

**(1998) 11 AHC CK 0067**

**In the Allahabad High Court**

**Case No :** Civil Miscellaneous Writ Petition No. 18913 of 1998

DCM Ltd.

APPELLANT

Vs

Rent Control and Eviction Officer/City Magistrate, Kanpur  
Nagar

RESPONDENT

**Date of Decision :** 05-11-1998

**Acts Referred:**

Constitution of India, 1950 — Article 226  
Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 —  
Section 12(1)(b)

**Citation :** (1998) 11 AHC CK 0067

**Hon'ble Judges :** J.C.Gupta, J

**Final Decision :** Dismissed

## Judgement

J.C. Gupta, J.—Since counteraffidavit and rejoinder affidavit have been exchanged, in the circumstances of the case and with the consent of the parties" counsel, this writ petition is disposed of finally.

2. By means of this writ petition, the petitioner has sought issuance of a writ of certiorari for quashing the order dated 1311998 passed by Rent Control and Eviction Officer/ "City Magistrate, Kanpur Nagarrespondent No. 1 declaring vacancy in respect of shop No. 18/179, The Mall Road, Kanpur Nagar. According to the petitioner the said shop has been in its occupation since long and for running the said shop the petitioner company entered into an agreement dated 6372 with M/s. Chunnilal Sohan Lal through its Karta Sri G.S. Agrawal. The petitioner has been regularly paying rent of the said shop and has paid the same upto March, 1998. It is further alleged that on 17182 the petitioner company received a notice under Section 226(3) of the Income Tax Act requiring it to make payment of rent directly to the Principal Officer, Assistant Commissioner of Income Tax department. On 111075 the petitioner company entered into another agreement with Sri VK. Agrawalrespondent No. 3 whereby it was agreed by the later that he would act as agent of the company to sell its products from the shop in question on the terms and conditions laid down in the said agreement

and the said respondent also gave security of Rs.50,000/-. According to the allegation made in the petition, the petitioner company had no information of the proceedings held before the Rent Control and Eviction Officer and when the company received a Caveat application/notices through Sri Sandeep Saxena, Advocate High Court, Allahabad, the petitioner sent its representative to Kanpur who enquired and found that without issuing any notice to the petitioner company, the proceedings were held before the respondent No. 1, and respondent No. 3 in collusion with respondents No. 4 and 5 got declared the shop in question vacant. In short the petitioner's case is that respondent No. 3 was not its subtenant and was only acting as its agent and that the impugned order declaring vacancy has been passed without serving any notice on the petitioner company in collusion with respondents No. 3, 4 and 5. It is also not disputed that by an order dated 27/1/98 the shop in question has been released in favour of respondents No. 4 and 5 who have purchased the property in question from the erstwhile owner/landlord.

3. In the counteraffidavit, respondent No. 3 has denied the petitioner's allegations. It is stated therein that the proceedings before the Rent Control and Eviction Officer were initiated on an application for allotment made by one Sri S.P. Shukla. Under the order of respondent No. 1, the Rent Control Inspector made an inspection of the shop in question and made enquiries. Statement of respondent No. 3 was also recorded wherein he stated that since about two years the petitioner company had closed its business and he himself was carrying on business independently in the name of M/s. VK. Agarwal as sole proprietor and profit and loss of this business were not shared by D.C.M. and the said business was being run by him with the consent of the petitioner. According to the case set up by this respondent the synthetic cloth business since very beginning was being done by him alone and Rs. 2100/ per month was being paid to D.C.M. as service charge/rent. Alongwith the affidavit copy of agreement dated 30/4/76 executed between the petitioner company and the said respondent has also been annexed and it is stated that as per the terms stipulated in para 2(a) of the said agreement, the respondent was liable for payment of rent of the premises and payment of rent so stipulated was acknowledged in the form of service/maintenance charges for which the petitioner company was giving receipts to him. There were two Schedules in the agreement. Schedule I related to Towels and Control cloth while Schedule II related to Synthetic Textiles and other varieties of cotton based goods not covered by Schedule I and the agreement specifically provided that Schedule I items were to be sold by the said respondent on commission basis whereas items mentioned in Schedule II were to be sold on outright basis and the petitioner company was not to have any share in the profit and loss on the sale of the items mentioned in the said Schedule. The respondent sold the items mentioned in Schedule II in the name of the firm M/s. V.K. Agarwal for which a separate portion in the shop in question was specified and permission by the letter dated November 7, 1975 was also given by the petitioner company to him. In this letter the area shown in red colour in the

attached sketch map was described as given to the said respondent, meaning thereby that this portion was in exclusive possession of the respondent. The electricity and telephone connections in the disputed shop were also in the name of the respondent.

