
(1961) 05 AHC CK 0024
In the Allahabad High Court
Case No : Special Appeal No. 501 of 1959

Kailash Chandra Jain and Others	Vs	APPELLANT
State of U.P. and Others		RESPONDENT

Date of Decision : 19-05-1961

Acts Referred:

Uttar Pradesh (Temporary) Control of Rent and Eviction Act, 1947 — Section 7F

Citation : AIR 1962 All 1 : (1961) 31 AWR 438

Hon'ble Judges : M.C. Desai, C.J;S.N. Dwivedi, J;B. Mukerji, J

Bench : Full Bench

Advocate : S.N. Kakkar, for the Appellant; Standing Counsel, J. Swarup, V.K.S. Chowdhry and K.N. Tripathi, for the Respondent

Final Decision : Dismissed

Judgement

M.C. Desai, C.J.—I agree with my brother Dwivedi that the State Government revised u/s 7-F an order passed by the Additional District Magistrate and not the order passed by the Commissioner u/s 3(3) refusing to revise it. The record of the case before the Additional District Magistrate was summoned by the State Government and the requirement of Section 7-F was fulfilled. The permission to file a suit was refused by the Additional District Magistrate. It cannot be deemed to have been refused by the Commissioner even though he confirmed it. The power of Section 7-F is to be exercised against an order refusing to grant permission for the filing of a suit and it was the Additional District Magistrate who refused it and not the Commissioner. The Commissioner's jurisdiction was to revise the Additional District Magistrate's order if he found that he had acted illegally, incorrectly, improperly or with irregularity. He did not act as an appellate Court. Consequently the State Government was required, if at all, to send for the record of the Additional District Magistrate's court and not that of the Commissioner's.

2. There is no question of applying the doctrine of merger. In the first place the Commissioner does not exercise powers as an appellate authority; his jurisdiction

to interfere with the order is restricted to interference on the ground of acting illegally or with material irregularity or wrongful refusal to act. He has no jurisdiction to go into other matters and, therefore, when he finds that the District Magistrate did not act illegally or with material irregularity or did not wrongfully refuse to act, it cannot be said that the Additional District Magistrate's order merges in his order, I receive considerable support for my view from *J. Harimal Oil Mills Vs. Assistant Collector, Central Excise and Another*, where it was laid down by Dixit, C. J. that the doctrine of merger of orders cannot be applied to administrative orders. In *Dwarka Nath v. Gayatri Devi* 1961 All LJ 353, I said that a permission on the basis of which a civil Court can, take cognizance of a suit for ejectment can be granted only by the District Magistrate.

Unless there are two permits, there cannot arise any question of merger. Consequently when a Commissioner refuses to interfere with, the District Magistrate's order granting a permission, his order does not merge with the permission granted by the District Magistrate. Finally, as my learned brother has pointed out, the question is what records should be called for and not whether one order merges in another or not. Even though there may be a merger of one order with another, there is no merger of, the records in which the two orders are passed.

3. With great respect I do not think that any question of interpreting the word "may" arises at all. The word "may" used in the first sentence cannot possibly mean "shall". The State Government cannot be forced to call for the record in every case decided by a Magistrate; the matter is at its discretion and the word "may" was the only appropriate word that could be used. The objection of the appellants is not that the word "may" means "shall" but that the State Government cannot make an order unless it first calls for the record. What was argued is that the calling for the record was a condition precedent to the exercise of the power conferred by Section 7-F; not that the Government must call for the record in every case but that if it wants to exercise the power u/s 7-F, it must. The contention was that either both, the acts (of calling for the record and making an order) may be done or neither.

I do not agree with this contention. Calling for the record is only a procedural step and not a condition precedent to the exercise of jurisdiction.

The jurisdiction of the State Government to make an order is not derived from the calling for the record. Not calling for a record is only a procedural irregularity which, is not fatal. Section 7-F only requires the record to be called for; it does not lay down what the Government should do to it after it receives it. The Government may not peruse it at all even though it receives it and yet can pass an order, which will be fully valid. If it can pass a valid order even without perusing the record, it does not stand to reason that it cannot pass a valid order without sending for the record.

