

(1998) 03 AHC CK 0042

In the Allahabad High Court

Case No : C.M.W.P. No's. 43480 of 1997 and 8067 of 1998

Madan Mohan

APPELLANT

Vs

City Magistrate/Rent Control and Eviction Officer, Auraiya and
others

RESPONDENT

Date of Decision : 11-03-1998

Acts Referred:

Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 —
Section 12(1), 12(2), 12(3), 12(3A), 12(3B)

Citation : (1998) 2 AWC 1153

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

Bench : Single Bench

Advocate : S.C. Tiwari, for the Appellant; Vijai Bahadur and S.C., for the
Respondent

Judgement

J. C. Gupta, J.—Both these Writ Petition Nos. 43480/97 and 8067/98 are taken up together.

2. Writ Petition No. 43480/97 has been filed by the sitting tenant Madan Mohan against the order dated 9.5.97, passed by the Rent Control and Eviction Officer-respondent No. 1, while Writ Petition No. 8067/98 has been filed by the landlord against the order of the revisional court condoning the delay in filing the revision against the order of release made in favour of the landlord on the basis of the order declaring vacancy.

3. Since the existence of order of release is dependent upon the order declaring vacancy, I take up Writ Petition No. 43480/97 first.

4. For the purposes of disposal of these writ petitions, it is not necessary to narrate facts in detail excepting that undisputedly the petitioner has been tenant in the accommodation in question since 1955. It is also pleaded by the petitioner that even an order of allotment was made in his favour by the Rent Control and Eviction Officer whose copy has been annexed as Annexure-1. Though the said

order was challenged by the landlord but thereafter a compromise was entered into between the parties and the landlord accepted the petitioner as his tenant.

5. The proceedings before the Rent Control and Eviction Officer, initiated on an application moved by the landlord whereby it was claimed that there had arisen a deemed vacancy under the provisions of Section 12 (4), of the U. P. Act No. XIII of 1972 inasmuch as the petitioner Madan Mohan has left the accommodation in question and has sublet the same. The respondent No. I directed the Rent Control Inspector to make spot inspection and submit his report. Accordingly, the Inspector made inspection and submitted his report dated 16.12.96 wherein it was reported that the accommodation was lying locked and on enquiry, it was informed to him that Madan Mohan has sublet the accommodation to other persons as he has become very old. Notice is alleged to have been issued to the petitioner Madan Mohan and the same is said to have been served sufficiently upon him and when no objection was received, the Rent Control and Eviction Officer by the impugned order declared the accommodation vacant.

6. I have heard Sri S. C. Tiwari, counsel for the petitioner and Sri Vijai Bahadur for the landlord-respondent and with their consent, both these writ petitions are disposed of finally.

7. It is apparent from the record that the impugned order declaring vacancy has been passed ex-parte in the absence of the petitioner. According to the petitioner, he was never served with any notice whereas according to the counsel for the respondent and as per the impugned order, he was personally served. At this stage, it is not necessary to go into this question because it has yet to be seen whether the impugned order passed ex-parte is in conformity with the requirement of law.

8. Section 12 (4) states that any building or part which a landlord or tenant has ceased to occupy within the meaning of sub-section (1), or sub-section (2) or sub-section (3) or sub-section (3A) or sub-section (3B), shall, for the purposes of this Chapter, be deemed to be vacant.

9. A perusal of this sub-section clearly indicates that a building shall be deemed to be vacant if the tenant has ceased to occupy the same within the meaning of sub-section (1) or sub-section (2). I am not referring to other subsections as the building in question is admittedly a shop and, therefore, other sub-sections are not applicable.

10. In order to test the real import of sub-section (4), it is necessary to refer to sub-sections (1) and (2), of Section 12, of the Act, which are reproduced below :

"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 if :

(a) he has substantially removed his effects therefrom, 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, elsewhere.

(2) In the case of a non-residential 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."

11. It is not disputed from either of the parties that clauses (a) and (b) of subsection (1) of Section 12 apply both to residential and non-residential, buildings. The crux of the matter, however, is that before a tenant can be deemed to have ceased to occupy the building or part thereof, it has to be found that he has substantially removed his effects therefrom or he has allowed it to be occupied by any person who is not a member of his family.

12. Similarly in the case of a non-residential 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, under the provisions of subsection (2) of Section 12.

13. A bare perusal of clauses (a), (b) of Section 12 (1), and Section 12 (2), would indicate that the tenanted accommodation in certain circumstances is to be deemed vacant by legal fiction. The effect of a legal fiction by a deeming clause is well known. Legislature can introduce a statutory fiction and Courts have to proceed on the assumption that such a state of affairs exist on the relevant date. Under the Act, vacancy cannot be deemed unless it has been specifically established by evidence on record that the circumstances stated in one of the clauses (a), (b) and (c) of Section 12 (1), or in Section 12 (2) of the Act exist. The use of the expression "he has substantially removed his effects" occurring in clause (a), or "he has allowed it to be occupied by any person who is not a member of his family" occurring in clause (b), or the expression "admits a person who is not a member of his family as a partner or a new partner" in subsection (2), of Section 12 show the legislative intent that the legal fiction would arise only if these circumstances have occurred after the enforcement of the Act.

