

(2008) 12 UK CK 0031

In the Uttarakhand High Court

Case No : Writ Petition No. 166 of 2003 (M/S) and Writ Petition No. 165 of 2003 (MIS)

Garhwali Sabha Hardwar

APPELLANT

Vs

VI Additional District and Sessions Judge, Saharanpur and Others

RESPONDENT

Date of Decision : 31-12-2008

Acts Referred:

Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 —
Section 12, 16, 2(1)(f)

Citation : (2009) 1 UC 533

Hon'ble Judges : Sudhanshu Dhulia, J

Bench : Single Bench

Advocate : Sri Arvind Vashisth in Writ Petition No. 166 of 2003 M/S, Sri Lok Pal Singh in Writ Petition No. 165 of 2003 M/S, for the Appellant; Sri Arvind Vashisth for Res. No. 3, Sri Pankaj Miglani for Res. No. 4, for the Respondent

Final Decision : Dismissed

Judgement

1. Heard Learned Counsels for the parties.
2. This matter pertains to the release/allotment of an premises, located in Haridwar. The two connected petitions, one filed by the landlord and the other filed by a person calling himself a "tenant" of the premises, are being decided together. These petitions have been pending in this Court for the last almost 20 years and the matter itself pertains to the year 1979.
3. Much water has flown in the Ganges between 1979 and 2008 and presently the buildings or the premises of the present nature which are owned by a public religious or charitable institution are, in fact, outside the purview of the Uttar Pradesh Urban Buildings (Regulation of Letting Rent & Eviction) Act, 1972 (from hereinafter referred to as the Act), However, the dispute itself pertains to the period when admittedly the premises was within the purview of the Act.

4. Admittedly, the position is that the building in question is owned and held by a Society which is registered under the Societies Registration Act, 1860 and claims itself to be a public charitable institution. It would be the landlord of the premises. Proceedings u/s 12 of the Act were initiated in order to declare the premises as "vacant" way-back in the year 1979, and vide order dated 13-7-1981, the premises were declared as "Vacant". Subsequently thereafter on 31 -8-1982 a release application was filed by the landlord u/s 16 of the Act. For the same premises allotment applications were also filed by prospective allottees, one of them being Respondent No. 5, namely, Suresh Chandra. The contention of the Respondent No. 5 before the allotment authority was that he is the person who has initiated the entire proceedings of "vacancy" of the premises and he is an Ex-serviceman and wants to open a general merchant shop on the premises. Whereas in its release application, the landlord i.e. the Petitioner had stated that it is a public charitable trust and it wants to open a reading room/library and a dispensary for public at large and, therefore, the premises must be released in its favour.

5. The Learned Counsel for the Petitioner-landlord, before this Court, has made primarily three submissions. The first submission of the Learned Counsel for the Petitioner-landlord is that the premises in question belongs to a public charitable trust and, hence, it is exempted from the operation of the Act.

6. This submission of the Petitioner, has no force even though it is true that presently the building has been exempted from the operation of the Act but this has been done vide an amendment in the year 1995 by way of U.P. Act No. 5 of 1995 which was w.e.f. 26-9-1994. No retrospectivity, earlier than this (26-9-1994) has been given to this amendment and the relevant date would be the year when the building was declared as vacant u/s 12 of the Act which much precedes the aforesaid amendment. It is a settled position of law that all Statutes are prospective in nature and in order to give retrospectivity to the Statute, it must be expressly stated in the Statute itself. Since, there is no retrospectivity given to the Statute, the building in question will not be said to be outside the purview of the Act. Therefore, the provision of excluding the said building cannot be referred back to year 1979 or 1983-84, as the case might be.

7. Second submission of the Learned Counsel for the Petitioner is that admittedly the building is owned by a Society which is registered under the Societies Registration Act, 1860 and, therefore, it is again exempted from the operation of the Act u/s 2(1)(f) of the Act.

