
(1993) 10 AHC CK 0029
In the Allahabad High Court
Case No : Writ Petition No. 93 (R/C) of 1993

Munshi Lal Agarwal and others

APPELLANT

Vs

9th ADDL.DISTRICT JUDGE, LUCKNOW and others

RESPONDENT

Date of Decision : 08-10-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 9, 107(2)
Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 —
Section 34(1)

Citation : (1993) 10 AHC CK 0029

Hon'ble Judges : H.N.Tilhari, J

Final Decision : Dismissed

Judgement

H.N. Tilhari, J.—The tenantspetitioners have filed this petition under Article 226 of the Constitution of India, challenging the order dated 1851993 passed by IX Additional District Judge, Lucknow whereby the learned IX Additional District Judge during the pendency of Rent appeal No 54 of 1990 passed an order on applications moved by the landlord opposite parties for issue of a Commission to inspect the house i. e. the landlord house and to report about its actual condition or alteration to the Court. The applications have been mentioned in the order Annexure8 as applications (C26, C43, C51 and C73) and the objections to the applications have been mentioned as (C34 and C75). The learned IX Additional District Judge, Lucknow has allowed these applications in part i. e. it has taken a view that local inspection by the Court is not necessary instead the justice requires that an Advocate Commissioner be appointed and a commission be issued to make the spot inspection and to submit his report. This order was passed by the learned Additional District Judge, Lucknow on 1851993.

2. The facts of the case in brief are that the opposite party landlord had moved an application for release of the house No. 251/35 Terhi Bazar, Rakabganj, Lucknow under Section 21 U.P. Urban Buildings (Regulation of letting, Rent and Eviction) Act, 1972 (U. P. Act No. X1IT of 1972) on the ground of bonafide need and further, that it was in dilapidated condition, and it is required by the

applicants for their own use after demolition and reconstruction. The release application was contested and a written statement was filed by the petitioner challenging the release application and alleging that the house of the opposite party was not dilapidated. The release application of the opposite party was rejected and having felt aggrieved therefrom the opposite party Landlord filed the appeal being Rent appeal No. 54 of 1990. During the pendency of this appeal No. 54 of 1990 the applications (C26, C43, C51 and C73) were moved & to those applications the present petitioners filed the objections. The objection that has been filed is C34 on the record of the Court below. A copy of which has been annexed as Annexure 6 to the writ petition. It was submitted by way of objection that before the appellate Court the opposite party appellant had moved an application for appointment of Commissioner which was originally allowed at the back of the respondent in the appeal i. e. (petitioner) in the writ petition and the said order allowing the Commission in appeal was withdrawn and the application for Commission was rejected. It is further submitted in the preliminary objection that it was not open to the landlord to move other applications for appointment of Commissioner in the appeal as he had not challenged the earlier order of the appellate Court rejecting the prayer of the present opposite party i. e. the appellant for appointment of Commissioner and for Local Inspection. He submitted that in view of rejection of earlier applications (C7, C9, C12 and C21), the Landlords' application for Commission was barred by doctrine of estoppel and resjudicata. The learned Additional District Judge by his order dated 18/5/1993 allowed the application for Commission as has been mentioned above, taking the view that for having the clear picture of the actual position in the light of subsequent developments or new situation which have developed during the period from the issuance of Commission by the Court below, it is necessary to issue a fresh Commission and that the doctrine of estoppel or resjudicata are not applicable and in any way these technical rules are not intended to obstruct the flow of justice.

3. Feeling aggrieved from the order of the Additional District Judge, dated 18/5/1993 the petitioner has filed this writ petition under Article 226 of the Constitution of India.

4. The counter affidavit has been filed by the opposite party Landlord and the case has been argued on behalf of the petitioner by Sri K. L. Gurnani and on behalf of the opposite party by Sri Basant Kumar Nigam at length.

