribed Authority in the present case was a nullity as Mr. S.S. Sengar the Prescribed Authority did not have the requisite qualification to decide the application u/s 21 of the Act. A preliminary objection was raised by Mr. Raja Ram Agarwal who appeared for the landlords that a new point cannot be permitted to be raised for the first time in a writ petition. The Petitioners could not be allowed to raise the above plea for the reason that they had taken no such plea before the Appellate Authority. He further urged that a decision on the question would involve an enquiry into facts which was not within the domain of this Court. In the alternative, he contended that even if the order of the Prescribed Authority was a nullity the jurisdiction and the competency of the Appellate Authority to decide the appeal on the merits was not questioned and his decision could not be said to be a nullity. I, therefore, heard learned Counsel for the parties on this preliminary objection.

5. Mr. Jagdish Swarup, learned Counsel for the Petitioners contended that there

is a clear distinction between want of jurisdiction and the error in the exercise of jurisdiction. An order passed by an authority where the authority has no jurisdiction to decide the matter was a nullity. He cited the authority of a Full Bench decision of the Calcutta High Court in *Hriday Nath Roy v. Ram Chandra Barna Sarma* AIR 1921 Cal 34. In the above decision the Full Bench laid down that "a judgment pronounced by a Court without jurisdiction is void, subject to the well-known reservation that when the jurisdiction of a Court is challenged, the Court is competent to determine the question of jurisdiction, though the result of the enquiry may be that it has no jurisdiction to deal with the matter brought before it." The Full Bench then referred to the celebrated dictum of Lord Hobhouse in *Malkurjun v. Narhari* 5 CWN 10:

A Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken, the decision, however wrong, cannot be disturbed.

The Full Bench then observed:

There is a clear distinction between the jurisdiction of the Court to try and determine a matter, and the erroneous action of such Court in the exercise of that jurisdiction. The former involves the power to act at all, while the latter involves the authority to act in the particular way in which the Court does not. The boundary between an error of judgment and the usurpation of power in this the former is reversible by an appellate Court within a certain fixed time and is therefore only voidable, the latter is an absolute nullity.

Mr. Jagdish Swarup contended that the above observation of Sri Ashutosh Mukerjee, J. in the above case laid down the proposition in very clear words that the order passed by a Court acting without jurisdiction is a nullity. Basing upon this conclusion he contended that the entire proceedings were rendered null and void because the original order passed by the Prescribed Authority was a nullity. In support of this contention he relied on a Division Bench decision of this Court in *District Magistrate v. Parasnath* reported in 1967 AWR 485 where it was held that if the original order of the first court was without jurisdiction, then the order of the Appellate Court would be also without jurisdiction.

6. I had occasion to consider this question in the case of *Ram Narain Sharma v. 5th Additional District and Sessions Judge, Moradabad* 1976 AWC 626 . In the above case a similar plea was taken that the Prescribed Authority being an Executive Magistrate, ceased to be a Prescribed Authority and had no jurisdiction to decide the application u/s 21 of the Act. There too the point was canvassed for the first time in the writ petition. One of the questions considered was whether the order of the Prescribed Authority merged in the appellate order. I had held that there was a merger. I had referred to the decision of *Gojer Bros. (Pvt.) Ltd. Vs. Shri Ratan Lal Singh*, where Mr. Justice Chandrachud had referred to the doctrine of merger in civil suits. I had also referred to the case of Commissioner

