

(2012) 07 AHC CK 0340

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 41947 of 2010

Moti Lal Jawahar Lal Gupta

APPELLANT

Vs

Additional District Judge, Varanasi and Others

RESPONDENT

Date of Decision : 25-07-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, 151

Constitution of India, 1950 — Article 226, 227

Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 —
Section 10, 11, 12, 12(2), 12(4)

Citation : (2013) 1 ALJ 721

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Advocate : Ram Niwas Singh and Vinay Kr. Singh Chandel, for the Appellant;
Ajai Kumar Singh, Ashish Kumar Singh and R.K. Kannoja, S.C., for the
Respondent

Final Decision : Dismissed

Judgement

Sudhir Agarwal, J.—Heard Sri. Ram Niwas Singh, Advocate for petitioner, learned Standing Counsel for respondents No. 1 and 2 and Sri. Ajai Kumar Singh, Advocate for respondent No. 3. None is present on behalf of respondents No. 4, 5 and 6 though name of Sri. R.K. Kannoja, Advocate has been shown in the cause list. The petitioner is aggrieved by the order dated 04.02.2008 (Annexure-6 to the writ petition) passed by Rent Control and Eviction Officer, Varanasi (hereinafter referred to as the "RCEO") in purported exercise of power u/s 16(1)(a) of U.P. Urban Building (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as the "Act, 1972") allotting the premises in question, namely, a shop situated at ground floor of House No. D 17/142 to Sri. Mahendra Srivastava son of Sri. Dau Dayal Srivastava, resident of House No. D-36/19-A, August Kunda, Varanasi; the order dated 16.11.2009 (Annexure-2 to the writ petition) rejecting petitioner's application seeking restoration of premises to him by setting aside the order dated 04.02.2008; and, the revisional

order dated 28.05.2010 passed by Additional District Judge, Court No. 11, Varanasi dismissing revision preferred by petitioner.

2. The case set up by petitioner as evident from his pleadings in writ petition is that House No. D-17/142 is owned by Sri. Sunil Krishna Ghosh and others residing at Calcutta and they are the landlords. A power of attorney was executed by owners in favour of Sri. Gorakh Nath Sharma son of Sri. Aditya Sharma, resident of D-32/84, Pataleshwar, Bengali Tola, Varanasi City. In the premises in dispute one Sri. Bharat Lal Kasera was the tenant and thereafter petitioner got tenancy rights. One Sri. Niwaran Chandra Chatterji filed Suit No. 224 of 1978 seeking declaration of ownership in respect to property in dispute on the basis of adverse possession. An ex parte decree was passed in his favour on 28.10.1980. Based on the said decree, mutation in municipal records was made entering his name as owner of property in dispute. Thereafter Sri. Rajendra Ghosh and others filed restoration application against ex parte decree dated 28.10.1980 which was registered as Misc. Case No. 155 of 1983 and allowed by trial Court's order dated 01.10.1985. The ex parte decree dated 28.10.1980 accordingly was set aside. Sri. Niwaran Chandra Chatterji filed Revision No. 829 of 1985 before this Court but it was dismissed on 18.08.1999. Even a review application was rejected. The aforesaid suit ultimately was dismissed for want of prosecution on 17.07.2000 and a restoration application filed by plaintiff, Niwaran Chandra Chatterji is still pending.

3. Respondents No. 4 to 6 claimed to have purchased aforesaid building from Sri. Niwaran Chandra Chatterji vide sale-deed dated 09.07.1986. It is at their instance though they had no concern with property in dispute, an application was filed by respondent No. 3 for allotment of shop in question disclosing that owner of property is Sri. Dilip Kumar Tulsiani, respondent No. 4. Consequently, the RCEO heard only respondents No. 3 and 4 to 6 on the aforesaid application of allotment and declared vacancy by its order dated 27.12.2007. Thereafter he passed allotment order on 04.02.2008. Before passing the said order neither petitioner was issued any notice nor was heard. The proceedings are illegal inasmuch as real owners of property in dispute were not given any notice or opportunity.

