

(1998) 05 AHC CK 0033

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 8274 of 1998

Madan Pal Singh

APPELLANT

Vs

Smt. Pushpa Lata Pandey and Others

RESPONDENT

Date of Decision : 29-05-1998

Acts Referred:

Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 —
Section 21(1)

Citation : AIR 1998 All 372

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

Bench : Single Bench

Advocate : Siddhartha Verma, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Dismissed

Judgement

J.C. Gupta, J.—This is tenant's writ petition with the prayer to quash the order dated 20-11-1995 passed by the prescribed Authority-respondent No. 8 and the order dated 21-2-1998 passed by the lower appellate authority-respondent No. 9.

2. The facts in brief are that the dispute relates to a house situated in Mohalla Nagran, district Budaun, which was under the tenancy of the father of the petitioner since before the time it was purchased by late Sri Bhagwat Dayal Pandey through a registered sale deed dated 4-7-1977. It is alleged that even prior to the purchase of the house in question Late Bhagwat Dayal Pandey had conveyed his intention to the petitioners father that he required the house in question for himself and the tenant had agreed for vacating the same within 4-5 months but when the tenant did not vacate, Sri Bhagwat Dayal Pandey served him with a notice informing him that the house in question has been purchased by him for his own use and asked the tenant to vacate the same. Instead of complying with the notice, the tenant gave a wrong reply. Since Sri Bhagwat Dayal Pandey required the house in question for himself and for the members of his family he filed an application u/s 21(1)(a) of the U.P. Act No. XIII of 1972.

During the pendency of the said application Bhagwat Dayal Pandey expired. Substitution application was moved by Sri Surendra Kumar Pandey his son, but the same was rejected and application for release was dismissed. Thereafter Sri Surendra Kumar Pandey moved a fresh application u/s 21(1)(a) of the Act before the Prescribed Authority giving rise to the present writ petition. It was registered as Case No. 22/1986 wherein it was alleged that the landlord-applicant was living in a small rented house at Budaun. His wife and children were living at Sahaswan and since the accommodation at Budaun was very small, he was unable to shift his entire family from Budaun to Sahaswan. One of his sons was studying in Budaun while other members were still forced to live at Sahaswan. The landlord was working as a Clerk in the office of Sub-Registrar, Budaun and on account of a meagre salary he was unable to maintain two establishments; one at Budaun and other at Sahaswan. Tenant was requested several times for vacating the house in question but he refused to do so and was demanding illegal "Pagan". The landlord was facing a great hardship on account of non-availability of house in question. He had to go to Sahaswan in the evening frequently to maintain his family there and to return next morning to join his office at Budaun. He had suffered heart attack also and the doctors advised him rest, therefore, it was not advisable for the landlord to undertake journeys for going from Budaun to Sahaswan to look after his family staying there. It was further alleged that the tenant had taken the house in question on rent when he was posted here. He has now retired and since he belonged to Meerut, he had no charm to continue his living at Budaun because he has his farming, and cultivation and other property at Meerut; He used to remain out of Budaun most of the time and was in no need of the house in question. The landlord has no other accommodation except the house in question in whole of Uttar Pradesh.

3. During the pendency of application, Surendra Kumar Pandey also died and his legal heirs respondents Nos. 1 to 7 were brought on record. Application for release was also got amended and it was alleged that the said respondents are in dire need of the house in question and they have no other house except the house in question.

The members of the family of the deceased-landlord are still forced to continue their living in the rented house at Sahaswan. The members have no charm to live at Sahaswan after the death of Surendra Kumar Pandey as they have no other relatives at Sahaswan. It had become practically impossible for them to live in the rented house at Sahaswan. They all wanted to settle at Budaun in the house in question but on account of refusal of tenant-petitioner to vacate the house, they were being forced unnecessarily to pay rent of the house at Sahaswan. It was further alleged that applicant No. 2, the widow of the deceased-landlord did not feel secured at Sahaswan along with her grown up daughters and that too in a locality which was mostly populated by the community of other religion. The landlord of that house was also putting pressure on them to vacate the rented house at Sahaswan.