of Income Tax, *Bombay Vs. Amritlal Bhogilal and Co.*, , where their Lordships held that "as a result of the confirmation or affirmance of the decision of the Tribunal by the Appellate Authority the original decision merges in the appellate decision alone which subsists and it operative and capable of enforcement.... "In the case of *Collector of Customs, Calcutta Vs. East India Commercial Co. Ltd.*, it was held that where the Appellate Authority merely dismissed the appeal the order of the original authority becomes merged in the order of the Appellate Authority. I had also referred to in that case the decision of the Division Bench of this Court in *Purshottam v. Sheo Prasad* 1972 AWR 362 where it was held that when the appeal was heard on the merits and the question of want of jurisdiction had been gone into the defect was cured. Reliance was placed in the above case by the Division Bench on the decision of the Supreme Court in the case of *Janardan Reddy and Others Vs. The State of Hyderabad and Others*, . In the case of *Abdul Hameed v. 7th Additional District and Sessions Judge, Kanpur* 1976 AWC 177 a learned single Judge of this Court held that in a case under the Act even where the order of the Prescribed Authority was null and void, the order on being confirmed by the Appellate Authority on the merits was operative and binding. In other words, the infirmity in the order of the Prescribed Authority was cured. The learned single Judge rejected the submission of the learned Counsel for the Petitioner in that case that when the order of the Prescribed Authority was a nullity, the order of appeal therefrom could not be of a greater validity, as unsound. I have referred to all these cases in my above decision and had also given reasons for not relying on the decision of the Division Bench in the case of *District Magistrate v. Parasnath* (Supra). In that case, Division Bench had relied on the decision of the Supreme Court in the case of *State of U.P. v. Mohd. Nooh* AIR 1953 SC 86 . The Supreme Court itself in the case of *Madan Gopal Rungta Vs. Secretary to The Government of Orissa*, and in the case of *Collector of Customs v. East India Commercial Co.* (Supra) had clearly stated "Mohd. Nooh's case was a special case which stands on its own facts." I had also referred to the case of *Janardhan Reddy v. State of Hyderabad* (supra) and had followed the law laid down in that case.

7. Mr. Jagdish Swamp, learned Counsel for the Petitioners contended that Janardhan Reddy's case (supra) had not been correctly appreciated and that the law laid down in *R.N. Sharma's* case (supra) needed re-consideration. In the case of *Janardhan Reddy v. State of Hyderabad* (supra) six petitions under Article 32 of the Constitution were being considered. The Petitioners had been tried by a special Tribunal constituted by the Military Governor of Hyderabad. The Petitioners had been convicted of murder and sentenced to death and also convicted of certain other offences and sentenced to various terms of imprisonment. They had filed an appeal to the Hyderabad High Court but their convictions and sentences were confirmed. They, therefore, tried to obtain leave of the High Court in appealing to the Judicial Committee of Hyderabad but during this period the Constitution of India, came into force. The Petitioners thereupon amended their application by asking for leave to appeal to the Supreme Court

under Article 134(c) of the Constitution. That application was rejected. They thereafter applied for special leave to appeal which too was dismissed under Article 136 of the Constitution on the ground that the Supreme Court had no power to hear an appeal from a judgment delivered by the High Court at Hyderabad before the 26th January, 1950. The Petitioners thereafter made an application under Article 226 of the Constitution which too was rejected. They thereafter filed two sets of petitions in the Supreme Court - one under Article 32 of the Constitution and the other for special leave to appeal against the order of the High Court refusing to grant them relief under Article 226 of the Constitution. Several points were raised before the Supreme Court but only the first one needs to be mentioned. It was that the trial of the Petitioners by the Special Tribunal was without jurisdiction. On a consideration of the material before the Supreme Court it was held that the chargesheet No. 14 in respect of Case No. 17 was never properly made over to the Tribunal and the trial of the accused in that case was, therefore, without jurisdiction. Their Lordships thereafter considered whether any relief could be granted to the Petitioners under Article 32 of the Constitution and whether any writ of habeas corpus or certiorari could be issued. Their Lordships then summed up the position in the following words:

The trend of decisions thus seems to be in favour of the view that if it should appear...to which it would lie if its order was with jurisdiction.