4. The petitioner filed an application dated 06.02.2008 under Order 9, Rule 13 read with Section 151, C.P.C. and Rule 32 of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Rules, 1972 (hereinafter referred to as the "Rules, 1972"). The said application was contested by respondent No. 3 vide objection dated 29.04.2008. A separate objection was filed by respondents No. 4 to 6 which is also dated 29.04.2008. The RCEO rejected the aforesaid application of petitioner vide his order dated 16.11.2009 firstly, on the ground that Order 9, Rule 13, C.P.C. is not applicable in the present matter; secondly, on the ground that the petitioner is an unauthorised occupant and thirdly that the notice was issued to him which he refused to receive and, therefore, it was deemed sufficient service of notice upon petitioner. The petitioner's revision against

aforesaid order dated 16.11.2009 has also been dismissed by revisional Court.

5. This writ petition has been contested by respondent No. 3 as also the respondents No. 4 to 6 by filing their separate counter-affidavits.

6. The respondent No. 3 has denied averments of petitioner that property in dispute is owned by Sri. Sunil Krishna Ghosh, Sidheshwar Das, Ashim Krishna Ghosh, Tapan Kumar Ghosh, Pradeep Kumar Ghosh and others: The alleged power of attorney executed in favour of Gorakh Nath Sharma is also denied.

7. It is said that the owner of property in dispute was late Niwaran Chandra Chatterji who transferred the same vide registered sale-deed dated 09.07.1986 in favour of respondents No. 4 to 6, The petitioner is occupying the premises in dispute wholly unauthorisedly as there is no letter of allotment issued in his favour. It is also contended that application submitted by petitioner was not maintainable either in law or otherwise. The respondent No. 2 issued notice to petitioner on 11.12.2007 fixing 18.12.2008. The notice was served by process server in presence of two witnesses, namely, Ramesh Vadhvani and Kishore Jaiswal but petitioner refused to receive notice and this fact was supported by affidavits filed by aforesaid two independent witnesses. The petitioner's contention that he was not aware of proceedings is also not correct inasmuch as he put in appearance through his Advocate, Sri. Shashi Bhushan before RCEO but instead of case No. 18 of 2007 the said Vakalatnama was filed in Case No. 19 of 2007, Pappu Sonkar v. Dilip Kumar Tulsiani which was another proceeding u/s 16(1)(a) in respect to a different part of the accommodation in the building No. D-17/142 though he was not party in Case No. 19 of 2007 and no notice was issued therein to him.

8. In the counter-affidavit filed by respondents No. 4 to 6 similar averments have been made besides the fact that they are paying house tax, water tax etc. of the premise in dispute and are registered owner of the said house in municipal record. It is further said that earlier accommodation in question was occupied unauthorisedly by one Sri. Bharat Lal Kasera who was residing with his family members in the room in question. He permitted petitioner's occupation without consent of respondents No. 4 to 6 and, therefore, the petitioner was an authorised occupant in accommodation in question.

9. The petitioner has filed rejoinder affidavit in reply to both the counter-affidavits reiterating what he has said in the writ petition. All other aspects, if any, I shall deal at appropriate stage.

10. At this stage only one aspect need be mentioned. In para 4 of the rejoinder affidavit filed in reply to counter-affidavit of respondent No. 3, petitioner has given period of his occupation of accommodation in question, i.e., year 2000. The exact date and month is not given. According to respondents No. 2 to 6 the petitioner is occupying the premises in dispute since 2005.

