

(2008) 10 AHC CK 0070

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 7682 of 1997

Jyoti Prasad Gongal

APPELLANT

Vs

IIIrd Additional District Judge, Agra and others

RESPONDENT

Date of Decision : 20-10-2008

Acts Referred:

Constitution of India, 1950 — Article 226
Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 —
Section 12, 12(1)(a), 12(1)(B), 12(1)(C), 16
Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Rules, 1972
— Rule 8

Citation : (2008) 10 AHC CK 0070

Hon'ble Judges : V.K.Shukla, J

Final Decision : Dismissed

Judgement

V.K. Shukla, J.—Jyoti Prasad has approached this Court questioning the validity of the order dated 7.7.1988 passed by Rent Control and Eviction Officer directing release of the premises in question in favour of the landlord exercise of its authority vested under section 16 of U.P. Act No. XIII of 1972 and order of its affordance dated 12.12.1996 passed by 3rd Additional District Judge, Agra in Revision No. 20 of 1991.

2. Petitioner has been tenant of shop No. 14/34A/16 Phawara Hospital Road Agra. Qua the said premises in question one Bijendra Singh Parmar moved application contending therein that premises in question is lying locked and thus, there is deemed vacancy of the premises in question. On the said application being moved Rent Control and Eviction Officer was asked to submit its report. There after Rent Control Inspector went on the spot and submitted its report. Along with said report submitted statement of Ravi Prakash Agarwal and Ramesh Chandra Jain that inspection was carried out by the Rent Control Inspector in their presence and it was found that said shop in question was closed was also appended. Rent Control Inspector on 29.1.1987 had submitted report and clearly mentioned therein that before taking decision respective parties be heard. After

said report in question has been submitted notices were issued but neither landlord nor sitting tenant entered appearance to answer to the same on the first call as such another notice was send. Senior Rent Control Inspector again made inspection of the premises on 25.3.1988. On the said date during repeat inspection, shop in question was found closed and in the front of the said shop one sugar cane crushing machine was found and it has been informed by neighbour shopkeeper that Jyoti Prasad has closed the shop for last 5 and 6 years. On 24.5.1988 order was passed declaring the vacancy. After said order has been passed application was moved for setting aside of ex parte order. Said order was set aside and release application had come forward on behalf of landlord. Landlord made specific statement that tenant has taken away entire article from the shop in question and locked the shop in question. During the course of the said proceedings after scrutinizing the facts mentioned in release application Rent Control and Eviction Officer found need of landlord to be bona fide and genuine one, and directives were issued for releasing of the shop in question. After said order was passed directing release of the premises in question possession pursuant to the same was taken on 15.3.1990 by the landlord. Tenantpetitioner thereafter moved application for review of the said order and as far as review application is concerned no order has been passed on the same. However application under section 5 of the Limitation Act was moved along with the revision preferred under section 18 of U.P. Act No. XIII of 1972 and detailed order was passed condoning the delay and thereafter revision itself has been taken and decided on merit. Said revision has been dismissed on 12.12.1996. At this juncture present writ petition has been filed.

3. Counteraffidavit has been filed mentioning therein that shop in question is situated in prime commercial locality of Agra the hub of entire medicine, jewellery, electronics, college books stationery and garments business of the Agra. It has been stated that after shop in question was vacated same is being used by the landlord for earning their livelihood and after death of her husband on 11.1.1999, the respondent No. 3/1 is all alone running S.T.D. Booth and photo stat center therein to earn her livelihood as there is no male member in the family. It has also been stated that earlier petitioner was carrying on business of medicine store under the name and style of M/s United Chemists in partnership with his elder brother Sri Shital Prasad Gupta and said business was closed by them in or about the year 197980 and their entire stock was removed by the tenant and the shop was lying closed dumped with expired medicines, empty almirah etc. and the shop in question was illegally retained by the tenant to induct therein unauthorized occupant and to earn huge premium from him as it was very valuable property. The factum of closure of the business since 197980 was admitted by Sri S.P. Gupta the brother and partner of the petitioner in the shop in question himself in his statement before the sales tax authority on 11.3.1981 on the basis of which the final assessment order was made by the sales tax authorities. It has been further contended that Brijendra Singh Parmar is own man of the petitioner and this was the reason notice issued to the

landlord were returned as incomplete address of landlord. It has been stated that inspection was made by Rent Control Inspector behind the back of the landlord and it was found that the shop in question was lying closed for a long time same was declared vacant. It has also been contended by the landlord that when he acquired knowledge of the said proceedings, landlord made an application for recall of the ex parte order against him. It has been further contended that order to proceed ex parte against landlord, was recalled. It has also been stated that possession of the shop was taken on 15.3.1990 and inventory was prepared of the goods lying in the shop. Photocopy of the same would go to show that entire stock was of expired medicines and in order to defraud this Court deliberately said endorsements have been removed while preparing photocopies of the same. It has also been stated that valid proceedings have been undertaken qua release of the shop in question.

4. Rejoinder affidavit has been filed disputing the averments mentioned in the counteraffidavit and reiterating the averments mentioned in the writ petition. It has been stated that size of the disputed shop is six ft. wide and four ft. deep and further it has been sought to be contended that only whole sale business has been closed down and retail sale of medicine continued till 1990 in disputed shop when he was forcibly dispossessed under the ex parte order of release dated 7.7.1988. It has also been contended that entire proceedings are out come of manipulation and maneuvering and inter se parties J.S.C.C. No. 49 of 1980 was on going wherein complete address was provided for and landlord was well aware of depositing of the rent up to 31.3.1990 which was deposited on 19.1.1990. In this background it has been sought to be contended proceedings are illegal and are ex parte to petitioner.