4. The aforesaid release application was contested by the tenant-denying the alleged need of the landlord. The landlords have a house at Dataganj where they are comfortably living. The house at Sahaswan also belonged to them. The son of the tenant namely; Madan Pal Singh the present petitioner is practicing as an Advocate in Budaun since 1964 and he is also having his Chamber in the disputed house. In case the house is released, his profession as lawyer would be adversely affected. The father of the applicant Bhagwat Dayal Pandey had earlier filed Suit No. 124/81 which was got dismissed by his son, Sri Surendra Kumar Pandey.

5. During the pendency of proceedings the father of the petitioner also died and the petitioner was brought on record as his legal heir.

6. The prescribed authority-respondent No. 8 by the order dated 20-11-95 allowed the landlords' application and released the house in question in their favour holding that the need for the disputed house is genuine and bona fide. The issue of comparative hardship was also decided against the petitioner. Aggrieved by the said judgment appeal was filed by the petitioner which has also been dismissed by respondent No. 9 by the order dated 21-2-1998. The petitioner has now approached this Court by means of this writ petition for the quashing of the aforesaid orders passed by respondents Nos. 8 and 9.

7. Since counter affidavit and rejoinder affidavit have been exchanged and parties' counsel have been heard, and with their consent, this writ petition is disposed of finally at the admission stage itself.

8. Before this Court learned counsel for the petitioner has confined his contentions mainly on three points namely;

Firstly, that no notice as contemplated under the proviso at Section 21 (1) (a) of the U. P. Act No. XIII of 1972, hereinafter referred to as the "Act", was proved to have been served upon the tenant, therefore, the application u/s 21(1)(a) of the Act was not maintainable.

Secondly, that the Courts below have erroneously held that the need of the landlord for the house in dispute is bona fide and the question of bonafide need has not been objectively decided; and Thirdly, that the Courts below have not made any real comparison of the likely hardships of the parties. POINT No. 1 : 9. Much emphasis has been laid on the first ground and it was vehemently argued by the counsel for the petitioner that service of notice as contemplated under the proviso to Section 21(1)(a) is a condition precedent for entertaining application u/s 21(1)(a) of the Act and since no such notice is either proved to have been served or brought on record, the application moved by the landlord-respondents u/s 21 (1)(a) of the Act could not be entertained and decided by the Courts below. 10. In order to appreciate the aforesaid submission of the learned counsel, it may be necessary to have a look at the proviso which is reproduced below :-- "Provided that where the building was in the occupation of a tenant since before its purchase by the landlord, such purchase being made after the

commencement of this Act, no application shall be entertained on the grounds mentioned in Clause (a), unless a period of three years has elapsed since the date of such acquisition and the landlord has given a notice in that behalf to the tenant not less than six months before such application, and such notice may be given even before the expiration of the aforesaid period of three years :"

11. A bare perusal of the aforesaid proviso would indicate that the same applies only to cases where a tenant has been in occupation of the building before its purchase by the landlord and such purchase having been made after the commencement of the Act. If the tenant in a building is in occupation since before its purchase by a subsequent landlord, the landlord cannot get the tenanted accommodation released before the expiry of period of three years since the date of purchase of the building. The proviso further requires the landlord to give a notice in that behalf to the tenant at least six months before an application under Clause (a) is filed.

12. The aforesaid proviso came up for interpretation in the case of *Misri Lal v. Addl. District Judge, Gorakhpur* 1992 AIIJ 1134 and it was observed therein as follows :

"It may be observed that the notice contemplated under the proviso referred to above is not a notice for terminating the tenancy. The object of the notice is to furnish information to the tenant about the requirement of the landlord in order to enable the tenant to search for an alternative accommodation after receiving the notice. The legislature appears to have thought the period of six months to be sufficient period for this purpose, and it is with this end in view that the competent authority stands prohibited from entertaining the application for release for a period of six months to be counted from the date of the service of the notice. It is, therefore, obvious that the non-mentioning of the period of six months in the notice itself could not invalidate the notice. The release application based on such notice, in case it is filed after the expiry of six months calculated from the date of the service of the same on the tenant, cannot be dismissed as non-maintainable."