8. Regarding second submission of the Learned Counsel for the Petitioner-landlord, it is necessary to first examine Section 2(1)(f) of the Act. Section 2(1)(f) of the Act exempts certain class of buildings from the operation of Act. Section 2(1)(f)- reads as under:

2. Exemption from Operation of Act. -

[(1).....

[(a).....

[(b).....

[(bb).....

[(bbb).....

[(c).....

[(d).....

[(e).....

[(f) any building built and held by a society registered under the Societies Registration Act, 1860 (Act No. LXII of 1860), or by a co-operative society, company or firm, and intended solely for its own occupation or for the occupation of any of its officers or servants, whether on rent or free of rent, or as a guest house, by whatever name called, for the occupation of persons having dealing with it in the ordinary course of business.

9. There are two relevant "words" in the said provision, namely, "built" and "held" and, therefore, in order to take the said building outside the purview of the Act, this building must have been "built" as well as "held" by the said Society. However, there is no finding on record nor was it the contention of the Petitioner-landlord that the building in question was both "built" and "held" by this Society. It may have been held by the Society at the relevant point of time but that alone does not qualify the Society for the said "exclusion". The building in question must be both "built" as well as "held" by the Society. Since it is neither the case of the Petitioner-landlord nor is there any finding on record, therefore, this record proposition of the Petitioner-landlord cannot be accepted.

10. The third submission of the Learned Counsel for the Petitioner-landlord is that rejecting the release application of the landlord, which is a public charitable trust on ground that it discriminates on the basis of religion and place of birth, is entirely wrong and his release application on this ground has wrongly been rejected.

11. Let us now examine the third submission of the Learned Counsel for the Petitioner-landlord. It is a settled position of law that once a premises is declared vacant u/s 12 of the Act, it is the landlord which will have the first charge on the premises. It is the release application of the landlord which, has to be considered first u/s 16(1)(b) of the Act and while considering this release application of the landlord, no prospective allottee has got any right to be even heard by, the District Magistrate (which being the authority has the power to either release or allot the building u/s 16 of the Act). All that has to be seen by the authority is, as to whether the landlord has a bona fide need for the premises. In case, the officer comes to the conclusion that the landlord has a bona fide need of the premises, the matter comes to an end and the premises has to be released in favour of the landlord, which ipso facto means that such a premises has now

become outside the purview of allotment. Reference has to be made here on the seminal decision of the Allahabad High Court in Talib Husain and Anr. v. 1st Addl. District Judge, Nainital and Ors.: 1986 (1) ARC 1, wherein the aforesaid law has been laid down by the Full Bench of Allahabad High Court.

12. In the present case, the authority concerned had dismissed the release application of the landlord Petitioner against which the revision was filed by the Petitioner-revisionist and the matter was remanded back to the authorized officer for considering afresh in the light of the observations made by the revisional authority. However, the release application of the Petitioner was once again dismissed on wholly irrelevant consideration and not only this, the allotment authority while dismissing the release application of the Petitioner relied upon the objections made by a prospective allottee which is not permissible in law and then the allotment officer came to the conclusion that there is no bona fide need of the Petitioner. On the other hand, without elaborating or assigning any reason, a finding was given that the Respondent No. 5 has a need of accommodation and, therefore, the premises, was allotted in his favour. Revision was again filed before the revisional authority, who rejected the revision of the landlord as well as some other prospective allottees vide his judgment and order dated 14-12-1988. It is this order of the revisional authority which has presently been challenged by the landlord, as well as by a prospective allottee.

13. The main thrust of the revisional authority while rejecting the release application of the Petitioner-landlord was on the Proviso to Section 16(2) which reads as follows:

Section 16. Allotment and release of vacant building. -(1).....