5. After pleadings inter se parties have been exchanged, present writ petition is being taken up for final hearing and disposal with the consent of the parties.

6. Sri S.K. Srivastava, Advocate, learned Counsel for the petitioner contended with vehemence that in the present case entire inspection which has been carried out was ex parte to the petitioner as at no point of time any notice whatsoever has been given to tenants and coupled with this it was not at all case of deemed vacancy, as from the premises in question tenant has never substantially removed his effects, in this background entire proceedings qua declaration of vacancy and release are ex parte and manipulated proceedings as such orders passed are liable to be quashed and possession of the said shop is liable to be restored back to the petitioner tenant.

7. Countering the said submission Sri P.C. Jain, Advocate contended with vehemence that in the present case notice has been sent on correct address to the tenant and in spite of the same he has failed to appear before Rent Control and Eviction Officer, then for such a situation tenant has to blame himself. Coupled with this in the present case petitioner who was an erstwhile tenant has rightly been held to have ceased to occupy the building within the meaning of section 12 (1) of U.P. Act No. XIII of 1972 as there was ample evidence available

on record to show and substantiate that he has substantially removed his effects and this was fully fortified from the circumstances that shop was lying locked for last many years and the front of the shop was occupied by a third party sweet cane juice seller and no business was being carried out from said place as all medicines found were beyond expiry date as such in these circumstances no interference is required.

8. In order to appreciate arguments advanced on behalf of parties relevant extinct of section 12 and section 16 of the U.P. Act No. XIII of 1972 are being looked into.

12. Deemed vacancy of building in certain cases, (1) A landlord or tenant of a building shall be deemed to have ceased to occupy the building or a part thereof.

(a) he has substantially removed his effects there from, or

(b) he has allowed it to be occupied by any person who is not a member of his family, or

(c) in the case of a residential building, he as well as members of his family have taken up residence, not being temporary residence, elsewhere.

(2) In the case of a nonresidential building, where a tenant carrying on business in the building admits a person who is not a member of his family as a partner or a new partner, as the case may be, the tenant shall be deemed to have ceased to occupy the building.

(3) In the case of a residential building, if the tenant or any member of his family builds or otherwise acquires in vacant state or gets vacated a residential building in the same city, municipality, notified area or town area in which the building under tenancy is situate, he shall be deemed to have ceased to occupy the building under his tenancy.

Provided that if the tenant or any member of his family had built any such residential building before the date of commencement of this Act, then such tenant shall be deemed to have ceased to occupy the building under his tenancy upon the expiration of a period of one year from the said date.

Explanation. for the purposes of this subsection.

(a) a person shall be deemed to have otherwise acquired a building, if he is occupying a public building for residential purposes as a tenant, allottee or licensee;

(b) the expression "any member of family", in relation to a tenant, shall not include a person who has neither been normally residing with nor is wholly dependent on such tenant.

(3A) If the tenant of a residential building holding a transferable post under any Government or local authority or a public sector corporation or under any other employer has been transferred to some other city, municipality, notified area or

town area, then such tenant shall be deemed to have ceased to occupy such building with effect from the thirtieth day of June following the date of such transfer or from the date of allotment to him of any residential accommodation (whether any accommodation be allotted under this Act or any official accommodation is provided by the employer) in the city, municipality, notified area or town area to which he has been so transferred, whichever is later.

(3B) If the tenant of a residential building is engaged in any profession, trade, calling or employment in any city, municipality, notified area or town area in which the said building is situate, and such engagement ceases for any reason whatsoever, and he is landlord of any other building in any other city, municipality, notified area or town area, then such tenant shall be deemed to have ceased to occupy the first mentioned building with effect from the date on which he obtains vacant possession of the last mentioned building whether as a result of proceedings under section 21 or otherwise.

(4) Any building or part which a landlord or tenant has ceased to occupy within the meaning of subsection (1) or subsection (2), subsection (3), subsection (3A) or subsection (3B) shall, for the purposes of this chapter, be deemed to be vacant.

(5) A tenant or, as the case may be, a member of his family, referred to in subsection (3) shall have a right, as landlord of any residential building referred to in the said subsection which may have been let out by him before the commencement of the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) (Amendment) Act, 1976 to apply under Clause (a) of subsection (1) of section 21 for the eviction of his tenant from such building, notwithstanding that such building is one to which the remaining provisions of this Act do not apply.

16. Allotment and release of vacant building. (1) Subject to the provisions of the Act, the District Magistrate by order.

(a) require the landlord to let any building which is or has fallen vacant or is about to fall vacant, or a part of such building but not appurtenant land alone to any person specified in the order (to be called an allotment order), or

(b) release the whole or any part of such building, or any land appurtenant thereto, in favour of the landlord (to be called a release order) Provided that in the case of vacancy referred to in subsection (4) of section 12, the District Magistrate shall give an opportunity to the landlord or the tenant, as the case may be, of showing that the said section is not attracted to his case before making an order under Clause (a);

(2) No release order under Clause (b) of subsection (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 land 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 purposes 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 a new buildings.