13. It was further held in the aforesaid decision that so far as the notice under the proviso in question is concerned, it should contain a formal demand in writing insisting upon vacant possession.

14. In the case of *Smt. Nazuk Jahan and Others Vs. Additional District Judge and Others*, , it was held by the Supreme Court that the notice contemplated by the proviso to Section 21 of the Act cannot be a casual or oral request to the tenant, but a formal demand, ordinarily in writing and clearly insisting on vacant possession after the requisite period.

15. The notice as contemplated under the aforesaid proviso thus should precede the institution or filing of the release application as no useful purpose of giving notice insisting on vacant possession would be served if the notice were to be given after the filing of the release application.

16. In *Abdul Jabbar v. VII Addl. District Judge, Gorakhpur* (1989) I ARC 277 it

has been held that the service of notice contemplated by the said proviso is a condition precedent for the filing of an application for release u/s 21(1)(a). In this case, since no such notice was at all given, application for release was held to be not maintainable.

17. In a recent case of Vijay Bahadur Singh v. IVth Addl. District Judge, Etawah (1997) 2 ARC 59 it has been observed :

"Service of notice is a requirement of law for the maintenance of a petition u/s 21 (1)(a) of the Act and, therefore, it was incumbent on the landlords to specifically and unequivocally alleged that they had complied with the requirements of the proviso. A vague plea, that a legal notice had been served, was of no consequence."

18. The observations made by Hon"ble A. N. Varma, J. in the case of Bhusan v. District Judge, Ghaziabad (1983) 2 ARC 79 were as follows :--

"In my view what is required is that the application u/s 21(1)(a) should not be filed before the expiry of six months from the giving of notice to the tenant."

19. In the case of Mahendra Pal Singh Vs. 2nd Addl. District Judge, Dehradun, , Hon"ble S.R. Singh, J. observed. "..... the notice contemplated by the First Proviso to Section 21 (1) cannot be treated at par with a notice for determination of tenancy contemplated by Section 106 of the Transfer of Property Act, Determination of tenancy is not a condition precedent for seeking eviction of a tenant u/s 21 while it is an essential requirement for instituting a suit under the general law of landlord and tenant governed by Section 106 of Transfer of Property Act. It is in this backdrop that want of notice determining the tenancy u/s 106 is fatal to a suit for eviction of a tenant while it cannot be considered fatal for eviction of a tenant u/s 21 of the Act for the reason that tenancy, as provided under Sub-section (8) of Section 21, stands determined by operation of law on expiration of a period of one month from the date of order of eviction."

20. In a recent decision in the case of Martin and Harris Ltd. Vs. VIth Additional District Judge and Others, , application for release was moved within six months from the date of purchase of the premises. The questions which arose for consideration before the Apex Court were as to whether the application was not maintainable on account of the same having been filed before the expiry of three years from the date on which the premises were purchased by the landlord and whether the said application was not maintainable on the additional ground that it was filed prior to the expiry of six months from the date on which notice was given by the landlord to the tenant as required by the same proviso. As far as the first question is concerned, it is not relevant for the purpose of the present writ petition as admittedly the application for release in question has been filed after the expiry of period of three years from the date of purchase.

20A. As far as the second point was concerned, it was observed Martin and

Harris Ltd. Vs. Vith Additional District Judge and Others, : .

"So far as this point is concerned it must be held on the clear language of the first proviso to Section 21(1) of the Act that application for possession u/s 21 (1) (a) had to be filed by the landlord concerned not earlier than expiry of six months from the date of issuance of the notice by the landlord. On the facts of the present case it cannot be disputed that when the notice was issued on 20th September, 1985, the application for possession could not have been filed by the respondent invoking the grounds mentioned in Clause (a) of Section 21(1) of the Act, at least till 20th March, 1986, while the application was filed in January, 1986. To that extent it can be said that the application was premature. The provision in this connection has to be treated to be mandatory."

21. The object of giving such a notice seems to be to give sufficient time to the tenant to enable him to ascertain as to whether the requirements of the new landlord for the tenanted accommodation are genuine and bona fide and also to get alternative accommodation arranged for himself if he realises that the landlord has a good case.