Before the R.C. and E.G. he was called upon to furnish the vouchers relating to purchase of cloths from January 1997 to June 1997 and in compliance of the said order he filed bills showing some of the purchases made by him to show that he has been purchasing cloth from other mills. In reply to the contents of paragraph 7 of the writ petition, it has specifically been stated by the respondent that initially the petitioner company was supplying its products to the said respondent on consignment basis but later on they started drawing bills in the name of respondent No. 3 directly. Simultaneously he was allowed to use a portion of the said shop for the sale of Synthetic material in his own independent right and since then the petitioner company started charging Rs. 900/ per month and he was also permitted to sell other products by petitioner through their letter dated 7111975. As regards the petitioner's allegation that he had no information of the proceedings held before the Rent Control and Eviction Officer, it has been stated by the respondent that at every stage he informed and communicated to the petitioner about the allotment proceedings. As soon as he received notice from the Rent Control Inspector, the same was sent to original to the petitioner company by registered post on 3061997. Carbon copy of the letter alongwith the copy of original postal receipt and acknowledgment due which was received back after service on the petitioner were also annexed with the affidavit. It is further stated that he again served a letter on the petitioner company by registered post and the allegation of fraud and collusion have been denied specifically. It has also been stated in paragraph 6 of the counteraffidavit that the petitioner company has assigned the tenancy rights and other rights of the retail outlets of the company in favour of M/s. Phoenix Overseas Ltd., a public limited company vide Memorandum of Understanding dated 1411995, as such the petitioner company is not entitled to file the present writ petition. The copy of the Memorandum of Understanding has been annexed as Annexure C.A.10 by virtue of which the retail outlets of the D.C.M. including the retail outlet in the shop in question have been assigned to M/s. Phoenix Overseas Limited, New Delhi. This Memorandum of Understanding was acted upon and thereafter M/s. Phoenix Overseas Limited issued various advertisements in the News Papers stating that the said company has acquired rights of all D.C.M. shops. A true photo copy of the advertisement dated 16496 published in Hindustan Times, New Delhi Edition has been annexed as Annexure C. A. 11 and the one published in Economic Times dated 10th March, 1995 has been annexed as Annexure C.A12.

4. Respondent No. 5 one of the coland lady and not related to No. 3 also filed counteraffidavit wherein also it has been claimed that the petitioner company has been left with no right whatsoever in the shop in question and writ petition at its instance is not maintainable, on account of the assignment of all rights of the company in favour of M/s. Phoenix Overseas Ltd. she denied that there was any

collusion between her and respondent No. 3. The shop in question under law would be deemed to have been sublet and accordingly was vacant under the provisions of the Act.

5. In the rejoinder affidavit filed on behalf of the petitioner company it was reiterated that respondent No. 3 was merely, an agent of the company. The letter dated 71175 gave only a right to respondent No. 3 to sell the products of Synthetic material in the capacity of agent of the company under certain specified racks in the shop in question. In reply to paragraph 6 of the counter affidavit of respondent No. 3, the allegation of assignment of rights of the petitioner company in favour of M/s. Phoenix Overseas Ltd., has not been denied. However, it is asserted that the petitioner company has not relinquished its tenancy rights.

6. Sri Ranjit Saxena, learned Counsel for the petitioner firstly argued that the Rent Control Inspector had submitted a report with regard to vacancy of the shop in question without service of notice on the petitioner and the petitioner had not been served with any subsequent notice and the proceedings were held by the R.C. and E.C. behind the back of petitioner company and therefore, the impugned order declaring vacancy is liable ,to be quashed on this ground alone. On the other hand Sri Janardan Sahai and Sri Sandeep Saxena, learned Counsel for the respondents argued that the petitioner had full knowledge of the proceedings and since it had been left with no interest in the shop in question after the assignment of its rights in favour of M/s. Phoenix Overseas Limited, the company did not contest the proceedings before Rent Control and Eviction Officer. The burden to satisfy this Court that the petitioner had not been served with any notice of hearing or had no knowledge of the proceedings before the respondent No. 1 laid heavily upon the petitioner. Even as per the petitioner's own case, the respondent No. 3 was acting as its agent. It has been pointed out by the respondent counsel that in the counter affidavit, it has been specifically stated by the respondent No. 3 that the notice served upon him by the Rent Control Inspector was in turn sent by him in original to the petitioner company by registered post at the address of the company and after its service acknowledgment due was received by him which bore the official seal of the petitioner company. Copies of the notice, the postal receipt and acknowledgment due received after service have been annexed with the counter affidavit. But only a vague denial has been made in the rejoinder affidavit and it has not been explained as to how the seal of the petitioner company could find affixed on the postal acknowledgment due. Under law there is a presumption of due service on the addresses when a letter is sent by registered post and A.D. is received back after delivery of the letter. Another information was sent to the petitioner by respondent No. 3 by registered post and its reply given in the rejoinder affidavit is again vague. It cannot, therefore, be said that the petitioner had no knowledge of the proceedings which were held before the Rent Control and Eviction Officer and there appears to be weight in the submission of the learned Counsel for the respondent that since the petitioner company had been left with no interest in the

shop in question on account of transfer of the rights in favour of M/s. Phoenix Overseas Limited, the petitioner did not think it necessary to contest the matter before the R.C. and E.O.