9. Hon''ble Apex Court in the case of Harish Tandon v. Additional District Magistrate, 1995 (1) ARC 220=1995 (25) ALR 184 qua deeming provisions of U.P. Act XIII of 1972 mentioned as follows :

"20. The Act with which we are concerned is a statute which purports to regulate the relationship between the landlord and the tenant and in many respects contains provisions for achieving that object which are different from the Transfer of Property Act. As such it was open to the framers of the Act to look to the interest of the tenant as well as the landlord and to prescribe conditions under which the tenant can continue to occupy a building and having contravened any of the conditions prescribed shall be deemed to have ceased to occupy the building."

10. Section 12 of the Act, clearly expresses its intention by creating legal fiction i.e., something shall be deemed to have been done which in fact and truth has not been done. The role of Court, at such juncture is to find out after examining and ascertaining as to for what purpose and between what persons such statutory fictions is to be resorted to. Thereafter full effect has to be given to such statutory fiction and same has to be carried to its logical conclusion. Amongst various grounds provided for presuming deemed vacancy under Clause (a) of subsection (1) of section 12 a landlord or tenant of a building shall be deemed to have ceased to occupy the building or part thereof, if he has substantially removed his effects there from.

11. At this juncture Rule 8 of the U.P. Urban Buildings (Regulation of Letting Rent and Eviction) Rules, 1972 are being looked into :

Rule 8 : Ascertainment of vacancy [sections 12, 16 and 34 (8)]. (1) The District Magistrate shall before making any order of allotment or release in respect of any building which is alleged to be vacant under section 12 or to be otherwise vacant or to be likely to fall vacant get the same inspected by a Gazetted Officer.]

(2) The inspection of the building, so far as possible, shall be made in the presence of the landlord and the tenant or any other occupant. The facts mentioned in the report should wherever practicable, be elicited from at least two respectable persons in locality and the conclusion of the inspection report shall be pasted on the notice board of the office of the District Magistrate for the information of the general public, and an order of allotment may be passed not before the expiration of three days from the date of such pasting, and if in the

meantime any objection is received, not before the disposal of such objection.

(3) Any objection under subrule (2) shall be decided after consideration of any evidence that the objector or any other person concerned may adduce.]

12. Rule 8 of U.P. Urban Buildings (Regulation of Letting Rent and Eviction) Rules 1972 deals with ascertainment of vacancy and same obliges the Rent Control and Eviction Officer before proceedings to declare vacancy to get the place in question inspected and further obligation is that inspection of the building, so far as possible, shall be made in the presence of the landlord and the tenant or any other occupant. The facts mentioned in the report should wherever practicable, be elicited from at least two respectable persons in locality and the conclusion of the inspection report shall be pasted on the notice board of the office of the District Magistrate for the information of the general public, and an order of allotment may be passed not before the expiration of three days from the date of such pasting, and if in the meantime any objection is received, not before the disposal of such objection and further any objection under subrule (2) shall be decided after consideration of any evidence that the objector or any other person concerned may adduce.

13. After vacancy in question is ascertained, then only in term of section 16 allotment order could be passed and before that, if landlord has come forward requesting for release of premises in question pleading bona fide genuine need, the same has to be given precedence, and only in the event of release being refused allotment could be taken up.

14. Hon"ble Apex Court in the case of Yogendra Tewari v. D.J. Gorakhpur 1984 (2) ARC 7=1984 (10) ALR 285 has taken the view that question of vacancy being jurisdictional fact must be ascertained in accordance with procedure laid down in Rules. Relevant paragraph 5 is being extracted below :

"5. It is needless to stress that the making of an order of allotment by the District Magistrate under section 16 (1) (a) of the Act consists of two stages. The first stage is actual vacancy of a building or a part thereof in consequence of an intimation given by the landlord or the tenant under section 15, or a declaration of deemed vacancy of such building or part thereof under section 12 (4). It is clear from the terms of the proviso to section 16 (1) that in the case of a deemed vacancy under section 12 (4) of the Act, the District Magistrate is required to give an opportunity to the landlord or the tenant, as the case may be, of showing that no declaration of deemed vacancy under section 12 (4) could at all be made in his case before making an order of allotment under section 16 (1) (a). The use of the word "shall" in the proviso to section 16 (1) makes the requirement mandatory. The District Magistrate therefore cannot make an order of allotment under section 16 (1) (a) on the strength of deemed vacancy under section 12 (4) until the landlord or the tenant, as the case may be, has an opportunity of being heard in the matter. The District Magistrate is required in terms of Rule 8 (2) to give an opportunity to the landlord to file his objection or

make his submission, if any, to the making of an order of allotment under section 16 (1) (a). In the case of deemed vacancy referred to in section 12 (4), he is entitled to show that none of the Clauses (a) to (c) of section 12 (1) comes into play. The second stage is reached when there is a deemed vacancy under section 12 (4) or actual vacancy in consequence of an intimation under section 15. Under Rule 9 (3) the District Magistrate is required to serve a notice on the landlord intimating of the date on which the question of allotment will be considered. The landlord may, in response to the notice issued to him under Rule 9 (3), make out a case for release of the building or a part thereof, or any land appurtenant thereto, 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 et cetera. The landlord has clearly a right to have an order passed by the District Magistrate under section 16 (1) (b) for the release of the building or a part thereof for any of the purposes set out in section 16 (2). The District Magistrate may release the building or part thereof or any land appurtenant thereto under section 16 (1) (b) where any of the aforesaid conditions are proved to exist to his satisfaction. If the landlord fails to satisfy the District Magistrate on any of these aspects, the District Magistrate would reject his application for release and proceed to make an order of allotment under section 16 (1) (a). The proviso to section 16 (1) has been introduced to meet with the requirements of principles of natural justice. As vacancy, actual, expected or deemed, is a jurisdictional fact for the making of an order of allotment under section 16 (1) (a) or for an order of release under Clause (b) thereof the District Magistrate must follow the procedure prescribed under the Act and the Rules framed there under. Even in the absence of these provisions viz., proviso to section 16 (1) and Rules 8 (2) and 9 (3) of the Rule; framed under section 41 of the Act, the principle of would, clearly be applicable. The District Magistrate in making an order of allotment under Clause (a) or an order of release under Clause (b) of section 16 (1) clearly exercises a quasijudicial function and therefore he has the duty to hear. There must be an impartial objective assessment of all the pros and cons of the case after due hearing of the parties concerned, the impugned order of allotment passed by the Rent Control and Eviction Officer having been made without affording to the appellant an opportunity to have his say in the matter was clearly a nullity.