22. After the aforesaid decision of the Apex Court, it cannot be disputed now that giving of notice as contemplated under the first proviso is mandatory and if an application for release is filed or instituted without service of such a notice the same cannot be entertained and the landlord cannot get any relief therein.

23. Learned counsel for the landlord-respondents on the other hand argued that in the present case the petitioner never raised before the Courts below the plea of want of notice and he should be deemed to have waived that right and is now estopped from raising that plea before this Court.

24. The question that arises for consideration is whether such a mandatory requirement as contained in the aforesaid proviso could be waived? Answer to this question can straightway be given in affirmative and for this conclusion, I am supported by a number of decisions.

25. In the case of Martin and Harris Ltd. Vs. Vith Additional District Judge and Others, , it was held that the protection provided in the proviso to Section 21 (1) (a) to the tenant is personal to him and could be waived. It was also held therein that the provision contained in the aforesaid proviso obviously was enacted for the benefit and protection of the tenant and it is for the tenant to insist on it or to waive it. Relying on a decision of the Privy Counsel in the case of Surajmull Nagoremull v. Triton Insurance Co. Ltd., , it was held that if a proceeding before a Court is barred by law, a plea to that effect being a pure question of law can be agitated any time. But if the prohibition imposed by the Statute is with a view to affording protection to a party, such protection can be waived by the party. He may avail of it or he may not avail of it as he may choose. The contention of tenant that the provision contained in the proviso to Section 21 (1) of the Act was for public benefit and could not be waived, was turned down by the Apex Court in the aforesaid decision.

26. It is thus clear from the aforesaid decision of the Apex Court that the provision contained in proviso to Section 21 (1)(a) of the Act is not for public benefit and the protection has been given to the tenant which is naturally personal and thus could be waived.

27. In the case of State Bank of Patiala and others Vs. S.K. Sharma, , the Apex Court held that even in the case of violation of a mandatory provision, interference by Courts does not follow as a matter of course. A mandatory provision conceived in the interest of a party can be waived by that party, whereas a mandatory provision conceived in the interest of public cannot be waived by him. In other words whenever complaint of violation of a mandatory provision is made, the Courts are required to enquire in whose interest the provision is conceived. If it is not conceived in the interest of public, question of waiver and/or acquiescence may arise. Similar views were expressed by the Supreme Court in the cases of Krishan Lal Vs. State of Jammu & Kashmir, and Rajendra Singh Vs. State of Madhya Pradesh and others,

28. From the aforesaid decisions, therefore, it is crystal clear that the provision contained in proviso to Section 21 (1) of the Act has been enacted not for a public benefit but only for the personal interest of the tenant and for that reason the same could be waived by the tenant either expressly or impliedly.

29. The next question that arises for determination is whether in the facts and circumstances of the present case, the petitioner could be said to have waived the said right?

30. Learned counsel for the petitioner submitted that since service of notice as contemplated under the proviso aforesaid is a condition precedent to the maintainability of an application u/s 21(1)(a) of the Act, in the absence of any averment specifically made in this regard in the present release application, the Prescribed Authority had no jurisdiction to entertain the release application and consequently the impugned orders are nullity. It was further submitted by the learned counsel that the principle of waiver could not be applied to in such cases. In support of his contention reliance has been placed on the case of Associated Hotels of India Ltd., Delhi Vs. S.B. Sardar Ranjit Singh, , wherein the meaning of waiver was expressed in the following words (at p. 937 of AIR):

"A waiver is an intentional relinquishment of a known right. There can be no waiver unless the person against whom the waiver is claimed had full knowledge of his rights and of facts enabling him to take effectual action for the enforcement of such rights."