As I read it I do not find any different intention in the above order from the one that I have taken in the case of R.N. Sharma (*supra*). Learned Counsel sought to argue that the cases on which their Lordships relied and to which reference has been made in paragraph 26 of the Reports showed that if the order of the first court was a nullity then the order could be challenged even at a later stage of the proceedings. It must be made clear at once that there is no dispute to the proposition that an order without jurisdiction can also be appealed from in the same way as an order with jurisdiction before the Court to which the appeal lies. It must also be remembered that a court hearing a writ petition in exercise of its powers under Article 226 of the Constitution is not a court of appeal nor is the proceeding instituted before the High Court a continuation of the proceeding u/s 21 of the Act. The contention of the Petitioners in the present case is that the order of the Prescribed Authority was without jurisdiction and, therefore, a nullity and consequently, the order of the Appellate Authority was also a nullity. This contention is against the law laid down by their Lordships in the case of Janardhan Reddy (*supra*). Learned Counsel referred to the decision of Lord Denning in *Barnar v. National Dock Labour Board* 1953 (1) AER 1113 and to the decision of *Toronto Railway Co. v. Corporation of the City of Toronto* 1904 AC 809. In the latter case it was held that if the order of the first authority was void ab initio the confirmation by the appellate or revisional authority did not validate it. I regret I am unable to follow the principle laid down in the above cases for the reason that the Supreme Court has laid down the law on the point and under Article 141 of the Constitution it is the law of the land and binding on this Court also.

8. Learned Counsel further contended that where the order of the authority of the first instance was a nullity such an order would fall outside the scope of the rule of merger. In support thereof he cited the decision of the Gujrat High Court in the case of T.P. Kumaran Vs. R. Kothandaraman, Commissioner of Income Tax, Gujarat, and to the decision of Collector of Customs v. A.H.A. Rahiman AIR 1957 Mad 496. With great respect to the learned Judges who decided these cases I regret my inability to accept the proposition as stated by their Lordships. I have already considered the matter at length in the case of R.N. Sharma (supra) and have given ray reasons for the same. It has been the consistent stand of this Court that if the Appellate Court is competent to hear the appeal and decide the matter including the question of want of jurisdiction then the infirmity in the exercise of jurisdiction is cured. The question of nullity can also be gone into and as their Lordships observed in the case of Janardhan Reddy (supra), there is a principle of finality. Even assuming that the order of the first court was without jurisdiction, the point could certainly be raised in appeal and decided. The order of the Appellate Authority would be a final order and not liable to challenge on the ground that the order of the first court or Tribunal rendered the entire proceedings a nullity.

9. Learned Counsel then contended that it is the duty of the High Court to strike down usurpation of public office and cited a decision of the Supreme Court in the case of the The State of Haryana Vs. The Haryana Cooperative Transport Ltd. and Others, . Their Lordships observed:

If the High Court finds that a person appointed to any of these offices is not eligible or qualified to hold that post, the appointment has to be declared invalid by issuing a writ of quo warranto or any other appropriate writ or direction. To strike down usurpation of office is the function and duty of High Courts in the exercise of their constitutional powers under Articles 226 and 227.

This principle is not attracted to the facts of the present case for the reason that in this writ petition the prayer is for the issue of a writ of certiorari to quash the order of the Appellate Authority and not for the issue of a writ of quo warranto to quash the appointment of Sri S.S. Sengar. It must be pointed out here that the Petitioners never raised the question of the want of jurisdiction of Shri Sengar either before the Prescribed Authority or before the Appellate Authority. The point has been raised here for the first time in the writ petition. To permit the Petitioners at this stage to enter into an investigation as to whether Shri Sengar could or could not exercise his powers u/s 21 of the Act would amount to an investigation into questions of fact. It will not be appropriate in the present case to enter into any investigation of facts at this stage.

10. On a consideration of the rival contentions and the case-law I am of the opinion that the preliminary objection raised by the learned Counsel for the Respondent must be upheld. The Petitioners cannot, therefore, be permitted to raise the question of the want of jurisdiction of Shri S.S. Sengar, the Prescribed Authority.