11. Be that as it may, it is not the case of petitioner that he is occupying the

premises in question with any order of allotment issued by competent authority under Act, 1972. Sri. Ram Niwas Singh, learned counsel appearing for petitioner submitted that under Rule 8 of 1972 Rules, notice to a person occupying a premises is mandatory before making an order of allotment. He also contended that an application for setting aside an ex parte order could have been filed by petitioner under Rule 32 of 1972 Rules and RCEO in ignoring this aspect of the matter and taking a different view has committed patent error. In any case he also contended that under Rule 22 the Prescribed Authority and Appellate Authority are vested with powers of civil Court in trying a suit in respect to various matters and clause (b) confers power to set aside an ex parte order. Hence petitioner's application dated 06.02.2008 could also have been considered under Rule 22(b). Sri. Singh has placed reliance on the Apex Court's decision in *Mansaram Vs. S.P. Pathak and Others*, .

12. Learned counsel appearing for respondents supported the impugned orders for the reasons stated therein and also reiterated what they have stated in the counter-affidavit.

13. It is evident from the record that petitioner himself has not claimed any authority for occupying the premises in dispute except that he was allowed to retain possession of accommodation in question by one Bharat Lal Kasera. Though the petitioner claimed to have got possession in 2000 and respondents said that said possession is since 2005 and in inspection report dated 13.11.2007 (Annexure-CA-2 to the counter-affidavit of respondent No. 3) also the year of occupation of petitioner in the accommodation in dispute is said to be 2005 but that would not make any difference for the reason that in either of the case, in absence of any order of allotment, the occupation of premises in dispute by petitioner cannot be said to be legal in any manner. Section 11 clearly prohibits letting of any building except in pursuance of allotment order issued u/s 16 and Section 13 declares occupation of a premises by a person without any order of allotment or release u/s 16 as unauthorised.

14. It has repeatedly been held time and again that occupation of a premise in contravention of provisions of Act, 1972 is illegal and unauthorised. I need not burden this judgment with catena of such authorities but refer only recent one, namely, the Apex Court's decision in *Nutan Kumar and Others Vs. IInd Additional District Judge and Others*, .

15. When a premises is occupied by a person unauthorisedly, he is a deemed unauthorised occupant. The statute thus contemplate that the property shall be deemed to be vacant. Without commenting upon the authority of Sri. Bharat Lal Kasera who was earlier occupying premises in dispute since neither he is party to the present litigation nor anything has been said about his authority in which he was occupying the premises in question but treating the same to be valid, as soon as he permits petitioner to occupy the premises in question and petitioner having not shown that he was a family member of Sri. Bharat Lal Kasera, the shop in question would be deemed to have ceased to be occupied by a valid

tenant u/s 12(2) and, therefore, RCEO was entitled to treat the accommodation in question deemed vacant.

16. This Court has taken a view, when a person occupies a premises unauthorisedly which is governed by Act, 1972, the power of competent authority to allot such premises treating it vacant, by passing an allotment order, is not checked or restricted in any manner since his possession need not be recognised by competent authority for any purposes. In this regard it would be useful to refer this Court's decision in Geep Industrial Syndicate Limited Vs. The Rent Control and Eviction Officer and Others, . In para 13 the Court said:

Sections 11 and 13 of the present Act make that position very clear. No one now can either let out any premises without an allotment order nor can anyone occupy the same. If any one occupies the premises without an allotment order, he would not only be an unauthorized occupant but also liable to prosecution u/s 31 of the said, Act. His possession being unauthorised cannot be recognised in the eye of law and if it cannot be recognised in the eye of law, there would be a vacancy. That would entitle the Rent Control and Eviction Officer u/s 16 to pass an allotment order.

17. To the same effect is the view taken in Ajay Pal Singh and others v. District Judge, Meerut and others, 2008 (2) ARC 264 : (AIR 2008 SC 2325) (paras 22 and 23).

18. Recently also this Court in Smt. Sheela Devi Vs. Patanjali Mocate and Others, has taken the same view as is evident from para 14 thereof, which reads as under:--

14. The premises in the possession of an unauthorized occupant would be deemed to be vacant for the purposes of Rent Control Act, even if an unauthorized occupant is inducted into the premises contrary to the provisions of the Act by the landlord himself, the legislature has not placed any restriction on the rent control authorities to initiate proceedings u/s 12 of the Act. So far as the release of such premises which are deemed to be vacant u/s 12(4) of the Act is concerned, the application of release has to be considered on merit in accordance with law by the District Magistrate. The unauthorized occupant has no right to interfere in the aforesaid proceeding of release.