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5. Sri K. L. Gurnani, the learned Counsel for the petitioner laid main emphasis on the point that vide order dated 15/9/1990 copy of which is Annexure No. 5 to the writ petition, the Additional District Judge, on earlier occasion rejected the applications moved by the landlord for local inspection either by the Court or by Vakil Commissioner or by Amin which applications were (C7, C9, C12 and C21) and as such the opposite party No. i.e. IXth Additional District Judge, had no jurisdiction to either entertain or allow similar four applications for the same

purpose in view of the Doctrine of resjudicata which is applicable in respect of orders passed during the course of proceedings of the case at any stage of the case i. e. in other words he submitted that the orders passed on 15/9/1990 operate as resjudicata and as such he submitted the order passed was illegal and without jurisdiction. Sri K. L. Gurnani the learned counsel for the petitioner in support of his above contention placed reliance on the decision of Supreme Court in the case of Satya Dhayan v. Smt. Devrajini Devi reported in AIR 1960 SC page 941 and in particular on the principle and the observation that the principle of resjudicata applies as well as to the different stages of the same litigation. Sri Gurnani further tried to submit that the conduct of the opposite party landlord had been mala fide throughout the proceedings under Section 21 of the Act. so the Court below should not have shown any indulgence in favour of landlord, like the one, as granting the application for issue of Commission as successive applications have been causing harassment and in connivance to the petitioner-tenant. On behalf of opposite party, Sri Basant Kumar Nigam refuted those contentions vehemently. He submitted that the order rejecting application for Commission vide Annexure 5 did not per se decide any case, it did not either amount to a judgment deciding the rights nor did it amount to a decree or case decided. Sri Nigam submitted that an order whereby the Court decides or determines some right of the parties that order may be said to operate as resjudicata but an order which is interlocutory in nature which does not determine the rights of the parties even relating to certain proceedings does not operate as resjudicata. He denied the allegations made by the petitioner's counsel to the effect that conduct of the opposite party has been mala fide in course of the proceedings under Section 21.

6. I have given my full consideration to the contentions raised by the learned counsel for the petitioner and that of opposite party. After having given my consideration to the learned argument made at the hearing of the learned counsels, I, in the open Court on the very day i. e. on 8/10/1993 by short order, dismissed the writ petition by ordering "the writ petition is hereby dismissed for various reasons to be given separately, with costs? and those reasons are being given hereinafter.

7. As regards the applicability of and the question of resjudicata before I proceed to examine this question it will be just and proper on my part to make a reference to few provisions of the law relevant on the subject i. e. jurisdiction and power of appellate Court to issue Commission etc. in the light of the provisions of the Act.

8. Section 34 of the U.P. Act No. XIII of 1972, particularly sub Section 1 thereof, is very material. It reads as under :

"34. Powers of various authorities and procedure to be followed by them :

(1) The District Magistrate, the prescribed authority or any (appellate or revising authority) shall for the purposes of holding any inquiry or hearing (any appeal or

revision) under this Act have the same powers as are vested in the Civil Court under the Code of Civil Procedure, 1908 (Act No. V of 1908), when trying a suit, in respect of the following matters namely,

- (a) summoning and enforcing the attendance of any person and examining him on oath;
- (b) receiving evidence on affidavits;
- (c) inspecting a building or its locality, or issuing commission for the examination of witness or documents or local investigation ;
- (d) requiring the discovery and production of documents ;
- (e) awarding, subject to any rules made in that behalf, costs or special costs to any party or requiring security for costs from any party ;
- (f) recording a lawful agreement, compromise or satisfaction and making an order in accordance therewith.
- (g) any other matter which may be prescribed.

