
(2006) 07 UK CK 0022

In the Uttarakhand High Court

Case No : Writ Petition No. 623 (MS) of 2006

Mr. Atique Ahmad and Others

APPELLANT

Vs

Smt. Jasvinder Kaur and Others

RESPONDENT

Date of Decision : 25-07-2006

Acts Referred:

Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 —
Section 16(1)(b), 3(g)

Citation : (2007) 2 UC 865

Hon'ble Judges : Rajesh Tandon, J

Bench : Single Bench

Advocate : Sri A. Rab, for the Appellant; Sri Manoj Kumar Sharma, Sri K.N. Joshi for Respondents No. 1 and Learned Standing Counsel for Respondents No. 2 and 3, for the Respondent

Final Decision : Dismissed

Judgement

Hon'ble Rajesh Tandon, J.—Heard Sri A. Rab, Advocate for the Petitioner, Mr. Manoj Kumar Sharma & Sri K.N. Joshi, Advocate for the Respondent No. 1 and Standing Counsel for the Respondents No. 2 and 3.

2. By the present writ petition, the Petitioners have prayed for a writ of certiorari quashing the order of vacancy as well as release dated 17th August 2005 and 13th December, 2005 passed by the Rent Control and Eviction Officer in Case No. 10 of 2003 Smt. Jasvinder Kaur v. Smt. Majeedan and Ors. (Annexures 17 and 18 to the writ petition) as well as the order dated 6th May, 2006 passed by the revisional Court/District Judge, Dehradun in R.C.R. No. 2/ 2006 Atique Ahmed v. Jasvinder Kaur and others.

3. Briefly stated, according to the case of the Petitioners, they are tenants of shop No. 26 Landhoure Bazar, Mussoorie along with a small portion in the premises itself for residential purposes. Petitioners have submitted that their father had two wives; namely Smt. Majeedan & Smt. Masoodi. Smt. Masoodi who used to live in village had No. issue, whereas Petitioner No. 1 according to him, is

the eldest son of the late Rafique Ahmed and has become major in the year, 2003. However, Petitioners No. 2 and 3 are still minOrs. 4. In the year, 1993, father of the Petitioner died leaving behind the Petitioners, Smt. Majeedan and Smt. Masoodi.

5. Petitioners have submitted that looking to the family members, who were minors at that time, their cousin Mohd. Khurseed assisted them in the business of barber and now Petitioner No. 1 is looking after the said business. Proceedings for vacancy were started on an application preferred before the Rent Control and Eviction Officer for release of the accommodation on the ground that the same is vacant. A perusal of the application u/s 16(1)(b) shows that after the death of Rafique Ahmad in the year, 1993, Smt. Majeedan came to Mussoorie and paid the rent upto 1994 and removed entire house-hold effects and from 1995, Mohd. Khurseed has started business, when in point of fact, Mohd. Khurseed is not a member of the family and as such, the accommodation has fallen vacant and the same has been occupied by Mohd. Khurseed, who is an unauthorized occupant and as such the landlord has prayed for declaring the vacancy and for release of the accommodation.

6. On the aforesaid application, an inspection was made and the report was submitted on 30th August, 2001. The same is quoted below:

7. As will appear from the aforesaid report that the premises has been occupied by Mohd, Khurseed. There is also an affidavit of Mohd, Khurseed himself, who has stated that he is looking-after the children of late Rafique Ahmed. The affidavit was filed by Sri Atique Ahmed as well. In paragraph 6 of the affidavit, it has been stated that the electricity connection is in the name of Mohd. Khurseed and the bills are being paid by him as well. Mohd. Khurseed has also paid the rent on 30th June, 2003. The affidavit of Vikram Verma is also on the record, who has deposed that Mohd. Khurseed is doing the entire work. Similar affidavit has been filed by one Mr. Chandra Bhan. Paragraph 3 of the aforesaid affidavit is quoted below:

8. Mohd. Khurseed has also filed an affidavit dated 28th April, 2005. He has admitted that he has applied for electric connection. Paragraph 6 to that effect is quoted below:

9. On 15th December, 2005 an inspection was made by the SDM, where Mohd. Khurseed has been found to be the tenant of the shop in question.

10. The Rent Control and Eviction Officer on the basis of the aforesaid findings on the record has found that in the year, 1995, the shop as well as the residential portion has been occupied by Mohd. Khurseed, who is not a member of the family and as such the accommodation was deemed to be vacant. The findings of the Rent Control & Eviction Officer is quoted below:

11. After the declaration of the vacancy, the premises was released in favour of the landlord on 13th December, 2005 u/s 16(1)(b) of U.P. Act No. 13 of 1972.

