

(1968) 01 AHC CK 0032

In the Allahabad High Court

Case No : Civil Miscellaneous Writ. No. 341 of 1967

Mohd. Shuaul Islam

APPELLANT

Vs

The Rent Control and Eviction Officer and others

RESPONDENT

Date of Decision : 18-01-1968

Acts Referred:

Uttar Pradesh (Temporary) Control of Rent and Eviction Act, 1947 — Section 7, 7(20)

Citation : (1968) 38 AWR 141

Hon'ble Judges : Satish Chandra, J

Bench : Single Bench

Advocate : S.N. Kacker, for the Appellant; K.N. Singh for opp. parties, for the Respondent

Final Decision : Dismissed

Judgement

Satish Chandra, J.—In this petition Under Article 226 of the Constitution an order of allotment dated 20-1-1967, is sought to be quashed.

2. The allotment order related to a portion of "Nasim Manzil" situate at 29/32, Rana Pratap Marg, Lucknow. It belonged to Mohd. Habib and Mohd. Mujeeb. The owners entered into an agreement for sale of the building on 21-4-1963, with the Petitioner's father for Rule 58,000/- . A part payment of Rs. 39,000/- was made and it is stated that the possession of the building was delivered to the Petitioner's father by the vendor on 19-10-1963. At that time Mohd. Ishaq, a relation of the vendor, was residing in the house. According to the Petitioner, Mohd. Ishaq became annoyed at the transaction of sale and he on 21-10-1963, informed the R.C. and E.O., Lucknow, that he had been living in "Nasim Manzil" and had vacated it and that the building was open for allotment. On the same date Sri S.S. Pandey Respondent No. 3 made an application for allotment of this building. The R.C. and E.O. the same day passed an order of allotment in favour of Sri Satya Sindhu Pandey. The same day Sri Pandey obtained delivery of possession of the building from Mohd. Ishaq. The possession of a small portion of the building in which Mohd. Mujeeb, one of the vendors, was living, however,

could not be delivered to the allottee. Mohd. Habib one of the owners, and Mohd. Ikram Uddin, the Petitioner's father (who was the intending purchaser) filed a Writ Petition (No. 685 of 1963) before the Lucknow Bench of this Court praying for the quashing of the order of allotment. The writ petition came up for hearing and was disposed of on 2-11-1965. The learned Judge held that Mohd. Ishaq was not a tenant. He was in occupation with the permission of the owners. His possession being on behalf of the owners was that of a licensee. His departure from the house did not amount to a vacancy of the accommodation. So, no allotment order could be passed in respect of the building. It was also held that the allottee could not himself enter into possession without the consent of the landlord. The possession of the allottee was hence wrongful. The allotment order was quashed and it was indicated that the Respondents will make no difficulty about vacating the premises.

3. Sri Pandey, the allottee, filed a Special Appeal (No. 139 of 1965). This appeal was dismissed on 14-12-1965, by a Division Bench. The Bench held that a portion of the building had been given on licence to Mohd. Ishaq who was in occupation as such. When Mohd. Ishaq vacated, the portion so vacated could be validly allotted. The Bench observed:

We find that the allotment order was rightly quashed not on the ground given by our learned brother but on the ground that it was in respect of the entire bungalow whereas only a portion of it could be said to have fallen vacant. A portion of the bungalow was in the occupation of the Respondent who had kept his goods in it. Only the remaining portion was in the occupation of Mohd. Ishaq and only that portion was vacated by him. So the Respondent could be said to have ceased to occupy only a portion of the bungalow and only that portion became an accommodation in respect of which an order could be passed u/s 7(2). The order passed in respect of the entire bungalow was, therefore, illegal and be quashed. In certiorari it could not be corrected.

For the Petitioner it has been stated that the Division Bench passed this order while dismissing the Special Appeal summarily. The Petitioner was not heard and that was the reason for the misapprehension of the factual position that Mohd. Ishaq was a licensee of a portion of the building. The Petitioner's case is that Mohd. Ishaq was living in the whole building without any specific portion being in his exclusive occupation.