15. Hon"ble Apex Court in the case of Achal Mishra v. Rama Shankar Singh 2005 (5) SCC 531=2005 (59) ALR 591 (SC)=2005 (29) AIC 110 again considered the aforementioned scheme as follows :

"11. On the scheme of the Act, it is clear that the preliminary step is to declare a vacancy. At this stage, an enquiry has to be made including an enquiry involving at least two respectable neighbours. It is thereafter that the vacancy has to be notified and objections invited. This is followed by either dropping of the proceedings on the objections being upheld that there was no vacancy or by allotment to a tenant on finding the vacancy or in ordering a release of the building, in case a landlord was found entitled to have such a release under the

Act. Therefore, the notifying of a vacancy is only a step in the process of making an allotment of the building to a tenant. The Act contemplates that no building should be let out by a landlord except through the process of allotment by the rent control authority. Since the order notifying a vacancy is only a step in passing the final order in a proceeding under the Act regarding allotment, it is clear that the same could be challenged while challenging the final order, unless there is anything in the Act precluding such a challenge or conferring a finality to the order notifying a vacancy. It was held long ago by the Privy Council in *Moheshur Singh v. The Bengal Government* (1859) 7 Moo Ind App 283 (302) :

"We are not aware of any law or Regulation prevailing in India which renders it imperative upon the suitor to appeal from every interlocutory order by which he may conceive himself aggrieved, under the penalty, if he does not do so, of forfeiting forever the benefit of the consideration of the Appellate Court. No authority or precedent has been cited in support of such a proposition, and we cannot conceive that anything would be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon the suitor the necessity of so appealing, whereby on the one hand he might be harassed with endless expenses and delay, and on the other inflict upon his opponent similar calamities."

14. It is thus clear that an order notifying a vacancy which leads to the final order of allotment can be challenged in a proceeding taken to challenge the final order, as being an order which is a preliminary step in the process of decision making in passing the final order. Hence, in a revision against the final order of allotment which is provided for by the Act, the order notifying the vacancy could be challenged. The decision in *Canpat Roy's* case, which has disapproved the ratio of the decision in *M/s. Trilok Singh and Co.*, cannot be understood as laying down that the 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 itself, in a revision against the final order of allotment. It has only clarified that even the order notifying the vacancy could be immediately and independently challenged. The High Court, in our view, has misunderstood the effect of the decision of this Court in *Ganpat Roy's* case and has not kept in mind the general principles of law governing such a question as expounded by the Privy Council and by this Court. It is nobody's case that there is anything in the Act corresponding either to section 97 or to section 105 (2) of the Code of Civil Procedure, 1908 precluding a challenge in respect of an order which ultimately leads to the final order. We overrule the view taken by the Allahabad High Court in the present case and in *Smt. Kunj Lata v. Xth Additional District Judge, Kanpur Nagar and others* (supra) that in a revision against the final order, the order notifying the vacancy could not be challenged and that the failure to independently challenge the order notifying the vacancy would preclude a successful challenge to the allotment order itself, in fact, the person aggrieved by the order notifying the vacancy can be said to have two options available. Either to challenge the order notifying the vacancy then and there by way of a writ

petition or to make the statutory challenge after a final order of allotment has been made and if he is aggrieved even thereafter, to approach the High Court. It would really be a case of election of remedies."

16. After noticing the aforementioned provisions and judicial pronouncement the first question to be adverted to, is as to whether vacancy in question has been declared after due notice and opportunity to petitioner as envisaged under Rule 8 (2) of 1972 Rules.