4. Even if it be said that the calling for the record is a condition precedent to the

making of an order, I am not bound to quash the order of the Government. If I find that no prejudice has been caused, I will be justified in refusing to quash it. It has not been explained how the appellant was prejudiced by the State Government's not summoning the record of the Commissioner's court. There was no matter required by the law to be considered by the Government before making an order and consequently it cannot be said that by not calling for the record it failed to consider a certain matter and thereby caused prejudice to the appellants.

A Commissioner is not required to send for the record and if he can pass an order u/s 3(3) without sending for the record of the District Magistrate's court, it should not be held that the Government's passing an order u/s 7-F without calling for the record is prejudicial to the appellants. The Government before passing the order sent for a report from the Additional District Magistrate and heard the appellants' counsel so the appellants had full opportunity of bringing to its notice any relevant matter that might have been on the record of the Commissioner's court.

5. A suit has already been instituted on the basis of the permission granted by the Government and even if we quash the permission, the suit will go on and can be decreed, as held by this Court in 1961 All LJ 353 (supra). No useful purpose will, therefore, be served by our quashing the permission granted by the State Government.

6. The appeal should be dismissed with costs.

S.N. Dwivedi, J.

7. House No. 12, Sheocharanlal Road, Allahabad, belongs to Behari Lal, the 4th respondent. K.C. Jain, the 1st appellant, occupies as tenant the residential portion on the first floor. The 2nd and 3rd appellants occupy portions on the ground floor. One Beharilal barbar was tenant of another portion of the house. He is dead, and we are not concerned with him in this case. Sometime in 1956 the 4th respondent applied u/s 3 of the U. P. (Temporary) Control of Rent and Eviction Act (hereinafter called the Act) to the Additional District Magistrate for permission to institute a suit for evicting all the said tenants from the house. On May, 30, 1957 his application was rejected and on July 27 following his revision was also dismissed by the Additional Commissioner. He, however, succeeded in obtaining an order from the State Government u/s 7-F of the Act permitting him to institute a suit for the appellants' ejectment. That order was made on December 26, 1958. Then on February, 14, 1959, the appellants applied to the State Government for a review of its order. Their applications were rejected on May 1, 1959.

8. Before the appellants moved in Court the writ petition out of which this appeal has arisen, the 4th respondent had instituted in the court of the I Additional Munsif, Allahabad, suits for their ejectment from the house.

9. At the hearing of the writ petition three questions of law were mooted on behalf of the appellants: (1) since the State Government did not send for the record of the Additional Commissioner, it had no power to make the impugned order u/s 7-F, (2) the State Government could not consider any facts, which were de hors the records of the Additional District Magistrate and the Additional Commissioner, and (3) the State Government misapprehended that it had no power to review its order.

10. The learned Judge, who heard the petition, answered all the questions against the appellants and dismissed their petition. They then tiled the present appeal against his order. It was heard by Mootham, C. J. and Srivastava, J., and by their order, dated September 7, 1960 they referred it to a larger Bench for decision, as they entertained "considerable doubt as to the correctness of the view taken by another Bench in *Latomal v. Smt. Mohini Bala Sp. A. No. 24 of 1960, D/- 11-2-1960*". We shall advert to that decision later in our judgment.

11. In the present case the entire record of the case before the Additional District Magistrate was before the State Government. It is also not in dispute that the State Government did not send for the record of the revision before the Additional Commissioner. Copies of the grounds of revision before him and of his order were admittedly before the State Government, but some other documents, which were comprised in the record of the revision were not called for by the State Government.

12. On these simple facts learned counsel for the appellants asks us to quash the order of the State Government. According to him the State Government could not act u/s 7-F without first sending for the record of the revision before the Additional Commissioner.

13. This argument was not accepted by the, learned Judge. It was left undecided in *Latomal's* case, Sp. A. No. 24 of 1960 (All) (*ubi supra*).