4. Thereafter on 24-9-1966, the two owners of Nasim Manzil executed a deed of sale thereof in favour of the Petitioner. Mohd. Habib, the erstwhile owner, made several applications to the R.C. and E.O. demanding restoration of possession of the building. It appears that on 28-1-1966, Sri Pandey made a fresh application for allotment of a portion of Nasim Manzil. He stated that originally the entire building had been allotted to him but the order of allotment had been quashed in a writ petition. In the special appeal the Bench held that as only a part of the accommodation had been vacated by Mohd. Ishaq only that portion could be the subject of an order of allotment. He mentioned that Mohd. Habib had been in

possession of a motor garage, one room in the main building, one servant's Kothri and the underground basement. The rest of the bungalow had fallen vacant. He prayed that the rest of it be allotted to him. The R.C. and E.O. heard the parties and by the impugned order dated 20-1--1957, allotted the portion which was in the occupation of Mohd. Ishaq to the third Respondent. He directed that the possession of the remaining portion of the building shall be restored to the landlord owners.

5. This order of allotment has been challenged on the ground that the R.C. and E.O. was in law not entitled to proceed on the basis that the observations of the Division Bench, that Mohd. Ishaq was in occupation of a portion of the building, was binding on the Petitioner. It was also urged that Mohd. Ishaq was living in the house as a licensee. His leaving the house would not in law create a vacancy so as to attract the jurisdiction of the R.C. and E.O. to make an order of allotment.

6. For the Petitioner it was urged that the Bench deciding the special appeal had not issued notice to the owners and had not heard them. Any finding recorded against the Petitioner's predecessor behind his back would not be binding on him. In law a finding recorded by a Court against a party, in a judgment which ultimately is completely in favour of that party, would not operate as resjudicata against such a party. In Chikkamma and Ors. v. Kempegowda and another AIR 1953 Mys 38)it was held that where a suit was decided in favour of a party the decision of an issue against such a party would not operate as res judicata because that party could not have appealed against that decision, because no part of the decree was against that party. Similar view was taken by the Rajasthan High Court in Mst. Asa Bai Vs. Prabhulal and Others, and by the Nagpur High Court in Firm Kanhaiyalal Mohan Lal Somani v. Paramsukh AIR 1956 Nag. 273. The Petitioner's submission that the view expressed by the Division Bench that Mohd. Ishaq was in possession of a portion of the building would not be res judicata appears to be well founded. The point was open to adjudication.

7. The single Judge had in his judgment stated that the Petitioner's case was that one Mohd. Ishaq, brother-in-law of Petitioner No. 1, was living in the house as a licensee. Petitioner No. 1 in that case was Mohd. Habib, the then owner. The learned Judge had noticed that Mohd. Habib was in possession of a part of the building. It is apparent that Mohd. Ishaq was living in the rest of the house. In the present petition it has been stated that Mohd. Ishaq was living as a licensee and that the entire house was in his occupation. In paragraph 15 of the petition it has been clarified that Mohd. Ishaq was residing in Nasim Manzil ever since Mohd. Wasim migrated to Pakistan. It is thus clear that Mohd. Ishaq was living for several years in this house as a licensee that is to say without payment of any rent, presumably because he was a relation of the owners. Of the two owners Prof. Mohd. Mujib was the Vice Chancellor of Jamia Millia University, New Delhi. Apparently he was living in New Dalhi. Mohd. Habib was a professor in the University of Aligarh. He, as found by the single Judge as well as the Division

Bench deciding the special appeal, was living at Aligarh. It appears that Mohd. Ishaq was in occupation of the house; though Mohd. Habib had retained one room, garage, a servant's quarter etc. for himself. The Petitioners do not appear to have led any evidence or material before the R.C. and E.O. to show that Mohd. Habib had retained for himself any other portion of the house. Their case that the owners were in possession of the whole house, or that Mohd. Ishaq was not in possession of any specific portion does not appear to be well founded. The R.C. and E.O. did not go wrong in deciding on the basis that Mohd. Ishaq was in possession of a part of the building and had vacated it.