11. On the merits of the case learned Counsel for the Petitioners raised four contentions. Firstly, that neither the Prescribed Authority nor the Appellate Authority had applied the correct principles in measuring the bona fide need of the landlords for additional accommodation. Secondly, that the Appellate Authority and the Prescribed Authority had not referred to or taken into consideration the existence of a mezzanine floor in the building which had been let out by the landlords. Thirdly, the conclusion by the Appellate Authority that the Petitioners could have a show room or office room in their factory at Fazalganj was patently erroneous. Lastly, neither the Prescribed Authority nor the Appellate Authority had considered the provisions of Rule 16(2)(a) of the Rules made under the Act. I will take up these points seriatim.

12. As far as the first point is concerned, it is well-settled that the question of "bona fide need" depends upon the facts of each case and is principally a question of fact. Section 21(1) of the Act uses the words "bona fide required...by the landlord...." These words came up for interpretation before the Full Bench of this Court in Chandra Kumar Sah and Another Vs. The District Judge and Others, . Their Lordships referred to several decisions on the point of different High Court even and of the Supreme Court in Mattulal Vs. Radhe Lal, . The Supreme Court observed:

...Mere assertion on the part of the landlord that he requires the non-residential accommodation in the occupation of the tenant for the purpose of starting or continuing his own business is not decisive. It is for the Court to determine the truth of the assertion and also whether it is bonafide. The test which has to be applied is an objective test and not a subjective one.... The word "required" signifies that mere desire on the part of the landlord is not enough but there should be an element of need and the landlord must show, the burden being upon him, that he genuinely requires the non-residential accommodation for the purpose of starting or continuing his own business.

The Full Bench further made the point clear by the following observations:

It is thus clear that if the claim of the landlord is not dishonest and he has no oblique motive or is not for any designed purpose of evicting the tenant, his need should be held to be bona fide. There is nothing in the provisions of the Act to suggest that a landlord even though bona fide requiring an accommodation for his own occupation may not be allowed to occupy it himself: if it is not one of the aims and objects of the Act to prevent a landlord's occupying an accommodation himself even though he wants to occupy it himself and does not want to profiteer or to take any unconscionable advantage of the shortage of accommodation.

The question for consideration is whether the above principle has been followed in the decision by the Appellate Authority. The landlord needed both the accommodation, residential one as well as the non-residential one. A perusal of the order of the Appellate Authority shows that he had taken into consideration the various factors in assessing the bonafide need of the landlords and also

considered the question of respective difficulties. The Appellate Authority on an appraisal of the evidence has come to the conclusion that the landlords required additional residential accommodation. The Appellate Authority also came to the conclusion that the landlords required space for their business. The Appellate Authority has considered the respective hardships of the parties in case the petition was allowed or dismissed and in my opinion the principles laid down under Rule 16 have been complied with. I, therefore, do not find any substance in the contention of the learned Counsel for the Petitioners on the first point.

13. As regards the second point, there is no dispute between the parties that the landlords had built a mezzanine floor in the building and had let it out to the others in 1973. The application u/s 21 of the Act made by the landlords was filed in the year 1975. It is, therefore, clear that in the year 1975 the landlords did not have the mezzanine floor with them. The contention that the two authorities had not referred to or taken into consideration the existence of a mezzanine floor in the building which had been let out by the landlord is not quite correct. If the accommodation on the mezzanine floor was not even available to the landlords in 1975 because it was occupied by another tenant it could not be assumed that the landlords had the use of the same accommodation. The choice is with the landlord as to which accommodation would suit his purpose. For this he may seek the eviction of one or more tenants. If the landlord prefers the eviction of one tenant instead of another the tenant against whom eviction is sought cannot raise a plea that the landlord should have proceeded against the other tenant. In the present case the landlords have sought the eviction of the Petitioners and not the tenants on the mezzanine floor. There is no illegality in doing so. The existence of the mezzanine floor has been referred to in the order of the Appellate Authority. It would have been a different matter if the landlords were found to be in possession of the accommodation on the mezzanine floor also, but that is no body's case. The mere absence of a discussion in regard to the mezzanine floor in the order of the Appellate Authority would not vitiate his order. The landlords had referred about the mezzanine floor in their written statement and they had not concealed the matter. They had also pointed out that it was occupied by a tenant. I, therefore, do not find any manifest error of law apparent on the face of the record in the order of the Appellate Authority in regard to the second point.