17. On the touchstone of the provisions quoted above, facts of the present case are being adverted to. This is undisputed position that petitioner Jyoti Prasad had been carrying on medicine business from shop No. 14/34A/16 Phawara Hospital Road Agra. Qua the said premises in question landlord had filed J.S.C.C. Suit No. 49 of 1980 on the ground that tenant have committed default in making payment of rent of the said suit which had been on going before Judge Small Causes Court. One Bijendra Singh Parmar moved application for allotment of the said premises under section 12 (1) of U.P. Act No. XIII of 1972 mentioning therein that he intends to open general merchandise business from the said premises as erstwhile tenant has ceased to occupy the shop and shop in question is lying absolutely unused, as such vacancy is there. On the said application being moved directives were issued by Rent Control and Eviction Officer to register the case and asked Rent Control Inspector to submit its report. After the said order has been passed, Rent Control Inspector in presence of Ravi Prakash Agarwal and Ramesh Chandra Jain made the spot inspection and submitted its report. From the report of inspector dated 29.1.1987, this much is clear that neither tenant nor landlord were present at the point of time when inspection had been carried out. There is nothing on record to show and substantiate that inspector, informed in writing to landlord or tenant the date and time when he would carry out inspection. Rent Control and Eviction Officer on 29.1.1987 while submitting report mentioned therein that it was informed that shop in question is lying closed for long time and even at the point of time of inspection same was closed and as such necessary incumbents be heard before taking any decision. After said reports dated 29.1.1987 was filed notices were sent by registered post but same has been returned with the note that shop in question was found closed then it was pasted on the shop in question. Again inspection was carried out by Senior Rent Inspector and thereafter on 25.3.1998 report has been submitted and it was mentioned therein that shop in question was found closed and in front of the said shop sugar cane crushing machine was installed, keeping in view such a situation vacancy was declared and thereafter application was moved for recall of the order proceeding ex parte and same had been allowed. Revisional Court while allowing application under section 5 of Limitation Act, clearly and categorically, mentioned that there was no sufficient service on petitioner, and specially when shop was lying closed Endeavour ought to have been made to make service on residential address. Revisional Court while considering matter on merit summoned the original record and scrutinized the fact as follows :

"As a matter of fact this submission of the learned Counsel for the revisionist is not correct, when the original record of the Trial Court has been perused and scrutinized. The learned Trial Court issued notice by ordinary process as well as by registered process not once but twice and both the occasions neither the tenant Jyoti Prasad, revisionist nor the landlord, opposite party Satish Chand Surana appeared before the Court below to contest the petition. The learned Trial Court has got the inspection carried out twice, firstly by the Inspector and secondly by the Chief Inspector. Both the Inspectors submitted the reports dated 29.1.1987 and 25.3.1988 and both the occasions the shop was found closed and relevant extracts of the reports of both the inspectors were disclosed. In these circumstances firstly there is no error of noncompliance of the provision of notice to be issued by the Court below as notices were issued not once, but twice and not only by ordinary process but by both ways, firstly by ordinary processes and secondly by registered post and even once again registered processes were repeatedly issued. On both the occasions the shop in question was found locked and at the time of the first report the inspector reported that Jyoti Prasad, the tenant has kept the shop locked for months together and on the second occasion it was again found locked and the neighbours told the Chief Inspector that the shop has been closed for the last 56 years. Having considered the entire aspect, the learned Trial Court issued an ex parte declaration of the vacancy."

18. In the fact of present case this much is abundantly clearly that inspection on both the occasions has been carried out by Inspector and Chief Inspector, in the absence of landlord and tenant both and at no point of time landlord and tenant were informed of the date and time by Inspector/Chief Inspector when they were proposing to inspect the premises in question. Coupled with this, once proceedings had been commenced on the premises, that shop in question was lying locked and unused by tenant then sending of notice at the address of the shop, cannot be subscribed by any means, and the said notice ought to have been sent at the residential address, so that tenant could have turned up and could have contested the proceedings, in case he so desired. Petitioners have contended that vide paper 12A/15, notice has been sought to be sent on residential address of petitioner and address therein has also been incorrectly mentioned, even shop number has been incorrectly mentioned and it is surprising that adverse report has been there of service. In this background inevitable conclusion is that vacancy has been declared without following procedure as envisaged in Rule 8 and release orders have been passed in breach of the provision as contained under the proviso to section 16 (1) (a) i.e., without providing opportunity of hearing to petitioner.

19. The next question to be adverted to in the facts of present case is as to when proceedings have been found in breach of Rule 8 of 1972 Rules and in breach of section 16 (1) (a) of U.P. Act No. XIII of 1972 then should matter be remanded back for fresh consideration and release/allotment order passed, based on the same be quashed ipso facto or the merit of the matter/action be looked into by this Court specially when period of eighteen years have elapsed and there is a

material on record to decide the issue raised.

20. Once vacancy has been declared in breach of Rule 8 and section 16 (1) (a), without affording opportunity to landlord or tenant as the case may be, the said action cannot be subscribed and the release order/allotment order will have to go and fresh exercise will have to be undertaken after providing opportunity of hearing, that is the matter will have to be remitted back for fresh adjudication. There will be one exception to the said rule, as principle of natural justice cannot be put in straight jacket formula when the matter is pending for long and remanding the matter back on admitted position would be useless formality.

21. Hon'ble Apex Court in the case of R.E.V. Gounder v. V.V.P. Temple 2004 (13) AIC 389 (SC)=2005 (61) ALR 11 (Sum.) R.C. Keshwani v. Dwarka Prasad 2002 (48) ALR 275 (SC) has taken the view that when the matter is pending for long remand must be avoided. Hon'ble Apex Court in its authority Shall v. Manoj Kumar, 2004 (55) ALR 179 (SC)=2004 (18) AIC 369 placing reliance on earlier judgment of Hon'ble Apex Court Surya Dev Rai v. R.C Rai, 2003 (52) ALR 707 (SC)=2003 (9) AIC 1 has taken the view that in exercise of writ jurisdiction High Court has the jurisdiction also to pass itself such a decision or direction as inferior Court or Tribunal should have made.

22. In the present case, eighteen years period has already elapsed, as such matter is not being remanded back, rather to the contrary parties have been asked to address the Court on the merits of action taken and the parties to the dispute have readily advanced arguments on the merits of action taken.

23. Much stress has been laid on the fact that in the present case petitioner has not at all substantially removed his effect from the shop in question as such by no stretch of imagination deemed vacancy in question could have been declared. Said situation has been sought to be repelled from the side of landlord.