(2) No release order under Clause (b) of Sub-section (1) shall be made unless the District Magistrate is satisfied that the building or any part thereof or any land appurtenant thereto is bona fide required, either in its existing form or after demolition and new construction, by the landlord for occupation by himself or any member of his family, or any. person for whose benefit it is held by him, either for residential purposes or for purposes of any profession, trade, calling or where the landlord is the trustee of a public charitable trust, for the objects of the trust, or that the building or any part thereof is in a dilapidated condition and is required for purpose of demolition, and new construction, or that any land appurtenant to it is required by him for constructing one or more new buildings or for dividing it into several plots with a view to the sale thereof for purposes of construction of new buildings:

Provided that no application under this Sub-section shall be entertained for the purposes of a charitable trust the objects of which provide for discrimination in respect of its beneficiaries on the ground of religion, caste or place of birth.

14. While referring to the aforesaid proviso, the revisional court came to the conclusion that as the aims and objects of the Society are only limited to "Garhwalis" it is discriminatory in nature, hence, no release application on behalf

of such charitable trust (the trust being the landlord of the premises) can be entertained. The objections of the revisional authority were therefore to the trust being discriminatory on the grounds of religion and place of birth. According to the court below, the charitable trust only caters for "Garhwalis" and therefore, the building in dispute cannot be released in its favour. Moreover, according to the revisional court, there is a discrimination also relating to "place of birth" because the memorandum of association of this Society says that "Garhwalis" will be only "Garhwalis", who come from Pauri Garhwal, Tehri Garhwal and Uttarkashi. This Court, all the same, fails to understand as to how this Society is hit by proviso to Section 16(2) of the Act. Admittedly, as the name itself suggests it is a Society of "Garhwalis". Now, "Garhwali" is neither a religious denomination nor does the Memorandum of Association of the Society say that benefits of this Society are only for particular caste or religion. The term "Garhwali" denotes a people coming from a particular region in the hills (of the then State of U.P. which is now a part of Uttarakhand). Now, there are Hindu-"Garhwalis" as well as Muslim "Garhwalis" (though very few) and, hence, there can be no discrimination in terms of religion. Admittedly, there is no caste discrimination by the Society. As such, it cannot be said that the beneficiaries of the Society or the Trust are discriminated in terms of caste or religion. The third objection is of the place of birth. Again, a perusal of the Memorandum of Association of this Society says that there is no discrimination in terms of place of birth inasmuch as it does not say that the beneficiaries of the Society must be born in a particular place. The Learned Counsel for the Petitioner has also asserted that while giving rooms in "Dharmshala", there is no distinction made on this fact whether the guest is a "Garhwali" or a non-Garhwali. Statement has also been given at the Bar that the Memorandum of Association, as they stand, were in fact amended before the matter could be decided by the authority concerned. However, an objection has come to this Statement that this amendment was being brought in order to free the Petitioner i.e. the trust from the proviso as without the said amendments the trust was in fact clearly covered by this proviso, hence it was barred from even moving a release application. Moreover, this amendment was brought during the proceedings u/s 16 of the Act. This Court, however, does not see it worthwhile to go into this aspect as to when, how and to what purpose an amendment was brought out in the Memorandum of Association of the Society and what is going to be the impact of, such an amendment. This Court will only take into account the Memorandum of Association of the Trust as it existed prior to the filing of the release application by the landlord which is a trust. This is so because even the unamended Memorandum of Association of the Trust does not make the Trust discriminatory so that it is hit by the proviso to Section 16(2) of the Act, as it has already been discussed above.

15. One may, indeed, say that the objects and reasons of the Society are narrow or even parochial but they are not hit by the proviso inasmuch as there is no discrimination by the Society in terms of religion, caste and place of birth which

is the requirements of the proviso. Hence, there was no such handicap for the Society making it ineligible to move a release application for his own property, which it wants to use for a public purpose. Therefore, holding the Society as ineligible was a patent illegality committed by the revisional authority.