31. Learned counsel for the petitioner argued that in the present case, in the release application no averment was made that a notice was given as was required by the first proviso to Section 21(1) of the Act and, therefore, there could not be any question of waiver of that right by the tenant-petitioner. Reliance has also been placed by the petitioner's counsel on a single Judge decision of this Court in the case of Vijay Bahadur Singh v. IVth Addl. District

Judge, Etawah 1998 AIHC 731) (supra). In this case, the release application merely stated that a legal notice was served on the tenant and it was not specifically stated that the notice was in compliance with the provisions of first proviso to Section 21 (1) of the Act. The reply in the written statement was of denial and it was further stated that the application of the landlord was premature. Though no notice was filed by the landlord, the tenant himself filed the same before the Prescribed Authority. The learned Judge after examining the said notice was of the opinion that the notice was patently not a notice specifying the terms of the proviso and was an ordinary notice u/s 106 of the Transfer of Property Act terminating the tenancy of the tenant on the expiry of 30 days. On these facts it was held that the notice was not in accordance with the proviso and, therefore, the application for release was held to be premature on an objection raised by the tenant.

32. On the other hand learned counsel for the landlords-respondents vehemently argued that the plea that notice as contemplated under the proviso was not sent or served upon the tenant was not raised before the authorities below and, therefore, that plea cannot be permitted to be raised for the first time in the present writ petition. In support of his submission learned counsel has placed reliance on the case of Hari Shankar Gupta v. IIIrd Addl. District Judge, Agra (1997) 2 ARC103 wherein it was held that unless the plea of absence of notice was raised before the authorities below, the same cannot be permitted to be raised in writ petition. Similar view was expressed in the case of Arvind Kumar v. IIIrd Addl. District Judge, Moradabad (1995) 2 ARC 385 . Reliance has also been placed on certain observations made by the Apex Court in the case of Martin and Harris Ltd. Vs. VIth Additional District Judge and Others, . The facts of this case were that the landlord after having retired as Major General in Indian Army, purchased the tenanted property from its erstwhile owner. He thereafter gave a notice to the tenant seeking possession on the ground that he had purchased the property for his residential purpose and he bonafidely required the same for the said purpose. The tenant sent a reply refuting the claim of the landlord. The landlord thereafter filed an application u/s 21 (1)(a) read with Section 21 (1-a) of the Act, before the expiry of period of six months. In the written statement filed by the tenant, amongst others, a contention was raised that the application was not maintainable u/s 21 (1)(a) of the Act on twin grounds; (i) that it was filed prematurely before expiry of three years from the date on which the premises was purchased by the respondent No. 3 landlord; and (ii) that the landlord had not filed the suit after expiry of six months from the date of suit notice and consequently the application was not maintainable as per the first proviso to Section 21 (1) of the Act. During the pendency of the proceedings, however, the tenant joined issues on merits by seeking permission to cross examine the plaintiff on merits of the case on the grounds as pleaded u/s 21(1) (a) of the Act. After hearing the parties on merits, the claim of landlord was allowed by the Prescribed Authority holding that the landlord had proved his case for bona fide requirement of the suit premises. The tenant carried the matter in

appeal u/s 22 of the Act and no such ground was taken in the Memo of Appeal and the appeal was pressed on merits of the controversy between the parties on the question of bona fide requirement of the landlord and thereafter the matter was taken in writ petition filed before Lucknow Bench of this Court and there the tenant raised the question about the maintainability of the application on the ground of non-compliance of the provisions contained in the proviso to Section 21 (1)(a) of the Act. The High Court rejected the same and took the view that the application filed by the respondents-landlord was maintainable. On these facts it was held by the Supreme Court in the appeal filed by the tenant as under (at p. 503 of AIR):

"Consequently it must be held that the provision of six months notice before initiation of proceedings u/s 21 (1) of the Act, though is mandatory and confers protection to the tenant concerned, it can be waived by him. On the facts of the present case there is no escape from the conclusion that the appellant, for the reasons best known to it, consciously and being alive to the clear factual situation that the suit was filed on that ground prior to the expiry of six months" notice, did not think it fit to pursue that point any further and on the contrary joined issues on merits expecting a favourable decision in the suit and having lost therein and got an , adverse decision did not think it fit even to challenge the decision on the ground of maintainability of the suit while filing an appeal and argued the appeal only on merits and only as an afterthought at the stage of writ petition in the High Court such a contention was sought to be taken up for the first time for consideration. On the facts of the present case, therefore, it must be held that the appellant had waived that contention about the suit being premature having been filed before the expiry of six months from the date of the suit notice.