24. At this juncture view point of this Court and Hon'ble Apex Court is being looked into.

25. This Court in the case of Dr. S.N. Ghosh v. Rent Control and Eviction Officer 1975 (1) ALR 594 has observed that the above subsection contemplates three sets of circumstances, on the existence of any of them deeming provision is attracted. Clause (a) contemplates that if the landlord or the tenant substantially removes his effects from the building, vacancy shall be deemed to have taken place. Clause (b) contemplates that if the landlord or the tenant permits the building in question to be occupied by any person who is not a member of his family there will be vacancy. Clause (c) contemplates that in case of residential building if the landlord or the tenant as well as the member of his family as defined under the Act take up residence elsewhere not being temporary residence, the deeming provision shall come into play and the Rent Control and Eviction Officer will be entitled to declare a vacancy in the building and allot the same. Section 11 of the Act prohibits letting of any building except in pursuance of an allotment order issued under section 16 of the Act. The Act prohibits tenant

as well as landlord to allow any person to occupy any building or part thereof except in pursuance of an allotment order issued under section 16 of the Act. In a case where a landlord or a tenant contravenes these provisions and allows any other person who is not a member of his family to occupy the building or a portion thereof, the Act does not recognize him as a valid occupant and for that purpose section 12 has been enacted to create a legal fiction so that on the existence of the circumstances enumerated therein vacancy may be declared even though the building may physically be under the occupation of some person.

26. A careful reading of the three Clauses (a), (b) and (c) of section 12 (1) makes it amply clear that the legislature intended that if the tenant or landlord removes his effects substantially from the building in that case legal fiction would be attracted. The expression "substantially removing his effect" is of great significance. It does not contemplate removal of some household effects on the contrary it envisages that for all practical purposes the landlord or tenant as the case may be should be found to have practically removed all his household effects from the accommodation in question. Clause (b) is attracted when a tenant or landlord allows any person who is not a member of his family as defined in section 2 (g) of the Act to occupy the building. The provision is intended to prevent subletting and unauthorized occupation without allotment order. But the material question then arises as to whether it is open to a tenant to appoint a caretaker to look after his household effects and the building during the period of his temporary absence from the station. In enacting Clause (b) the legislature intended that the legal fiction should be applicable only when the tenant or the landlord allows the premises to be occupied by some other person surreptitiously with a view to defeat the provisions of the Act. The occupation by such a person if intended to be of a permanent nature the deeming provision would be attracted and vacancy would occur in law. But the legislature never intended that if a tenant goes out on leave or for tour for six months or for a year and in that case if the building is occupied by a servant or any of his family friend with a view to keep watch on his goods which may be kept in the building vacancy shall be declared or deemed to have occurred. It does not require any argument that a servant is not family member as defined in the Act and if the respondent contention is accepted, even the occupation of the house by a servant in the absence of the tenant may attract the deeming provision to declare the building vacant. This was never intended by the legislature in enacting Clause (b) of subsection (1) of section 12. A family friend may be kept to keep watch on the household effects of the tenant or the landlord during his temporary absence. In my opinion it is no difference in law, if the tenant permits his family friend to occupy a portion of the accommodation as caretaker during his absence or if a servant is allowed to reside therein for keeping watch. What is material is the dominant intention of the tenant, if on enquiry it is found that the tenant had gone out and that he had vacated the premises and allowed another person to occupy the building under the guise of a family friend although he had no intention or necessity to reside in the building, the deeming provision would

apply. But if it is found that the tenant had gone out temporarily and that he was to return back and continue to reside in the building, there would be no question of any vacancy. Occupation by a third person rules out a temporary occupation by caretaker or guest but if the person concerned is allowed to occupy the house exclusively on a permanent basis then the legal fiction would come into play and there would be vacancy. The determination of this question would therefore, depend on the facts of each case. Similarly under Clause (a) if it is proved that the tenant has not substantially removed his effects from the house in question the deeming provision would not come into play and the house cannot be declared vacant. It is well accepted principle that deeming provisions must be construed strictly. The expression "substantially" means that the tenant has removed almost all his belongings which may indicate his intention of not coming back to occupy the house in question. The deeming provision can, however, not be made applicable if it is found that only part of the belongings of the tenant have been removed and his furniture, luggage and other belongings are still kept in the house under the charge of a caretaker. As already discussed the real test to determine vacancy under the deeming provision is the intention of the tenant which can be inferred from the proved facts and circumstances.

27. This Court in the case of *B.P. Sewal v. District Judge*, AIR 1982 All. 504 has mentioned that removal must be in such manner that a further living was not possible. In other words the impression must be that the tenant did not intend to come back. Relevant extract of the aforesaid judgment is being extracted below :

12. Section 12 (1) (a) speaks of the tenant's substantially removing his effects from the premises in dispute. The words "substantially removed" mean something more than mere partial removal. The use of the word substantial means that the tenant has removed his household effects in such a manner that a further living was not possible e.g., if the tenant removed all the cots and beddings, kitchen, wares, tables and chairs, utensils, crockery and cutlery or thing required in the bath room it would be possible to draw an inference that the tenant has substantially removed his effects. In other words the impression must be that the tenant did not intend to come back. This Court had occasion to consider the matter in the case of *Smt. Maddi Devi v. Additional District Judge* 1981 ARC 167 and in the case of *Dr. S.N. Ghosh v. R.C. and E.O.* 1975 (1) ALR 594. In the latter case *K.N. Singh, J.* had occasion to consider the expression "substantially removed his effects". It was observed :

"It does not contemplate removal of some household effects, on the contrary it envisages that for all practical purposes the tenant or the landlord, as the case may be, should be found to have practically removed all his household effects from the accommodation in question."