The Petitioner has preferred a revision before the District Judge, who has recorded a finding that Mohd. Khurseed being not a member of the family is not covered u/s 3(g) of the UP Act No. 13 of 1972. The revisional Court has also relied upon the admission of Mohd. Khurseed to the following effect:

As discussed earlier, Khurseed Ahmed himself has admitted in his affidavit that he came from his village to Mussoorie after the death of original tenant in order to extend his help to the minor children of original tenant. Khurshid Ahmed has not mentioned his any other place of resident at Mussoorie. It is not the case of Khurshid Ahmed that he himself has got some accommodation of his own or has obtained any rental accommodation for his residence at Mussoorie. In the affidavit it self (paper number 19/1) Khurshid Ahmad has given his residential address as 36, Labour Bazar, Mussoorie i.e. the address of the disputed premises. This clearly shows that Khurshid Ahmed is residing in the rear portion of the disputed premises. Landlady has her affidavit in unambiguous term asserted that Khurshid Ahmed is residing in the rear portion of the premises in question along with his family members. Landlady as annexure of her affidavit has filed copy of the application which Khurshid Ahmed moved for an electric connection in the premises in question. Since for an electric connection in a tenanted portion., consent of landlord is required, else the application has to file an indemnity bond. The landlady as annexure of her affidavit has filed the indemnity bond filed by Khurshid Ahmed. In both these documents annexure 3 and 4 of affidavit paper Number 211 2. Khurshid Ahmed claiming himself to be the tenant of the premises in question filed application for electric connection as well as the indemnity bond. In both these document Khurshid Ahmed has given his address of the residence etc. i.e. of premises in question.

12. As will appear from the findings recorded by the revisional Court that Mohd. Khurseed himself has admitted this fact that indemnity bond has been filled up by Mohd. Khursheed and the address of the disputed premises has been given by him addressing himself to be the tenant of the disputed premises.

13. A counter affidavit has also been filed by the Respondent No. 3 and in the counter affidavit, affidavit of Smt. Jasvinder Kaur has been annexed. She has stated in paragraph 8 as under:

14. In the affidavit of Mr. Atique Ahmed, he has also stated that he has deposited the rent from 1994 upto 2003. Relevant portion of affidavit of Atique Ahmed is quoted below:

15. Paragraph 13 of the affidavit of Jasvinder Kaur dated 03-02-2005 establishes the subletting on the part of the Petitioners in favour of Mohd. Khurseed. Paragraph 13 is quoted below:

16. There is also on record, the receipt of electric connection granted by the electricity board showing the metre in favour of Mohd. Khurseed and indemnity bond showing him the tenant of the property. Some detail is quoted below:

17. A perusal of the aforesaid documents fully establishes that the accommodation by fiction of law shall be deemed to be vacant. Section 12(1)(a) to (c) reads as under:

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 residence, elsewhere.

18. The law is very well settled that there is a restriction for occupation without any allotment or release as contained u/s s 11 and 13 of the U.P. Act No. 13 of 1972. The same is quoted below:

11. Prohibition of letting without allotment order.- Save as hereinafter provided, No. person shall let any buildings except in pursuance of an allotment order issued u/s 16.

13. Restrictions on occupation of building without allotment or release.- Where a landlord or tenant ceases to occupy a building or part thereof, No. person shall occupy it in any capacity on his behalf, or otherwise than under an order of allotment or release u/s 16, and if a person so purports to occupy it, he shall, without prejudice to the provisions of Section 31, be deemed to be an unauthorized occupant of such building or part.

19. A rejoinder affidavit has also been filed by the Petitioners reiterating the facts mentioned in the writ petition. However, there was No. denial of the electricity connection in favour of Mohd. Khurseed.

20. Sri A. Rab, counsel for the Petitioners has referred Parvinder Singh Vs. Renu Gautam and Others, , where it has been held as under:

Rent Control laws usually protect the tenant so long as he may himself use the premises but not his transferee inducted into possession of the premises, in breach of the contract or the law, which act is often done with the object of the illegitimate profiteering or rack renting. The defeat the provisions of law, a device is at times adopted by unscrupulous tenants, and sub-tenants of bringing into existence a deed of partnership which gives the relationship of tenant and sub-tenant an outward appearance of partnership while in effect what has come into existence is a sub-tenancy or parting with possession camouflaged under the cloak of partnership.....Parting with possession or control over the tenancy premises by tenant in favour of third person would amount to the tenant having transferred his right under the lease" within the meaning of Section 14(2)(i)(a) of the Act."