Apart from waiver the appellant was estopped from taking up such a contention as the respondent, on account of the aforesaid contention of the appellant, had irretrievably changed his position to his detriment and lost an opportunity of seeking leave of the Court to withdraw the suit with liberty to file a fresh suit, as seen earlier. The second point for consideration is, therefore, answered in the negative in favour of the respondent-landlord and against the appellant."

33. In the present case, it is an undisputed fact that the petitioner has been in occupation of the accommodation in question as a tenant even before the same was purchased by Late Bhagwat Dayal Pandey, the grandfather of present landlords-respondents through a registered sale deed dated 4-7-1977. It is also an admitted fact that late Bhagwat Dayal Pandey had earlier moved an application for release of the accommodation in question for the requirement for himself and the members of his family. During the pendency of the said application Bhagwat Dayal Pandey expired and the substitution application for bringing legal heirs of the deceased-landlord moved by his son was rejected and the case was dismissed. The son of the deceased landlord thereafter filed the present application for release wherein, it has been specifically pleaded that prior

to the purchase of the said accommodation the father of the present applicant-landlord has conveyed his intention to the tenant that he required the accommodation in question for his personal need and the tenant had agreed for vacating the same but when he did not do so, the father of the applicant had served him with a notice and the same was served but the tenant gave a wrong reply. This averment has been made in paragraph 7 of the application, and in the reply thereof the tenant admitted the receipt of the notice but pleaded that the notice was wrong and incorrect and its suitable reply had been given by him to the then landlord. It would further appear that thereafter no such objection was raised before the Prescribed Authority regarding absence of notice as contemplated under the first proviso to Section 21 (1) of the Act, and the tenant contested the release application on merits only and for that reason the Prescribed Authority did not think it necessary to discuss that question. A perusal of the judgment of the lower appellate Court would also indicate that there is no decision of the appellate authority on the above question. It is well settled that where a point has not been dealt with in the judgment, there is a presumption that the said point must not have been raised or urged before the authority concerned. Learned counsel for the respondents-landlords invited the attention of the Court to the grounds of appeal which were taken in the memorandum of appeal filed by the tenant-petitioner before the District Judge u/s 22 of the Act against the order of the Prescribed Authority and it has rightly been urged by the learned counsel that no such objection was also taken in the grounds of appeal it would thus appear that perhaps the tenant-petitioner was satisfied with the requirement of service of notice as per the proviso and for that reason no such objection was either specifically pleaded or raised before the Courts below. It has of course been stated in the affidavit filed before this Court by the petitioner that learned counsel for the tenant-appellant had argued the aforesaid point before the lower appellate Court but it has been denied by the landlord in the counter affidavit. No affidavit of the counsel who argued the appeal has been brought on record. In the circumstances and in view of the fact that the judgment of the - lower appellate Court makes no mention of such a point, I am inclined to accept the assertion of the landlord that no such point was argued before the lower appellate Court. Had the same been raised and urged before the lower appellate Court, there is no reason why the lower appellate court would not have made any discussion thereon. Apart from the fact that no such objection about the maintainability of the release application on account of want of notice as per the proviso was raised before the Courts below, there is a notable feature appearing in the case which cannot be lost sight of. In the instant case the present release application was filed by the son of the deceased-landlord who was the purchaser of the property in question from the erstwhile owner. The deceased father of the landlord had earlier moved an application for release. In paragraph 7 of the present application it was specifically pleaded that a notice had been served upon the tenant by his father. The fact of receipt of notice was admitted to the tenant. After the dismissal of earlier release application, the present application has been filed by the son of the vendee after a long gap. The tenant had also been

apprised and had full knowledge that the landlord was claiming release of the tenanted accommodation for his personal use and had even filed application for release earlier also after serving the required notice. The property was purchased in the year 1977 and the present release application was moved in 1986. In these circumstances, there seemed to be no necessity for him to have served a fresh notice as per the requirement of the proviso to Section 21 (1) of the Act before filing the subsequent release application. It appears that in these circumstances, the tenant-petitioner might have thought better not to contest the aforesaid point and he joined issue on merits and for that reason the pleading as well as the right were waived.