14. By the mere fact that the shop is locked or that the tenant of a shop does not carry on business for sometime, it cannot be Inferred conclusively, without there being any other evidence that the tenant has substantially removed his effects therefrom and he should be deemed to have ceased to occupy the same.

15. Similarly under clause (b), a tenant is deemed to have ceased to occupy the building only when it has been established that he has allowed the same to be occupied by any other person who is not a member of his family. The occupation of a person envisaged here cannot possibly include the occupation by any person

as agent or servant of the tenant who has been engaged by the tenant to assist him in the discharge of his responsibilities. It has been held by the Supreme Court in the case of Harbans Lal Vs. Jagmohan Saran, , that where a person sits in the shop for conducting business on behalf of the tenant, his occupation would be considered as an occupation by the original tenant and to such a case clause (b) would not be attracted.

16. Sub-section (2) of Section 12 of the Act again incorporates a statutory fiction. It lays down that if a tenant carrying on business in a non-residential 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. This deeming provision would apply only if the tenant admits a person as a partner after the enforcement of the Act. If a person was a partner of the tenant carrying on business prior to the coming into force of the Act, no vacancy could be deemed to have occurred.

17. From the above discussion. It is thus clear that before declaring a tenanted accommodation vacant by legal fiction under the provisions of Section 12 (4) of the Act, there should be a clear and cogent finding that the tenant, in a case of non-residential building :

(i) has substantially removed his effects therefrom, or

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

(iii) where he is carrying on business in the building, has admitted a person who is not a member of his family, as a partner or a new partner, as the case may be.

18. In the present case, a bare perusal of the impugned order would Indicate that the Rent Control and Eviction Officer has concluded that the building in question was vacant under the provisions of Section 12 (4) of the Act without recording any specific finding whether the tenant's case was covered by clause (a) or (b) of sub-section (1), or by sub-section (2) of Section 12 of the Act. before declaring the building in question vacant u/s 12 (4) of the Act. It was incumbent upon him to have recorded clear and specific findings which were essential to attract the deeming provisions contained in the aforesaid provisions. He has neither recorded any finding that the petitioner-tenant has substantially removed his effects from the building in question nor has he recorded any clear finding that the petitioner has allowed the building in question to be occupied by any person in his own independent right who is not a member of his family. No finding has been recorded also in respect of the ingredients of sub-section (2) of Section 12. In the absence of any such finding, no vacancy could be deemed under the provisions of Section 12 (4) of the Act. It is well-settled that this Court while sitting in writ jurisdiction does not make Inquiry into disputed questions of fact and since the impugned order dated 9.5.1997 declaring vacancy suffers from the aforesaid manifest error of law, the same cannot be sustained.

19. Learned counsel for the petitioner contended that once order of vacancy has been quashed, the order of release also cannot be given effect to as existence of vacancy is sine qua non to an order of allotment. Learned counsel for the respondents on the other hand argued that the petitioner in this writ petition has only challenged the order declaring vacancy and not the release order made in favour of the landlord. A perusal of the writ petition would indicate that in paragraph 31 thereof, it has been averred by the petitioner that in execution proceedings of the release order, it has been stated that an ex-parte release order has been made on 20.5.97 and in Para 33, it has been stated that without issuing Form-D, the police partly implemented the release order by means of which three rooms of the premises in dispute have been wrongly attached.

20. It is well-settled law that the Rent Control and Eviction Officer gets jurisdiction to make an order of allotment or release only when there is a vacancy either actual or expected or there is a deemed vacancy within the meaning of Section 12 (4) of the Act. In the absence of existence of any such vacancy, he does not have the power either to make an order of allotment or of release. In other words, the validity of an order of allotment or release depends upon the existence of vacancy and where the order of vacancy is quashed, all orders passed subsequent thereto shall also have no legal sanctity. As far as the petitioner's prayer for restoration of attached rooms is concerned, for that matter the petitioner may apply before the Rent Control and Eviction Officer and if such an application is moved, the same shall be disposed of in accordance with law expeditiously preferably within a period of two weeks before proceeding further in the matter of declaration of vacancy.

21. In the circumstances of the case, it is further directed that the Rent Control and Eviction Officer shall decide the question of vacancy afresh in accordance with law and in the light of observations made above expeditiously preferably within a period of two months from the date of production of copy of this order, after giving a reasonable opportunity of hearing to the petitioner as well as to the landlord.

22. As far as Writ Petition No. 8067/98 is concerned, in view of the order passed in Writ Petition No. 43480/97, the same has become infructuous and is accordingly disposed of as such.

23. Both the writ petitions are disposed of accordingly.

Let a copy of this order be placed on the record of Writ Petition No. 8067/98.

24. A certified copy of this order may be furnished to the parties' counsel within one week on payment of usual charges.