16. It has already been stated in the proceeding paragraphs that the landlord has the first charge or the first claim on the property and, therefore, all that has to be seen is the bona fide need of the landlord in the release application. All the same, in this case, the release application of the landlord has been rejected on the ground that it is not even eligible to move a release application as it makes discrimination on the basis of religion, caste and place of birth. It has already been seen that this finding of the revisional authority been seen that this finding of the revisional authority is totally incorrect and is alien to the facts of the (sic) and is based on a wrong inter-(sic)of the proviso to Section 16(2) of the Act of the facts of the case. Another point which both the courts below have taken in favour of the Respondent No. 5 is that the entire proceedings of declaring a "deemed vacancy" on the property in dispute were initiated by the Respondent No. b and, therefore, this benefit should go to him. This reasoning of the court below does not get any support from any provision of the Statute Once a building has been declared vacant as deemed to be vacant u/s 12 of the Act, the first application which has to be decided by the authority is the release application of the landlord, if such an application is on record and if the authority finds the application to be bona fide, then immediately an order of release has to be passed in favour of the landlord. Sadly, that has not happened in the present case and courts below have meandered on irrelevant considerations. Therefore, the writ petition No. 166 of 2003 deserves to be allowed and the order of the revisional authority is liable to be quashed.

17. Next is the writ petition No. 165 of 2003. This is a writ petition of a self proclaimed tenant of the premises who states that he was in possession of the property and the property was wrongly declared vacant u/s 12 of the Act. The gravamen of his argument is that his revision has been rejected on the ground that he had not challenged the order of vacancy u/s 12 of the Act and, therefore, it is not given to him to challenge the order in revision once allotment has been made u/s 16 of the Act. According to the Petitioner in this case, this reasoning of the revisional court is based on the law laid down by the Allahabad High Court in the case of Ganpat Roy and Ors. v. Additional District Magistrate and Ors. reported in 1985 (2) ARC 73, which says that in case the "vacancy order" has not been challenged by the revisionist, he forgoes his rights and subsequently cannot challenged the same when an order of allotment or release has been made u/s 16 of the Act. The Learned Counsel for the Petitioner states that the law laid down is no more a good law, in view of the Supreme Court's decision in the case of Achal Misra Vs. Rama Shanker Singh and Others, , wherein the Petitioner would have a right to challenge the order of vacancy along with the order of allotment/release. A perusal of the two judgments, referred above does make the submission of the Learned Counsel for the. Petitioner as correct.

However, in the present case the Petitioner had earlier challenged the order of deemed vacancy dated 13-07-1981 in revision before the District Magistrate, Saharanpur wherein the revision of the Petitioner was dismissed on the grounds of maintainability as the revisional court had relief upon the law laid down in *Tirlok Singh and Co. Vs. District Magistrate, Lucknow and Others*, and held that revision is not maintainable against an order of vacancy. Indeed, this was a law at the time when the revisional authority was deciding the said revision of Petitioner against the order of deemed vacancy under Section 16 of the Act. In *Trilok Singh & Company's case* (supra), the Supreme Court has stated as follows:

9.....The Court further observed that Section 18 gave a right of appeal against an order of allotment or release and that any person aggrieved by such an order could prefer an appeal to the District Judge and if the order of allotment or release was varied or prescribed by the District Judge in appeal, the District Magistrate had u/s 18(2) the power to place the parties back in the position which they would have occupied but for such order. The Court further pointed out that the Act did not provide for a hearing at the stage when the District Magistrate passed an order of allotment or release but any person aggrieved by such an order was entitled to ask the District Magistrate to review his order and if in the meanwhile any person in possession of the building had been evicted, the District Magistrate had the power, if he set aside or modified the order of allotment or release, to put the applicant back in possession.

18. The Supreme Court in the same judgment had further stated as follows:

It equally does not appear to be correct to hold that an order notifying the vacancy did no injury and caused no prejudice to the interests of any party because an order notifying the vacancy could be objected to and if any objections, were filed, they would have to be decided after considering, the evidence that the objector or any other person concerned might adduce and that after an order of allotment or release was passed following upon the notification of vacancy, the aggrieved person could file a review application or an appeal u/s 18.