It was further observed that the deeming provisions cannot be made applicable if it is found only part of the belongings of the tenant had been removed and his furniture and luggage were still kept in the house under the charge of a caretaker.

14. In regard to the question of the petitioner having taken up residence elsewhere, the Rent Control and Eviction Officer concluded that the petitioner, his wife and children were all settled in Nigeria. The District Judge affirmed this finding, but has not referred to any evidence which would show that the petitioner and the members of his family had taken up residence permanently in Nigeria. The affidavit of the petitioner on record shows that he was frequently coming to Dehradun from Nigeria. Besides, his children had received education in Dehradun and his wife was also there during the period they were receiving education and the petitioner had often come from Nigeria on annual leave and stayed in the premises in dispute; the electric connection of the premises was in their name and also their licence besides all their household effects in the premises in dispute. Apart from it, it was stated by the petitioner that he and his family were citizens of India held valid passports and he had gone to Nigeria temporarily and had not settled there permanently. As a matter of fact, he intended to come back to India finally in May, 1979. None of these matters seem to have been considered by the District Judge who has chosen to rely entirely on third respondent's version as given in his affidavit. It, therefore, shows that the relevant material on record had not been considered and had been ignored."

28. This Court in the case of *Satish Chandra v. IIIrd A.D.J. and others*, 1981 RRC page 85 this Court on facts where some useless material was found kept in the premises has observed that the finding that premises were in virtual disuse implies the finding that the effects in the premises had been removed by the tenant with the result that premises ceased to be occupied. Relevant paragraph 3 is being quoted below:

"3. The question turns upon the proper interpretation of the words "has substantially removed his effect there from" and determination whether the facts of the present cases are covered by this phrase. The facts may be considered first. The inspector's report dated 16.3.1974 Annexure 3 to the writ petition was that he saw the Hathikhana in a locked condition when the main gate was locked and was not opened by the petitioner. The petitioner has asserted that he used to tether his cattle in it. The inspector noted that he looked over the enclosure wall and found the premises to be lying vacant. The Commissioner also inspected the premises in the locked condition from outside. He reported that the kotha was vacant and had no goods therein. That only 3 or 4 beams, some thatch, some broken lanes tins and a few hoe blades (phawras) were lying there and the courtyard was also quite empty. Also that it seemed that the house had been lying in such disuse for such long time. The local inspection note dated 18.10.1975 of the Rent Control and Eviction Officer was that he found some old doorframes, old beams, old nails and timber and some new iron material in the house which was asserted by the tenant to belong to his wife, the Delegation District Magistrate, who decided the case had also made a surprise inspection on 4.10.1977 and has noted in his order that he found some building material and old articles inside the building but the large space was lying vacant and that he did not find any cart horses or any other cattle in the premises. The case of the

petitioner vide his objection Annexure 5 to the petition was that he was using the premises for keeping stock, storing the packaging material and parking bullockcarts, horses and other cattle which brought the goods to his kachchi arhat and such user had been going on for a long time. Also that his goods and bardana were kept in the covered hall and the enclosed Sahan was used as parking space and that there had been no change in the manner of user and he had not removed any effects from the premises. The Rent Control and Eviction Officer had found some open space in front of the petitioner's kachhi arhat shop which was used for parking of rickshaw etc. It was urged on behalf of the petitioner that before section 12 (1) (a) can apply, there must be positive evidence about the goods that were kept in the premises as well as that the same had been removed at any specific time and that such evidence was lacking in the present petition. I am inclined to think that the petitioner's own case being that the covered hall was used for storing stock and bardana and the sahan for parking carts and cattle etc., the finding that the premises were vacant and in virtual disuse implied the finding that the effects in the premises had been removed by the tenant with the result that the premises ceased to be in use. The present is not a case where the tenancy does not involve keeping of any effects in the tenanted premises. In such a case it may not be possible to say that effects have been removed but where keeping of effects is admitted but the premises are found to be virtually vacant, and not merely temporarily I think it can be properly held that the effects had been removed and subject to the question of retrospectively to presently discussed the case is covered by the language of section 12 (a) of the Act. It is not necessary for the landlord to lead positive evidence about the actual removal. Therefore, the finding that the petitioner had substantially removed his effects from the premises can not be questioned."

29. This Court in the case of Vinoba Gramoday Sangh, Barbartpur, District Dehradun v. District Judge, Dehradun and others 1985 (2) ARC 253 has taken the view that merely report of Rent Control Inspector shows that he had found the shop in question locked and the persons of the locality informed him that business was not being carried on. The report of Rent Control Inspector could not constitute evidence to record a finding that the tenant has substantially removed his effects from the shop in dispute. Paragraphs 5 and 6 of the aforesaid judgment is being quoted below:

"5. Learned Counsel for the petitioner has then contended that the earlier order declaring the vacancy passed by the Rent Control and Eviction Officer suffers from an error of law apparent on the face of the record inasmuch as, in the aforesaid order vacancy has been declared under section 12 of the U.P. Act No. 13 of 1972 without recording a finding either under section 12 (1) (a) or any other clause of section 12 (1). Learned Counsel for the respondent on the other hand has contended that on the own showing of the petitioner in this writ petition a case was made out under section 12 (1) (b) of the Act as the petitioner has allowed the premises to be occupied by person who is not a member of his

family.