7. Learned counsel for the respondent vehemently argued that in any view of the matter since from the own documents of the petitionercompany, case of vacancy is clearly made out, this Court in its writ jurisdiction should not interfere with the order of the authority below whereby the shop in question has been declared vacant. From the documents placed on record, there can be no dispute that the petitionercompany entered into the shop in question as tenant of the earstwhile landlords. Execution of agreement dated 30476 between the petitionercompany and the respondent No. 3 is also not disputed. A perusal of the said document shows that it was stipulated therein that respondent No. 3 shall be liable for payment of rent to the landlord. There were two Schedules in the agreement. Schedule I related to Towels and Control Cloth of petitioner's Mill while Schedule II related to Synthetic Textiles. Respondent No. 3 was allowed to sell items of Schedule II from a separate specified portion of the shop in question and the petitionercompany specifically agreed that it would not be having any share in the profit and loss on the sale of items of Schedule II which according to the respondent No. 3 were sold in the name of M/s. YK. Agarwal. Genuineness of the letter dated 71175 issued by the petitionercompany to respondent No. 3 has not been disputed in the rejoinder affidavit. By means of this letter the petitionercompany permitted the respondent to sell the aforesaid products from a specified portion which was outlined in red colour in the map attached. It would thus appear that the petitionercompany not only permitted the respondent No. 3 to have exclusive possession of a portion of the shop but also allowed him to do business in his own rights. According to the petitionercompany the said respondent was allowed to use that portion and sell other products only as a licensee and not a sub tenant but it is well established law that mere nomenclature of the word "license" used in the documents would not change the real character of occupation which under the provisions of the present Act would be that of a subtenant. It is also noteworthy that the electricity and. telephone connections were all in the name of respondent No. 3 and he alone was responsible for paying their charges. The bills and vouchers produced before the R.C. and E.O. by respondent No. 3 clearly proved that the said respondent was not merely selling items of petitionercompany but also carried on business in his own independent rights. All these facts taken together would lead to no other inference that the said respondent was having exclusive possession and was doing business from the shop in question in his own independent rights and this amounted to subletting within the meaning of the provisions of the Act.

8. Learned counsel for the petitioner placing reliance on the case of Atul Gupta and others v. D.C. and G.M. Co. Ltd. and others, 1991 (1) All India Rent Control Journal 281 argued that the mere fact that under an agreement of agency, the agent was made to repay the rent payable by the company, would not amount to subletting and the terms of the agreement executed in favour of respondent No.

3 would clearly show that the intention was only to create agency and the shop in question was given to respondent No. 3 only as licensee and it would not amount to subletting. Be that as it may, the position under the provisions of U.P. Act No. XIII of 1972 is however, different. Under Section 12(1) (b) of the said Act a tenant of a building shall be deemed to have ceased to occupy the building if he has allowed it to be occupied by any person who is not a member of his family. By virtue of subsection (1) of Section 12 any building which a tenant has ceased to occupy within the meaning of subsection (1) of Section 12 shall be deemed to be vacant. Thus, by a legal fiction a building is deemed vacant where the tenant allows the same to be occupied by any person who is not a member of his family. Admittedly respondent No. 3 is not a member of the family of the petitionercompany. As already pointed out above he was allowed by the petitioner to use and sell in his own rights certain goods from the disputed shop, that user would amount to allowing the person to occupy the shop in question within the meaning of Section 12(1) (b) of the Act. It is true that occupation by a person as agent of the tenant cannot be treated as occupation of third person but where the said person/agent has been allowed by the tenant to use the tenanted accommodation exclusively in his own rights, the position would be different. In this connection a reference may be made to the decision in *M/s. Bajaj Auto Limited v. Behari Lai Kohli*, 1989 (2) A.R.C. 412. In that case the premises was letout to M/s. Bajaj Auto Limited as a monthly tenant. Eviction of the tenant was sought on the ground that it had sublet the premises to M/s. United Automobiles without the consent of the landlord. The eviction proceeding was defended by the tenant on the ground that M/s. United Automobiles were the authorised dealer and distributor of the products manufactured by the tenantcompany and has been in occupation of the premises in that capacity and could not therefore, be described as subtenant. It was contended before the Apex Court that M/s. United Automobiles was a distributor of the product manufactured by the tenant on commission basis and it paid the same amount to the tenant as rent of the premises payable by the tenant to the landlord and was entitled to be in possession only as long as it continued to be a distributor, and therefore, it should be held to be an "associate concern" within the meaning of the terms of the lease. The Supreme Court held that the tenantcompany had its separate legal identity and had nothing to do with M/s. United Automobiles except that the later was the dealer/distributor of some of its manufactured articles. M/s. United Automobiles was not a licensee and was not in possession of the premises on behalf of the tenant. The Monetary benefit available to the dealer was confined to the commission it received on the sale of every vehicle, and did not include the right of enjoyment of the premises. On these facts an irresistible conclusion was drawn that the tenant had created a sublease in favour of its dealer.