21. The Apex Court has also observed in the aforesaid judgment that in such matters all that is needed to be done is its appreciation and to draw inference. The inferences are that Mohd. Khurseed has entered into an agreement with the electricity department by fulfilling indemnity bond and admittedly he is residing and runs the shop and therefore, by fiction of law, the accommodation shall be deemed to be vacant within the meaning of Section 12(1)(a) and (b) of U.P. Act No. 13 of 1972.

22. In Ganpat Roy v. Addl. District Magistrate, 1985(2) ARC 73, the Apex Court has explained the word "fiction" which is fully applicable in the present case and by fiction of law, therefore, the accommodation shall be deemed to be vacant. The observation of the Apex Court is quoted below:

Section 13 provides that where a landlord or tenant ceases to occupy a building or part thereof, No. person is to occupy it in any capacity on his behalf or otherwise than under an order of allotment or release u/s 16. Section 15 casts a duty on every landlord or tenant to give intimation of vacancy; to the District Magistrate."

23. In Madhu Gopal Vs. VI Additional District Judge and Others, , the Apex Court has observed as under:

7. In any event, it is a well-settled principle of construction that unless clearly indicated, a proviso would not take away substantive rights given by the Section or the Sub-section. A landlord has a right to the property. The Section should not be so construed as to defeat the right to possession of property in appropriate cases unless the intention of the Legislature is manifest. We find No. such clear intention in the fact of this case.

8. We are, therefore, of the opinion that the High Court came to the correct conclusion that a landlord, even though not in actual physical possession at the time of the possession of the property, can ask for review of the order of release or allotment. It must be borne in mind that this view was also expressed by Mr. Justice N.D. Ojha, as our learned brother then was, in his judgment in Niren Kumar Das Vs. The District Judge, Pilibhit and Others, . We agree with that interpretation.

24. I have already taken a view in Gurnaam Singh v. Rent Control & Eviction Officer 2003 (2) ARC 433 2004(1) U.D., 60. relying upon the judgment of Apex Court in The Siemens Engineering and Manufacturing Co. of India Ltd. Vs. The Union of India (UOI) and Another, and Union of India (UOI) Vs. Mohan Lal Capoor and Others, at Page 97 and that the deeming clause fully applies to the present case and the findings recorded by the two courts below holding that the accommodation is vacant cannot be interfered U/A 226 and 227 of the Constitution of India.

25. In Harish Tandon v. Addl. District Magistrate Allahabad, U.P. and Ors. Supreme Court & Full Bench 1995 RC 123, where it has been held as under:

13. The role of a provision in a statute creating legal fiction is by now well-settled. When a Statute creates a legal fiction saying that something shall be deemed to have been done which in fact and truth has not been done, the Court has to examine and ascertain as to for what purpose and between what persons such a statutory fiction and it has to be carried to its logical conclusion. In the well known case of *East End Dwellings Company Ltd. v. Finsbury Borough Council*, (1952) AC 109 (B), Lord Asquith while dealing with the provisions of the Town and Country Planning Act, 1947, observed:

If you are bidden to treat an imaginary State of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative, State of affairs had in fact existed, must inevitably have flowed from or accompanied it.....The statute says that you must imagine a certain State of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that State of affairs.

That statement of law in respect of a statutory fiction is being consistently followed by this Court. Reference in this connection may be made to the case of *The State of Bombay Vs. Pandurang Vinayak Chaphalkar and Others*, . From the facts of that case it shall appear that Bombay Building (Control on Erection) Ordinance, 1948 which was applicable to certain areas mentioned in the schedule to it, was extended by a notification to all the areas in the province in respect of buildings intended to be used for the purposes of cinemas. The Ordinance was repealed and replaced by an Act which again extended to areas mentioned in the schedule with power under Sub-section (3) of Section 1 to extend its operation to other areas. This Court held that the deemed clause in Section 15 of the Act read with Section 25 of the Bombay General Clauses Act has to be given full effect and the expression "enactment" in the Act will cover the word "Ordinance" occurring in the notification which had been issued. In that connection it was said:

The corollary, thus, of declaring the provisions of Section 25, Bombay General Clauses Act, applicable to the repeal of the ordinance and of deeming that ordinance an enactment is that, whatever, the word "ordinance" occurs in the notification, that word has to be read as an enactment.

14. In the case of *The Chief Inspector of Mines and Another Vs. Lala Karam Chand Thapar etc.*, , it was said:

Were these Regulations in force on the alleged date of contravention ? Certainly, they were, in consequence of the provisions of Section 24 of the General Clauses Act. The fact that these Regulations were deemed to be Regulations made under the 1952 Act does not in any way affect the position that they were laws in force on the alleged date of contravention. The argument that as they were "Regulations" under the 1952 Act in consequence of a deeming provision, they were not laws in force on the alleged date of contravention is entirely

misconceived.