19. Now coming to the question, whether petitioner's application under Rule 32 read with Order 9, Rule 13, C.P.C. was maintainable before RCEO or not. I have no manner of doubt that Rule 32 of 1972 Rules has no application in the present case. It is applicable in respect to orders passed under certain specific provisions, namely, Sections 8, 9, 10, 18, 21, 22, 24(2), 27(1) and 28(4). Section 16 is not at all referred therein and therefore Rule 32 has no application in the present case. Moreover, it was not an ex parte order and, therefore, Rule 22 read with Order 9, Rule 13, C.P.C., even if for the sake of argument, can not be held applicable in the present case.

20. Now the next issue. There is Rule 8, sub-rule (2) which provides that inspection of building shall be made in presence of landlord, the tenant or any other occupant. In the present case the inspection was made in presence of petitioner's brother, Ramesh son of Sri. Jawahar Lal who was present at the time of inspection. It is not disputed that Sri. Ramesh who was present at the time of inspection was not petitioner's brother. The facts stated in the inspection report, as such, have not been challenged by petitioner. Thus the petitioner had knowledge of proceedings u/s 16 pending before RCEO.

21. Moreover, respondent No. 3 in his counter-affidavit has averred that notice was issued to petitioner by respondent No. 2 vide order dated 11.12.2007 fixing 18.12.2007. The notice was served by process server of the Court of respondent No. 2 in presence of two witnesses, namely, Ramesh Vadhwani and Kishore Jaiswal but the petitioner refused to receive the same. The affidavits of these two witnesses said to have been filed before RCEO have also been placed on record as Annexures-CA-4 & 5 to the counter-affidavit of respondent No. 3. Both these persons have stated that they are residing in the neighbourhood of accommodation in question. They have said that in their presence, petitioner read notice and thereafter returned to process server and further said that he shall appear on the date fixed to do necessary pairavi. This evidence has been believed by Court below and not shown perverse before this Court.

22. There is another interesting aspect. The Vakalatnama of Sri. Shashi Bhushan, Advocate is said to have been filed by petitioner in Case No. 19 of 2007 pending before the same Court on 18.12.2007 itself. The aforesaid case was titled as Pappu Sonkar v. Babu Lal, as is evident from Vakalatnama, copy whereof has been filed as Annexure-CA-7 to the counter-affidavit of respondent No. 3. However, the nakal obtained by respondent No. 3 shows that the counsel sought to have filed the same by mentioning parties name as Pappu Sonkar v. Dilip Kumar Tulsiani. It is also not disputed that in Case No. 19 of 2007, Pappu Sonkar v. Babu Lal, the petitioner was not a party. Para 30 of the counter-affidavit containing these facts has been replied by petitioner in his rejoinder affidavit admitting that he has signed Vakalatnama but he has explained that the other defendants of Case No. 19 of 2007 got his signature though petitioner had no knowledge of either case No. 18 of 2007 or Case No. 19 of 2007. The Vakalatnama was obtained by those defendants in Case No. 19 of 2007 alleging that petitioner was also party therein though he had not appeared in the said matter. Both the Courts below have disbelieved petitioner's above version regarding service of notice. These are the findings of facts. In absence of anything to show perversity therein, I do not find any reason to interfere in writ jurisdiction under Article 226 /227 of the Constitution.

23. Having said so, once the issue of notice goes, the petitioner being an unauthorised occupant of premises in question, I find no reason to interfere with the order of allotment made in favour of respondent No. 3 since the petitioner atleast has no right to challenge the said order being himself an unauthorised

occupant. The writ petition, therefore, is dismissed with costs, which I quantify to Rs. 10,000/-.