9. As has already been found above, from the own documents of the petitioner which had been brought on record whose genuineness has not been challenged by the petitioner, it is apparent that the petitionercompany had allowed

respondent No. 3 not only to act as its agent in the shop in question to sell the products of the company but also permitted him to occupy the shop in question and sell other products also in his own rights and the company was not to share any profit and loss on the sale of the said items. Therefore, under the provisions of U.P. Act No. XIII of 1972, the case is fully covered by Clause (b) of Section 12 (I) and the shop in question would be deemed vacant. Under the U.P. Act No. XIII of 1972 the tenant can not allow any third person to occupy any tenanted building and do business therein in his own rights without permission of the District Magistrate. He cannot put any such person in occupation even as a licensee without the permission of the District Magistrate. The agreement entered into between the petitioner company and respondent No. 3 was merely a device for giving effect to a transaction which the law did not permit. In other words the petitioner company on one hand appointed respondent No. 3 as its agent to sell its products from the disputed shop but simultaneously also permitted him to carry on his own business from the said shop with which business the company had no concern. This was not permissible under the provisions of the Act and therefore, under the deeming provisions the shop in question became vacant. It has also been pointed out by the learned counsel for the respondents that the petitioner company has assigned all its rights to M/s. Phoenix Overseas Limited, New Delhi which averment of the respondents has been specifically made in paragraph 6 of the counter affidavit of respondent No. 3 and along with the said affidavit copy of the Memorandum of Understanding dated 14/1/95 has been annexed as Annexure C.A.10. Advertisements published by M/s. Phoenix Overseas Limited in Hindustan Times and Economic Times have been annexed as Annexure C.A. 12 and C.A. 13. In the rejoinder affidavit, the petitioner company could not dare to deny these averments and the petitioner company tried to avoid the said transaction by simply asserting that the petitioner company has not relinquished its right of filing the writ petition. From the uncontroverted assertions, it is apparent that the petitioner company has assigned its tenancy rights in favour of M/s. Phoenix Overseas Limited and therefore, is left with no right in itself which could be enforced. In any view of the matter this assignment of the tenancy rights being not permissible under the provisions of the Act also amounts to creation of vacancy and when the petitioner does not possess in present in any enforceable rights, it cannot be permitted to seek relief in writ jurisdiction of this Court. It is a known maxim *nemo allegans turpitudinem quam audiendus est* that is, a person who has polluted his hands by being a party or privy to a fraudulent transaction shall not be allowed to approach the fountain of justice with his own infamy on his lips and obtain relief on the strength of such a transaction. It is also well established principle that when anything is prohibited directly, it is prohibited also indirectly. So a transaction will not be upheld which is a mere device for carrying into effect that which the legislature has said shall not be done (*quando aliquid prohibetur ex directo, prohibetur et per obliquum*). Under the U.P. Rent Control Act though the legislature permitted the tenant to get the business carried on through his agent, at the same time has put a restriction that the said person will not be allowed to

do his own business from the same premises or to have in his occupation the said premises exclusively in his own independent right. The Act also does not permit the tenant to transfer his rights by way of assignment or otherwise. If all this is done in contravention of the prohibitions and restrictions imposed under the Act, the law made a provision to treat the building as vacant by a legal fiction. For what has been stated above, the petitionercompany cannot be heard in writ jurisdiction of this Court as its hands are not clean and from their own documents a case of deemed vacancy is clearly made out. Therefore, this Court refuses to interfere with the impugned order in exercise of its extraordinary jurisdiction under Article 226 of the Constitution, especially when the shop in question has also been released in favour of respondents No. 4 and 5.

10. For the reasons stated above, this writ petition is dismissed and the stay order stands vacated.

11. In the circumstances of the case, parties are directed to bear their own costs.