15. In the case of J.K. Cotton Spinning and Weaving Mills Ltd. and Anr Vs. Union of India (UOI) and Ors, , it was said:

It is well-settled that a deeming provision is an admission of the non-existence of the fact deemed. Therefore, in view of the deeming provisions under Explanations to Rs. 9 and 49, although the goods which are produced or manufactured at an inter-mediate stage and, thereafter, consumed or utilized in the integrated process for the manufacture of another commodity is not actually removed shall be construed and regarded as removed. The Legislature is quite competent to enact a deeming provision for the purpose of assuming the existence of a fact which does not really exist.

16. Recently in the case of M. Venugopal Vs. The Divisional Manager, Life Insurance Corporation of India, Machilipatnam, Andhra Pradesh and another, after referring to the case of East End Dwellings Company Ltd. v. Finsbury Borough Council (supra), it was said that when one is bidden to treat an imaginary state of affairs as real, he must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, must inevitably have flowed.

17. When Sub-section (2) of Section 12, provides that whenever a tenant carrying on business in a building admits a person, who is not a member of his family, as a partner, the tenant shall be deemed to have ceased to occupy the building, full effect has to be given to the mandate of the Legislature. There is No. escape from the conclusion that such tenant has ceased to occupy the building. No. discretion is left to the Court to enquire or investigate as to what was the object of such tenant while inducting a person as partner who was not the member of his family. It can be said that the aforesaid statutory provision requires the Court to come to the conclusion that by the contravention made by the tenant such tenant has ceased to occupy the building. The framers of the Act have not stopped only at the stage of Section 12(2), but have further provided in Section 25, Explanation (i) another legal fiction saying that where the tenant ceases to occupy the building within the meaning of Sub-section (2) of Section 12, "he shall be deemed to have sub-let that building or part". In view of the three deeming clauses introduced in Sub-section (2) of Section 12, Sub-section (4) of Section 12 and Explanation (i) to Section 25, No. scope has been left for the Courts to examine and consider facts and circumstances of any particular case, as to what was the object of admitting a person who is not the member of the family, as partner and as to whether, in fact, the premises or part, thereof, have been sub-let to such person.

18. It was then urged that if such strict interpretation is given to Sub-section (2) of Section 12, then similar interpretation should be given to Section 12(1)(b) and to Section 12(3) of the Act which prescribes other conditions under which the tenant shall be deemed to have ceased to occupy the building under his tenancy.

It was pointed out that Sub-section (1)(b) of Section 12, says that a landlord or tenant of a building shall be deemed to have ceased to occupy the building or a part, thereof, if he has allowed it to be occupied by any person who is not a member of his family.....If the landlord or the tenant allows any person, who is not a member of the family within the meaning of the Act to occupy the premises, with the object that such person shall occupy such premises in his own rights, in that even, Clause (b) of Sub-section (1) of Section 12 shall be attracted.

26. In *Surya Dev Rai Vs. Ram Chander Rai and Others*, , the Apex Court has held as under:

Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When a subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.

Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirement are satisfied: (i) The error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby.

A patent error is an error which is self-evident i.e. which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view, the error cannot be called gross or patent.

The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or correction is yet capable of being corrected at the conclusion of the proceedings is an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of the High Court would obstruct the smooth flow and or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that every moment, may become incapable of correction at a later stage and refused to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the Lis.

The High Court in exercise of certiorari or supervisory jurisdiction will not convert

itself into a court of appeal and indulge in reappreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

27. Relying upon the judgment of Surya Dev Rai Vs. Ram Chander Rai and Others, , the Apex Court in Ranjeet Singh Vs. Ravi Prakash, , has held as under:

As to the exercise of supervisory jurisdiction of the High Court under Article 227 of the Constitution of India also, it has been held in Surya Dev Rai that the jurisdiction was not available to be exercised for indulging in reappreciation or evaluation of evidence or correcting the errors in drawing inferences like a court of appeal."

28. The writ petition fails and is dismissed. However, the Petitioners pray for time to vacate the premises. The Respondent No. 2 is allowed time up to 31st December, 2006 to vacate the premises provided:

(A) undertaking is given by the Petitioner before the appropriate authority by 15th August, 2006 to vacate the accommodation by 31st December, 2006.

(B) the Petitioners shall pay the damages for use and occupation by 15th August, 2006 along with the undertaking to pay the damages upto date.

(C) failing which liberty is given to the Respondent No. 3 to execute the order forthwith.

29. Writ petition lacks merit and is dismissed. No. order as to costs.