14. Section 7-F of the Act may now be set out:

"The State Government may call for the record of any case granting or refusing to grant permission for the filing of a suit for eviction referred to in Section 3 or requiring any accommodation to be let or not to be let to any person u/s 7 or directing a person to vacate any accommodation u/s 7-A and may make such order as appears to it necessary for the ends of justice".

15. The first thing that strikes the reader is that the State Government cannot call for the record of each and every, case; its power is limited to a case granting or refusing to grant permission for the filing of a suit for eviction referred to in Section 3 or a case requiring any accommodation to be let or not to be let to any person u/s 7" or a case "directing a person to vacate any accommodation u/s 7-A". Besides these three cases the State Government cannot call for the record of any other case arising under the Act. The next striking feature of the section is its unskillful drafting, for it is difficult to conceive of a case "granting or

refusing... .or requiring".... or directing a per- son.....". The act of "granting or refusing.... or requiring.... .or directing" can be performed only by a person or an authority.

One is therefore constrained to read some words after the word "case", which are not already there, in order to make the section intelligible. I think some such words should be read after the word "case" as "in which an authority has made an order". I have little doubt in my mind that the Legislature intended that the State Government should be empowered to call for the record of only that case in which an order "granting or refusingor requiring or directing....." has been made by some authority. The true intention of the Legislature must be given effect to by the Court.

16. If the section is to be read as I think it ought to be, then it would follow that the State Government may call for the record of that case only in which an order granting or refusing to grant permission for filing of a suit for eviction has been made by an authority. I have omitted the other two types of cases for we are not concerned with them in this appeal. Now, when an application for permission to institute a suit for eviction is made to the District Magistrate, he may either grant or refuse such permission. In either event a revision may be taken to the Commissioner.

He may allow the revision and refuse or grant permission as the case may be, or dismiss the revision. He may also allow the revision and remand the case to the District Magistrate for deciding it according to law. When he allows the revision and grants or refuses to grant permission, I think that the proceedings before him constitute a "case" within the meaning of Section 7-F. When he allows the revision against an order granting permission, to sue, the proceedings may perhaps be again a "case", for it may be said that he has, in effect, refused permission to sue.

But where he allows the revision and remands the case to the District Magistrate for rehearing, I doubt it can be said that he has granted or refused permission to sue. And where he upholds the order of the District Magistrate granting or refusing permission and dismisses the revision, I have no doubt in my mind that the proceedings do not constitute a "case" within the meaning of Section 7-F, because he has not passed any order (sic) granting or refusing permission; he has only declined to interfere with the order of the District Magistrate. There is a decisive difference between the language of Section 115, C. P. C. and Section 7-F; in the former the Court has the power to call for the record of a case which has been decided by a subordinate court, so that even an order dismissing an appeal may be a case; but in the latter the "case" must not be one merely decided by an inferior authority but it must be a case in which an inferior authority has passed an order granting or refusing permission.

17. The State Government may call for the record of a case in which an authority has passed an order directing a person to vacate an accommodation u/s 7-A. If

such an order of the District Magistrate is set aside in revision by the Commissioner, it cannot be said that he has passed any order directing a person to vacate an accommodation, and his order cannot be interfered with by the State Government u/s 7-F. If his order is irrevocable by the State Government, I think it naturally follows that it cannot send for the record of the case before him. This inference lends support to the view that I have already taken. It is no doubt desirable that the State Government should also send for the record of the revision, but on the view that I am taking, it cannot be said that the State Government acted illegally in not sending for the record of the case before the Additional Commissioner, who had dismissed the revision of the 4th respondent against the order of the Additional District Magistrate refusing him permission to sue.

18. It is argued on behalf of the appellants that when the Commissioner passes an order either allowing or dismissing the revision, the order of the District Magistrate is merged in his order, and there then survives only the record of the case before the Commissioner. For his argument he relies upon *Hafiz Mohammad Yusuf Vs. The Custodian General, Evacuee Properties, New Delhi and Others*, *Rabindra Nath Mitra v. State of U. P* 1959 All LJ 263 and *Commissioner of Income Tax, Bombay Vs. Amritlal Bhogilal and Co.*, . These cases turned on their own law, and are not helpful in the case here.