14. The third point raised by the learned Counsel for the Petitioners was that the conclusion by the Appellate Authority that the Petitioners could have a show room or office room in their factory at Fazalganj was patently erroneous. This is a pure question of fact. Whether there could be a show room or office room at the factory premises at Fazalganj or whether it would be convenient or suitable for the purpose of their business is again a question of fact. This Court cannot in exercise of its writ jurisdiction go into these questions of fact. It is well settled that questions of fact have to be decided before the Tribunals or courts which are empowered to decide the questions of fact. The finding of fact arrived at by the Appellate Authority on this point is conclusive and binding on this Court.

Moreover, nothing could be shown that the above finding was manifestly erroneous in law. I, therefore, do not find any merits in this contention.

15. The fourth and the last contention was that the Appellate Authority had not considered the provisions of Rule 16(2)(a) of the Rules made under the Act. Rule 16(2)(a) reads as follows:

(2). While considering an application under Clause (a) of Sub-section (1) of Section 21 in respect of a building let out for purposes of any business, the Prescribed Authority shall also have regard to such facts as the following-

(a) the greater the period since when the tenant opposite party, or the original tenant whose heir the opposite party is, has been carrying on his business in that building, the less the justification for allowing the application.

Learned Counsel for the Petitioners urged on the basis of the above Rule that the Petitioners were in possession of the accommodation for non-residential purposes since the year 1947 and there was, therefore, no justification for allowing the application of the landlords. Merely because a tenant has been in possession of accommodation for non-residential purpose for a long number of years is not a bar in allowing the application for release u/s 21 of the Act. What the law envisages is that while considering an application for the release of an accommodation certain principles have to be observed. One of them is Rule 16(2)(a) which is applicable to an accommodation let out for non residential purposes. These Rules have been made to provide a guideline to the authority considering the case of the release of an accommodation in favour of the landlord. Section 21 also provides that in considering case for the release of an accommodation the Court has to consider the hardship of the landlord if his application for release is rejected and has also to consider the hardship that the tenant would face if the application is allowed against him. A perusal of the order of the Appellate Authority shows that the Appellate Authority was alive to the question of the hardships that the parties would suffer if the application was refused or allowed, as the case may be. The Appellate Authority has weighed the respective need for the accommodation and also considered the respective hardships. In the present case the Appellate Authority has also considered the point that the tenant has available with him suitable accommodation to which he can shift his business without substantial loss. Rule 16(2)(b) provides in such a case that there shall be greater justification for allowing the application for release. It is, therefore obvious that Rule 16(2)(a) cannot be considered in isolation where the tenant has also suitable accommodation for his purposes. If the tenant did not have any other accommodation then greater weight would be attached to the provisions of Rule 16(2)(a), but where the tenant has other suitable accommodation with him, the authority has to consider the provisions of Rule 16(2)(b) as well. In the present case the Appellate authority has considered both the positions, as it was required under law. I, therefore, do not see any manifest error of law in the order of the Appellate Authority in not referring to the provisions of Rule 16(2)(a) specifically in its order. A perusal of the order of the Appellate Authority shows

that he had considered the respective cases of the parties fully and I do not discern any error of law apparent on the face of the record.

16. In the result, therefore, the writ petition fails and is dismissed but in the circumstances I make no order as to costs