34. Since for the first time the aforesaid point has been raised in this writ petition, the landlord-respondents with his counter affidavit has filed the copy of the notice which was served upon the tenant by his father before moving the earlier release application. If paragraph 2 thereof it was specifically mentioned that the house in question has been purchased by the landlord for his own use and since he has no other house of his own in whole of the state he was in great need of accommodation in question. The tenant was also called upon to deliver vacant possession of the house in question to the landlord. By the same notice the tenancy of the tenant was also determined on the expiry of 30 days from the date of receipt of notice. It would thus appear that the vendee, the father of the present landlord, had furnished information in writing to the tenant that he has purchased the house in question for his personal need and he required the same and the tenant was also asked to deliver vacant possession of the tenanted accommodation. The mere fact that the notice also made a mention that the tenancy would stand determined on the expiry of period of 30 days from the date of service of notice was of no consequence as undisputedly the release application was filed after the expiry of six months period from the date of service of notice. The object of the proviso was thus fully achieved and notice as contemplated is proved to have been served on the father of the petitioner, before the earlier release application was filed. In the circumstances of the present case it can safely be held that the tenant-petitioner had waived his plea about the non-maintainability of the release application on account of non-compliance of service of notice as per the proviso the Section 21 (1) of the Act. On the facts of the present case there is no escape from the conclusion that the petitioner was fully conscious of the facts that a notice as per the proviso had been served upon his father by the father of the present landlord, who had purchased the house in question from its erstwhile owner for his own use and being alive to the clear factual situation, he did not think it fit to pursue that point any further and on the contrary contested the case on merits expecting a favourable decision in the proceeding before the Prescribed Authority and having lost therein did not challenge the decision of the Prescribed Authority on the aforesaid ground in the appeal also filed before the lower appellate court and through out, the case was contested on merits and it is only at the stage of the present writ petition that such a contention has been sought to be taken up for

the first time for consideration. In the circumstances, the petitioner cannot be permitted to raise this point before this court for the first time as already stated above even on" facts the requirement of the notice appears to have been fulfilled in the present case. The resultant effect of the above discussion is that the first ground urged by the petitioner's counsel about the non-maintainability of the release application has to be rejected.

SECOND POINT:

35. Next it was argued by the petitioner's counsel that the question of bona fide need has not been objectively decided by the Courts below. He argued that bona fide need does not mean a mere desire or fancy, there has to be a compelling necessity to displace a tenant comfortably housed. He relied upon the decision in *Mattulal Vs. Radhe Lal*, . It was held therein that it is for the Court to determine the truth of the assertion and also whether it is bona fide. The test which has to be applied is an objective test and not a subjective one. The word "required" signifies that mere desire on the part of the landlord is not enough but there should be an element of need and the landlord must show the burden being upon him that he genuinely requires the non-residential accommodation for the purpose of starting or continuing his own business. Reliance has also been placed on the case of *Phiroze Bamanji Desai Vs. Chandrakant N. Patel and Others*, , wherein it has been held that the word "requires" that there must be an element of need before a landlord can be said to require the premises for his own use and occupation. It is not enough that the landlord should merely desire to use and occupy the premises. What is necessary is that he should need them for his own use and occupation.

36. In the case of *Smt. Kamla Ahuja v. VI Addl. District Judge, Meerut* 1981 (UP) RCC 199: 1981 All LJ 611 it was held that the word "bona fide" means genuinely, sincerely i.e., in good faith in contradistinction to mala fide. The word "requires" signifies that mere desire on the part of the landlord to have the accommodation is not enough but there should be an element of need and the landlord must show the burden being upon him that he genuinely requires the accommodation.

37. In the case of *Krishna Behari v. District Judge* (1985) 1 ARC 57 this Court took the view that the need of the landlord must be genuine and not frivolous or whimsical, the landlord is not the final arbitrator of his needs and the matter has to be objectively considered by the Court for finding it to be genuine.