6. Admittedly the premises in dispute is not a residential building and therefore, deemed vacancy cannot be declared under the provisions of section 12 (1) (c) of the Act. Deemed vacancy could only be declared either under section 12 (1) (a) or under section 12 (1) (b). A bare perusal of the impugned order shows that neither nay finding has been recorded, so as to make out a case under section 12 (1) (a) nor under section 12 (1) (b). I have perused the report of the Rent Control Inspector also which has been annexed with the counteraffidavit. The report of the Rent Control Inspector only shows that the premises were found locked and that the persons of the locality informed him that business was not being carried on by the petitioner. This report by the Rent Control Inspector could not constitute evidence to record a finding that the tenant has substantially removed his effects from the shop in dispute or he has allowed it to be occupied by any person who is not a member of his family. Learned Counsel for the respondents wants this Court to record a finding on the basis of the material which has been filed in this writ petition so as to make out a case under section 12 (1) (b) of the Act. In my opinion, it would not be proper to record a finding in these proceedings on this question inasmuch as in case the landlord brings his case under section 12 (1) (b) of the Act, the petitioner will have to be afforded an opportunity to rebut the case which is put forward by the landlord."

30. This Court in the case of Gopal Krishna Mittal v. Rent Control and Eviction Officer, Mussori Dehradun and others ARC 1985 (2) 537 has taken the view that while declaring deemed vacancy finding will have to be recorded that tenant has substantially removed his effect from the premises in question. In the absence of the same order declaring vacancy cannot be allowed to stand.

31. Hon"ble Apex Court in the case ui R.K. Shukla v. Sudhrish Narain Anand 2008 (7) SCC 393=2008 (72) ALR 612 (SC) has taken the view that gate being locked would not mean substantial removal of effects. Paragraph 23 is being quoted below.

"23. In our view, the question of deemed vacancy cannot arise at all in view of the facts, which would be evidenced from the order of the R.C. & E.G. and the report of the R.C.I. From the said order of the R.C. & E.G., it does not appear that the respondent had substantially removed his effects from the disputed premises. As stated hereinabove, the fact of the gate being locked and the absence of the respondent at the time of the inspection would not mean that substantial removal of effects of the respondent had been made. In view of our discussions made hereinabove, we are not of the view that any deemed vacancy had occurred and on this ground, we are not inclined to interfere with the judgment of the High Court."

32. On the parameters set out facts of the present case are being looked into. In the present case shop in question has been found closed and there has been additional material to infer that petitioners business was not at all being carried

on as in front of shop in question sugar cane juice machine was found installed along with sugarcane and generator. Qua this factual assertion, no rebuttal is there except for the fact that petitioner has not been heard. Apart from this, after possession has been taken over by the landlord claim of petitioner is fully exposed as each and every medicine found were already expired and in case petitioner has been carrying on his business as claimed by him, such state of affair would not at all have been existence. This fact shows that deliberately and willfully false statement of fact was mentioned by him qua running of his business. Apart from this, before this Court petitioner's specific case is that he was carrying on business till possession was taken over with his elder brother S.P. Gupta. In the counteraffidavit documentary evidence of Sales Tax department has been brought on record by annexing the same as C.A.1 showing that business of United Chemists was closed. No documentary evidence worth name has been produced by petitioner to show that any business was being carried out from the premises in question, except for bald statement of fact. In case mere lock would have been there such inference could not have been drawn of substantial removal of effects, but once evidence is there showing complete disuse of the premises for the purpose it was rented out and for all practical purpose removal of his effects from the premises question, i.e., some thing more than partial removal then there can be" no other conclusion that petitioner has substantially removed his effects. Here as mentioned above, shop was lying closed, sugarcane juice machine was installed, in front of shop where no business was being carried out, all medicines found were expired, no electricity connection was there, few almirahs were there in this background keeping of some effects only for the purposes of retaining tenancy cannot be subscribed, as for all practical purposes premises is vacant. In view of this factual position, in the facts of present case matter is not being remitted back to find out as to whether petitioner has substantially removed his effect or not, as on admitted position after eighteen years of litigation it would be nothing but empty formality.

33. The other ground for refusing relief to petitioner is his conduct, before this Court in not approaching the Court with clean hands. Petitioner was conscious of the fact that all medicines found in his shop were expired. He appended the said documents to show that said medicines were in his shop and he has not substantially removed his effects, and he had been carrying on business. Xerox copy of said documents were filed and most surprising feature of said documents running from pages 38 to 53 is that the endorsement made by Doctor that same are expired medicine has not all been shown whereas same documents have been appended by landlady, along with counter affidavit, wherein such endorsements with dates are there. On being confronted with such a situation petitioner has no reply to submit.

34. Moreover, in the present case brother of petitioner never came forward to question the validity of proceedings and reason appears to be obvious as he had already made statement before sales tax authorities qua closure of business.

35. Apart from this in the present case possession in question has been taken over 18 years back and landlady is widow and from the said premises it has been averred by her that she is carrying on P.C.O., photocopy business which is her sole source of livelihood. There is also evidence on record to show and substantiate that petitioner is staying at Delhi as he has duly sent letter addressed to the Chief Justice of Uttar Pradesh, Allahabad High Court, Allahabad which is on record from Jyoti Prasad S17 School Block Shakarpur Delhi, showing that he is residing at Delhi.

36. Consequently, present writ petition in the facts of case is dismissed.