If u/s 7-F the State Government could call for the record of any case decided by an inferior authority, the argument might have been attractive, but under the section the power of calling for the record is exercisable only in relation to a case in which an order granting or refusing permission has been passed and I have already said that an order of the Commissioner dismissing a revision against the order of the District Magistrate granting or refusing permission is not an order granting or refusing permission. On this view the question of merger of orders can scarcely be said to be germane. Moreover the doctrine of merger, which applies to certain types of orders, does not extend to records. No authority has been shown in support of the proposition that the record of the case before the inferior authority also merges in the record of the case before the appellate or revising authority.

19. I am also not impressed by the argument that the sending for the record of a case is the condition precedent to the exercise of power u/s 7-F. The argument assumes that "may" means "shall". "May" ordinarily means "may" and should be read here as "may". The context and object of Section 7-F do not compel substitution of "may" by "shall". "May" is used twice in Section 7-F, and it is not disputed that second time it is not used as "shall" The first "may" is in my view also used in the same sense as the second one.

The section confers power on the State Government; it is an enabling provision like Section 115, C. P. C, and the State Government is not bound to exercise the power in all cases. The power is discretionary, and like all other discretionary powers its exercise may depend on the circumstances of each case. I am of the

view that the first "may" is used in a permissive and not mandatory sense.

20. Section 7-F contemplates two stages. At the first stage the State Government has to take a tentative decision whether it should at all review the decision of the inferior authority; the second stage begins after it has decided tentatively in favour of reviewing the decision. Then it examines the pros and cons of the case, weighs the circumstances and facts for and against parties, considers the law, if material and then makes up its mind finally whether it is in the interests of justice to overturn the order of the inferior authority. Now, if the word "may" is not used in a compulsion sense at the first stage, it is difficult to comprehend the logic of the argument that at the second stage it should be interpreted to have been used in a mandatory sense, that the record of a case must be sent for at this stage,

It is either permissive or mandatory at both stages; it cannot be directory at one stage and mandatory at another stage. A word cannot, I think, have two meanings at the same place and in the same sentence. Further, the expression "may call for the record of a case" has, I think, now become a term of art to connote the revisional or superintending nature of the power conferred on an authority as contradistinguished from the appellate power. I cannot recall any instance of a law, and none has been cited before us, to bear the argument that the expression is used to mean the actual sending for of the record of a case before exercising power. Indeed this Court has often disposed of revisions without sending for the record at all.

If sending for the record were a condition precedent, it could not do so. And what this Court itself has done should a fortiori be permitted to the State Government under similarly worded Section 7-F. It is now well-known that the genesis and growth of administrative tribunals and authorities in modern times is traceable to the legislative desire of obtaining cheap and quick settlement of disputes, which is difficult in the court-room largely, if not mainly, on account of its unduly cumbersome, slow and expensive procedure.

The procedure before administrative tribunals and authorities is characteristically simple, informal, flexible, and shorn off empty ritualism. To say then that the sending for of the record of a case is the condition precedent to the passing of an order u/s 7-F is to overlook the ontogenesis of the administrative process and deny it its characteristic feature without any clear legislative mandate.

21. In my view the sending for of the record is not the condition precedent to the passing of an order u/s 7-F; the word "may" is used in the section in the permissive, and not in the mandatory sense.

22. The practical bearing of the distinction between a mandatory and permissive provision is only this that while the former must be strictly observed, the latter should be complied with substantially. If an order is made without substantial compliance with the permissive provision, and if prejudice has thereby been caused to any person, the order may be avoided at the instance of that person.

Thus if neither the record of the case nor the substance of the information contained in the record is placed before the State Government before it passed an order u/s 7-F, the person, who is prejudiced thereby, may invoke the aid of the Court to avoid the order. But if he is not so prejudiced, he can have no just cause for complaint and the Court should decline to assist him. I am accordingly of the view that Latomal's case, Sp. A. No. 24 of 1960 (All.), wherein prejudice was assumed, was rightly decided. These the Court quashed the order u/s 7-F for some material on record was never examined by the State Government.