38. There is no doubt that the U.P. Act No. XIII of 1972 regulates letting in the interest of general public and places restrictions on the right of the landlord to evict tenants under the provisions of ordinary law but the object of the Act is not to deprive a landlord to have his own accommodation for his use and occupation if the same is genuinely needed by him.

39. In the present case both the Courts below have concurrently found that the need of the landlord for the house in question is bona fide and genuine. It could not be shown that the landlords have any other house of their own excepting the

house in question. It has also been found as a fact that the respondents' father was living in a small rented house at Budaun. His wife and children were living at Sahaswan in another rented house and since the rented house at Budaun was too small to accommodate the entire family members, the wife and children were compelled to stay at Sahaswan. The family members, on account of the death of Sri S.K. Pandey landlord during the pendency of release application, had no charm to continue to live at Sahaswan and it has become practically impossible for them to live in the rented house at Sahaswan. They all went to settle at Budaun in the house in question. Besides that there was also a pressure from the landlord of the rented house of Sahaswan to vacate the same. In the circumstances, it cannot be said that the landlords have merely a desire to have the accommodation in question; On the contrary the need as claimed by the landlords seems to be genuine and bona fide. It is well settled-law that finding arrived at on the question of bona fides need is a finding of fact and since in the present case both the Courts below recorded a concurrent finding on the above question, this Court in exercise of its powers under Article 226 of the Constitution does not find any cogent or compelling reason to cause interfere in the said finding. POINT No. 3 :

40. Now coming on the third and the last point, it has been argued by the learned counsel for the petitioner that the Courts below have not made any real comparison of the likely hardships of the parties. This contention has also no force in as much as both the Courts below have gone into the question of comparative hardship of the parties and have recorded a clear finding that in case of rejection of the application, the landlord were likely to suffer a greater hardship than that of the tenant. The release application remained pending for about 12 years before the Courts below but, the tenant made no efforts to find out any alternative accommodation. In the case of Ashok Kumar Jaiswal v. District Judge, Mirzapur, (1981) 1 RCJ 576 (All) it was held that the issue of comparison of hardship has to be considered objectively with reference to concrete facts existing on the record, it could not be disposed of on the mere ground that the landlord had not pointed out that the tenant had any other accommodation available with him. It was equally for the tenant to prove that in spite of his best efforts, there was no accommodation available with him in the same town. Similarly, in the case of Mulk Raj Kappor v. Vth A.D.J., Bareilly 1979 ARC 227 it was held that the tenant is also required to bring evidence to establish non availability of alternative accommodation and if he fails, the finding of hardships is to go against him.

41. It is well settled law that no hard and fast rule can be laid down for determining the question of comparative hardship of the parties. The said question is to be examined keeping in view various factors such as the status of the parties, the number of family members of each party, the availability of any other accommodation with the landlord or the tenant, the efforts made by the tenant to find out any other accommodation and so on. The answer to this question would thus depend upon the own facts and circumstances of each case.

42. In the present case both the courts below have concurrently found that the landlord has got no other house of their own where the family members could stay and reside at Budaun. The rented house at Budaun was too small to cater their need. It has also been found as a fact that the landlord of the rented house at Sahaswan was putting pressure upon the landlord to vacate the said house. There is also evidence on record to indicate that after the death of Sri S.K. Pandey it was not possible for his wife and other family members to continue their living at Sahaswan. On the other hand the petitioner is a practising lawyer at Budaun and according to his own showing he has established a good practice and he is a man of affluent means. It has been found by the courts below that there is no reliable evidence to show that the tenant petitioner made any sincere efforts to have any other house on rent or otherwise. After weighing all the factors, the courts below have found that the landlords were likely to suffer a greater hardship than that of the tenant. Thus concurrent finding of fact based on appraisal of evidence cannot be said to be erroneous or illegal. This point also therefore goes against the petitioner.

43. For the above reasons and discussion, this writ petition has no merits and has to be dismissed.

44. The writ petition is dismissed. Parties are directed to bear their own costs. The petitioner is, however allowed two months time to vacate the house in question, failing which the respondents shall be at liberty to get the order of eviction enforced.