8. The question then arises whether vacating of an accommodation by a licensee would cause vacancy so as to attract the jurisdiction of the R.C. and E.O. to allot it. The view of the learned Single Judge in the previous writ petition, that no vacancy would arise, was expressly negated by the Bench in the Special Appeal. That finding cannot operate. The point would be at large between the parties and has to be adjudicated. u/s 7(2) of the UP (Temporary) Control of Rent and Eviction Act, 1947, the District Magistrate can by general or special order require a landlord to let or not to let to any person any accommodation which is or has fallen vacant or is about to fall vacant. u/s 7(1)(a) a landlord has to give notice of the vacancy of an accommodation to the District Magistrate. Under that provision, a vacancy can arise by the landlord ceasing to occupy it or by the tenant vacating it or otherwise ceasing to occupy it, or by termination of a tenancy, or by release from acquisition, or by any other manner whatsoever. In all these situations the District Magistrate can pass an order of allotment. Even where the landlord ceases to occupy, the accommodation becomes vacant. If the accommodation becomes vacant "in any other manner whatsoever" a vacancy arises and it could be allotted. The question is does an accommodation become vacant when a licensee ceases to occupy it. In *Badri Das v. District Magistrate* 1955 AWR 272 Brij Mohan Lall, J. answered this question in the affirmative. In that case the owner sold a property, but he was unable to deliver possession. He continued to remain in possession of the house. He remained in possession for about a year. Thereafter he delivered possession to the purchaser. It was held that the possession of the erstwhile owner for about a year was that of a licensee and on his vacating the premises a vacancy arose and the District Magistrate acquired jurisdiction to allot the house. His Lordship observed:

If the Petitioner had obtained actual possession, put a licensee in possession, and allowed him to continue for one year and if that licensee had surrendered possession after one year, it could not be seriously contended by the Petitioner that he was not bound to give information to the R.C. and E.O., and the said officer was not competent to make an allotment of the house. Section 7(1) of the Control of Rent and Eviction Act is wide enough to cover the case of a licensee relinquishing possession of the accommodation.

In *S.L. Jaiswal v. Commissioner, Varanasi* 1961 AWR 86 Kailash Prasad, J. held that when a tenant sublets an accommodation he does not withdraw his interest

from it and though he may be liable to ejectment but the accommodation does not fall vacant. Similarly if a tenant continues to retain an interest in an accommodation for the benefit of a relation of his, the accommodation does not fall vacant. The learned Judge held that before an accommodation could be deemed to have fallen vacant the tenant should vacate it with an intention of not returning to it. This view was over-ruled by a Division Bench in *Dr. A.C. Dass v. T.R.O.* 1962 AWR 455 where it was held at p. 462, col. 2:

The proposition that there is no vacancy when the accommodation is sublet is contrary to the provision in Section 7(1); when a licensee is put in occupation there may be no vacancy but there undoubtedly is when it is sublet. It is not correct to say that mere withdrawal from the accommodation is not a vacancy; vacancy does arise by ceasing to occupy it. The question whether the tenant, who ceases to occupy, has an intention to return to the occupation or not is relevant not to the question whether he has vacated or not, but to the question whether he has vacated as a landlord or as a tenant.

For the Petitioner reliance was placed on the passing observation that when a licensee is put in occupation there may be no vacancy. But the point here is if a vacancy would arise when the licensee leaves. No such point had specifically arisen in that case. The earlier authorities had not been noticed by the Bench. The trend of the judgment shows that whenever a tenant actually ceases to occupy, a vacancy arises. So, when an owner or a tenant leaves an accommodation in the occupation of a person who continues to live and reside in it, even though without payment of any-rent and without acquiring any interest in the property, and then such person surrenders the possession or ceases to occupy it, a vacancy would be created in the same manner as the owner ceasing to occupy it. In any event the phrase "in any other manner whatsoever" occurring in Section 7(1)(a) of the Act would cover the case of such a licensee.

9. For the Petitioner reliance was placed upon *Lal Beharilal Anr. v. State* 1955 AWR 473 where it was held that where a servant occupies property on behalf of the owner, the occupation is in law that of the owner and there is no lease. There is neither a right to exclusive possession nor an interest in the property in such a case. Where a servant's occupation or residence in a house belonging to his master is required for the purpose of service, such occupation is on the master's account and the servant will not be deemed to be a tenant. That decision turned on the question whether the possession of a servant under those circumstances would be as a tenant. Such a person may not be a tenant. A case of an individual occupying accommodation as a part of remuneration of his service or by virtue of an employment with the owner may or may not Cause a vacancy. In such cases it could be said that the servant was required to live in the house for the better performance of his duties. In such cases the applicable principles may be different, but the case of a relation of the owner residing in a house for a number of years not on account of any service and not merely as a caretaker of the property would be different. He would be in occupation on his own account. He

may be termed a licensee, but on his surrendering the possession the accommodation would become actually and factually vacant within the meaning of Section 7 of UP (Temp.) Control of Rent and Eviction Act. The Rent Control and Eviction Officer, Lucknow, was within his powers in making the impugned order of allotment.

10. The petition, therefore, fails and is dismissed with costs.