9. A reading of sub Section 1 per se shows that in respect of matters mentioned in clauses (a) to (g) or any of them the District Magistrate, the Prescribed Authority, as well as the appellate or revisional authority shall have same powers vested in it under the Code of Civil Procedure and as are enjoyed by the Civil Court when trying the suit for the purposes of holding any inquiry or for the purpose of hearing appeal or revision. "Hearing" is a term of very wide connotation. This expression taken into consideration along with the expression "same power as are vested in Civil Court" indicates that the District Magistrate or Prescribed Authority acting as original authority shall have same powers in regard to those matters as an original Civil Court or Court of original jurisdiction has got and the authorities exercising appellate jurisdiction or revisional jurisdiction shall have exactly same power vested in them as are vested in the Courts exercising appellate or revisional jurisdiction. So in order to examine the power of appellate Court in regard to inspection of building or issuing of Commission for examination of witnesses or Local investigation or the like, it is necessary to have in view the provision of Section 107 of the Code of Civil Procedure. Section 107 of the Code of Civil Procedure reads as under:

107. Powers & of appellate Court.

- (1) Subject to such conditions and limitations as may be prescribed, an appellate Court shall have power.
 - (a) to determine a case finally;
 - (b) to remand a case ;
 - (c) to frame issue and refer them for trial;

(d) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this code on Courts of original jurisdiction in respect of suits instituted therein."

10. Thus Section 107 has to be reviewed and considered and the powers of the Appellate Court under Section 107 (1) are to be taken to be subject to the conditions and limitations prescribed under order 41 of the Code of Civil Procedure. I am referring these provisions for the reason that powers of appellate Court under U. P. Act XIII of 1972, for the purposes of taking additional evidence or for the purposes of issuing a Commission are the same as that of the Appellate Court under Code of Civil Procedure. Sub Section 2 of Section 107 provides further that the powers of appellate Court shall be the same and Appellate Court shall perform the same duty either conferred or imposed by this code as are on the Court of Original jurisdiction in respect of suits. In view of this sub Section 2 the Appellate court has got power to issue Commission under order 26 of the Code of Civil procedure. See *Ramji Lal v. Lakhpatt Lal and others* AIR 1932 All 270 and *Banke Behari Lal v. Mahadeo Prasad* AIR 1953 All 97 (DB) at page 99 (Col. 1).

11. An order rejecting earlier application dated 15/9/1990 in this case is nothing but order is interlocutory in its nature. This order by itself does not pass or determine any right of the parties. The Court had only to observe that the report of the Commissioner is nothing but a piece of evidence and that a party cannot be allowed to adduce fresh evidence except in very exceptional circumstance. In the order dated 15/9/1990 the Court further observed that in the instant case, from the refusal of the lower Court record it is clear that the appointment of Vakil Commissioner was done on 6/1/1990 with the consent of the parties. The learned lower Court has given full opportunity to the parties to file their objection against the Commissioner report and after hearing these objections the learned Court had passed the order on 16/3/1990 that the Commissioner report would be read in evidence subject to the evidence adduced on behalf of the parties. It further appears from the records that the appellant has filed evidence in this case after the submission of the report of the Vakil Commissioner. In view of the matter the prayer of appellant for Local Inspection of the disputed property, I find, is not liable to be allowed. The appellant's application is rejected." Such orders are and have been taken to be orders of interlocutory nature and not one deciding or determining any of rights of the parties and so do not amount to be case decided. This being the position that the order does not amount to be an order determining the right of the parties when an application for issue of Commission is rejected it does not amount to be a case decided. It has been so held by a Division Bench of this Court in the case of *Gambhir Mal Pandia v. George Anthony John* reported in AIR 1934 Allahabad page 37.

12. Similar view has been taken by a Division Bench of the Punjab and Haryana

High Court in the case of Harbinder Kaur v. Jodha Ram. In that case the Punjab and Haryana High Court has quoted the observation of their Lordships of Supreme Court as to what is the meaning of the case decided which observations have been made in the case of Baldeo Das Shiv Lal v. Filmistan Distributors AIR 1970 SC at page 406 and which observation of the Supreme Court reads as under :

"but it is not decided in S. S. Khanna's case (AIR 1964 SC page 497 = 1964(4) SCR 409) that every order of the Court in Courses of suit amounts to be case decided. A case may be said to be decided if the Court adjudicates for the purposes of the suit, some right or obligation of the parties in controversy".