23. In 1959 All LJ 263, James, J. has taken a contrary view. In his opinion the sending for of the record of a case is the condition precedent to the valid making of an order u/s 7-F. With respect I am unable to share his opinion for the reasons that I have already stated. I express no opinion as to the correctness of the order on merits in that case. For my purpose it is enough that the facts of that case are radically different from the facts of the present case.

24. Assuming for argument's sake that the Additional Commissioner's record should also have been seen by the State Government before making the order, it is to be seen whether the failure to do so has caused any prejudice to the appellants. It is no longer in dispute that the entire record of the case before the Additional District Magistrate, the memorandum of revision and order of the Additional Commissioner were used by the State Government before making the impugned order. The only material, which formed part of the Additional Commissioner's record and was never placed before the State Government, consist of four documents, which would show that the 4th respondent had been ejected from the house No. 17 S.C. Basu Road on the strength of a permission to sue granted by the Rent Control and Eviction Officer to the landlord because of his personal need for the house, and not because of the 4th respondent had asked for permission to sue for the appellant's ejectment from his house on the ground that a similar permission had been granted to the landlord of 17 S. C. Basu Road, which he was occupying as tenant.

The Additional District Magistrate appeals to have refused to grant him permission, because the thought that the 4th respondent, not having paid rent, was himself responsible for the order permitting his landlord to sue for his ejectment. He did not therefore take into consideration the circumstance that he was about to be ejected from 17 S. C. Basu Road. In revision before the Additional Commissioner the 4th respondent filed the said four documents to prove that he was not blameworthy and that permission was given to his landlord on the ground that the latter needed the accommodation for his own use. Those documents, if they were before the State Government at the time of passing the impugned order, would, I think, have helped the 4th respondent and not the appellants. Accordingly I am of opinion that no prejudice has been caused to them by the omission of the State Government to send for the Additional Commissioner's record. They cannot therefore avoid the order of the State Government.

25. It was then urged on behalf of the appellants that the State Government illegally let in some new evidence regarding another house known as Sultanpur Bhawa and that its order is accordingly invalid. It is rather a technical objection, and cannot be accepted. I think that Section 7-F does not debar the State Government from considering new facts and circumstances before passing an order. Indeed sometimes it may be its clear duty to do so in the "interests of justice". Further, no prejudice is shown to have been caused to the appellants.

26. Another argument is that the State Government has illegally refused to exercise the power of review which it undoubtedly has. When the State Government granted permission to the 4th respondent, the appellants applied for review. By letter, dated May 1, 1959, they were informed that it was not possible to make any change in the order (koi bhi parivartan karna sambhav nahin hai). I do not think that this order can be construed to mean refusal to exercise the power of review. To my mind, it really means that the State Government, having reconsidered the matter, could not see its way to changing the order. In other words it has rejected the review application after considering the merits. If the State Government had taken the view that it had no power of review, it would have used instead of the word "sambhav" the word "shakti" or "chhamta", which means power or capacity.

27. The last argument is that a suit for ejectment can be instituted only with the permission of the District Magistrate, and that the State Government has no power to grant such permission. I would express no opinion on this question, for I think that it should more properly be raised before the Court which is seized of the suit for ejecting the appellants. It will be for that Court to decide the question in the first instance.

28. Learned counsel for the 4th respondent said that the writ petition was liable to be dismissed for great delay. The order of the State Government was made on December 26, 1958, and the writ petition was filed in Court on May 14, 1959. This argument was not urged before the learned single judge, who heard the petition on merits. I think it is now too late to raise the point. If the point had been raised before him, the appellants would have received an opportunity of producing evidence to explain the delay. If we now allow the point to be raised, it is likely to prejudice them. It may also be said that the 4th respondent waived this objection.

29. For the reasons stated above I would dismiss the appeal with costs.

B. Mukerji, J.

30. I agree and do not have anything very useful to add.