19. Based on *Trilok Singh & Company's case* (supra), the revision of the Petitioner was dismissed. This order of the revisional authority was not challenged by the Petitioner. Since, the District Magistrate subsequently allotted the same accommodation to one Shri Suresh Chandra, this order was challenged in revision by the landlord and also by other (sic) allottees as well as the Petitioner while rejecting the revision of the Petitioner, the revisional authority stated that the matter regarding the deemed vacancy i.e. the order dated 13-07-1981 has become final (sic) was not challenged any further and this operates as *res judicata*. (sic) ground on which, the (sic) dismissed was that in view of (sic) decision of the Supreme Court in *Ganpat Roy's case* (supra), once an allotment order has been passed, a prospective allottee cannot challenge the order of vacancy in a revision. As already referred above, the Supreme Court had

an occasion to examine this aspect in another case, namely, Achal Misra's case (supra) wherein Ganpat Roy's case (supra) was re-examined and the Supreme Court has held that in ratio of Ganpat Roy's case cannot be, understood as laying down that the law that a failure to challenge the order notifying the vacancy then and there, would result in the loss of right to the aggrieved person of challenging the notifying of vacancy (sic) in a revision against the final (sic) of allotment. To summarize, the Supreme Court in Achal Misra's case (Supra) had further stated as follows:

In fact the Person aggrieved by the order notifying the vacant can be said to have two (sic) available. Either to challenge the order notifying the vacant then and there by way of (sic) petition or to make (sic) statutory challenge (sic) of allotment has been made and if he is aggrieved even thereafter, to approach the High Court. It would (sic) be a case of election of remedies

20. Therefore this Court has no doubt that even at the order of allotment, the (sic) legality of the order of the (sic) vacancy can be challenged and to that extent the revisional court was (sic) in saying that it is no more (sic) to challenge the (sic) of vacancy after the allotment order has already been made. (sic) the are not the entire facts the case Here the Petitioner had (sic) earlier challenged the order of vacancy in revision which was also (sic) the Petitioner did not challenge, the order made by the revisional (sic) this would certainly act as (sic) against the Petitioner. Moreover, it is too late in the day to rake up the matter regarding the "deemed vacancy" and, as such, this Court is not inclined to open the issue of vacancy in the present writ petition. Therefore, the writ petition of the Petitioner fails as this Court is not inclined nor does it feel just and proper to examine the deemed vacancy aspect at this late stage.

21. The order of the revisional court is, therefore, liable to be set aside and is, hence, set aside. However, while setting aside the judgment of the revisional court, the matter has to be remanded back to the revisional court for a fresh disposal of the same in the light of the discussion made above. The revisional court is directed to decide the rival claims of the Petitioner and prospective allottees including Respondent No. 5 in accordance with law and in the light of the observations contained in this judgment which is as follows:

First the release application of the landlord will be entertained and the bona fide need of the landlord will be ascertained by the revisional court and if it comes to the conclusion that the landlord has a bona fide need, then the premises in dispute must be released in favour of the landlord. The revisional court is not liable to hear any objections of any other prospective allottee while disposing of the release application of the landlord. On the other hand, if the revisional authority comes to the conclusion that the landlord does not have a bona fide need, then only it would hear the rival contentions of the prospective allottees and allot the premises to one in accordance with law.

22. It is directed that the revisional court will dispose of the matter as

expeditiously as possible and in no case later than six months from the date of production of certified copy of this order before the revisional court.

23. With the aforesaid directions, writ petition No. 166 of 2003 (M/S) is allowed. The impugned order dated 14-12-1988 is set aside and the matter is remanded back to the revisional court for deciding afresh in the light of the observations made above. The writ petition No. 165 of 2003 (M/S) is dismissed. No order as to costs.