13. Every order in the suit cannot be regarded as a case decided within the meaning of Section 115 of the Code of Civil Procedure "These observation per se show that an order may be made at interlocutory stage but if it results in adjudication of some rights or obligations of the parties in controversy then order can be said to be case decided otherwise not. By an order dated 15990 the application for issue of Commission for local inspection was rejected on the ground that this is only a piece of evidence and oral evidence can be adduced so it is not necessary to issue a commission. So from the order dated 1591990 it is clear that it really did not decide any right of the parties. Only request of the parties to the Court either for Local inspection or for issue of Commission was refused by the then Additional District Judge. The said order declining the issuance of Commission did not amount to be an order determining or adjudicating upon some rights or obligations of the parties in controversy and this is what about that has been laid down by the Division Bench of Punjab and Haryana High Court as well and such orders are almost in the nature of order allowing or refusing adjournment.

14. As regards the doctrine of resjudicata relied by the learned Counsel for the petitioner in the case of Satya dhayan in v. Devrajini AIR 1960 SC 941 their Lordships of Supreme Court have been pleased to observe as under:

"The principle of resjudicata applies also as between two stages in the same litigation to this extent that a Court whether the trial Court or a higher Court having at an earlier stage decided a matter in one way will not allow the parties to reagitate the matter again at a subsequent stage of the same proceedings.""

15. But their Lordships further posed the question "Does this, however, mean that because at an earlier stage of litigation a court has decided an interlocutory matter in one way and no appeal has been taken their from or no appeal did lie, a higher Court cannot at a later stage of same litigation consider the matter again ? Dealing with this question there Lordships of the Supreme Court have further been pleased to observe "the fact that the Privy Council described Mr. Probyn's order as an interlocutory judgment does not justify the learned counsels" contention that all kind of interlocutory orders not appealed from become res judicata. Interlocutory order which have the force of decree must be

distinguished from other interlocutory orders which are steps towards the decision of the dispute between the parties by way of decree or final order. Their Lordships of the Supreme Court laid emphasis that the orders which are interlocutory in nature and which are steps in aid or course of the decision of the dispute do not determine the right of the parties or obligation of the parties. Such orders do not operate as *res judicata*. Similar view had been taken in the case of *Arjun Singh v. Mohinder Kumar* reported in AIR 1964 SC p. 993 dealing with the question of *res judicata* i. e. stage *res judicata*. Their Lordship Supreme Court held that this doctrine of stage *res judicata* is an *ancient* device of *Doctrines* of *res judicata*. It is laid down in para 13 as under :

"Interlocutory orders are of various kinds; some like orders of stay, injunction or receiver are designed to preserve the status quo pending the litigation and to ensure that the parties might not be prejudiced by normal delay which the proceedings before the court usually take. They do not, in that sense, decide in any manner the merits of the controversy in issue in the suit and do not, of course, put an end to it even in part. Such orders are certainly capable of being altered or varied by subsequent applications for the same relief, though normally only on proof of new facts or new situations which subsequently emerge. As they do not impinge upon the legal rights of parties to the litigation the principle of *res judicata* does not apply to the findings on which these orders are based, though, if applications were made for relief on the same basis after the same has once been disposed of the Court would be justified in rejecting the same as an abuse of the process of Court. There are other orders which are also interlocutory, but would fall into a different category. The difference from the one just now referred to lies in the fact that they are not directed to maintaining the status quo, or to preserve the property pending the final adjudication, but are designed to ensure the just, smooth, orderly and expeditious disposal of the suit. They are interlocutory in the sense that they do not decide any matter in issue arising in the suit nor put an end to the litigation. The case of an application under order IX, Rule (7) Civil P. C. would be an illustration of this type. If an application made under the provisions of that rule is dismissed and an appeal were filed against the decree in the suit in which such application were made, there can be no doubt that the propriety of the order rejecting the reopening of the proceeding and the refusal to relegate the party to an earlier stage might be conversed in the appeal and dealt with by the appellate Court. In that sense the refusal of the Court to permit the defendant to "set the clock back" does not attain finality. But though the same court is not finally bound by that order at latter stages, so as to preclude its being reconsidered and even if the rule of *res judicata* does not apply it would not follow that on every subsequent date on which the suit stands adjourned for further hearing the petition would be repeated and fresh orders sought on the basis of identical facts. The principle that repeated applications based on the same facts and seeking the same reliefs might be disallowed by the Court does not however, necessarily rest on the principle of *res judicata*. Thus if an application for the adjournment of a suit is

rejected, a subsequent application for the same purpose even if based on the same facts, is not barred on the application of any rules of resjudicata, but would be rejected for the same grounds on which the original application was refused. The principle underlying the distinction between the rule of res judicata and a rejection on the ground that no new facts have been adduced to justify a different order is vital. If the principle of resjudicata is applicable to the decision on a particular issue of fact, even if fresh facts were placed before the Court, the bar would continue to operate and preclude a fresh investigation of the issue, whereas in the other case on proof of fresh facts, the Court would be competent, may would be bound to take those into account and make an order con fermably to the facts freshly brought before the Court.?

16. Application for issue of Commission to make Local inspection is also an application in its nature of and it may be said to be a step in aid of prosecution or in aid of determining the issue or real controversy but it does not put an end to the litigation nor does it involve determination or decision of any right of the party or decision of a case within Section 115 of the Code and order passed earlier rejecting such application could not operate as res judkata and at the subsequent stage, it was open to court to pass order issuing Commission in view of the law laid down by a Division Bench of erstwhile Allahabad High Court in the case of Gambhir Mal v. George Anthony reported in AIR 1934 Allahabad 37 (DB). The relevant observation made in the above case of Gambhir Mal read as under :

""We think that the order of learned subordinate judge, in so far as he refused to issue a Commission for examination of plaintiffs was not justified in the circumstances of the case. The question is whether this Court can interfere in revision with aforesaid order. The learned subordinate Judge had jurisdiction to dispose of the application for examination of the witnesses on Commission. His order cannot be said to be without jurisdiction, nor can the learned Judge be considered to have failed to exercise a jurisdiction vested in him by law or to have exercised it illegally or with material irregularity because he took an erroneous view on a question arising in the case. An interlocutory order like the one in question cannot be said to amount to a decision of the case within the meaning of Section 115 of CPC. An additional ground on which this application for revision should be rejected is that there is yet time for learned subordinate Judge to rectify any errors which might have crept into his proceedings. We have no doubt that he will give due weight to the consideration that it is better to allow a little longer time than to run the risk of remand by appellate Court.?

17. The above observation of the Hon''ble Judges constituting the Division Bench in Gambhir Mal's case (Supra) lead to following conclusion:

(a) That order passed on an application under order 26 of the Code for issue of Commission is an interlocutory order not amounting to a decision of case or right so as to operate as rerjudicata or so as to be subjected to proceedings under Section 11 CPC.

(b) It is in such circumstances it is open to a court itself which has rejected an earlier application for issue of Commission to exercise its powers under order 26 of the Code and to issue Commission and earlier order of rejection of an earlier application under order 26 CPC by itself does not operate as a bar or as res judicata.

18. Under order 26 CPC it is the power of the Court to issue a Commission and the power has been conferred to issue a Commission For local inspection, investigation if it be requisite in its opinion or for the purpose of elucidating any matter in dispute or the like. Rule 9 of order 26 reads as under :

"Rule 9 of Order 26 t

Commission to make local investigation.

In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute or of ascertaining market value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a Commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court :

Provided that, where the State Government has made rules as to the persons to whom such Commission shall be issued the Court shall be bound by such rules"

So it was open to the Court below i. e. appellate court at a subsequent stage if he considered it to be necessary, just or proper to issue Commission and if it did issue it did not act in breach of any provisions of law. The learned Additional District Judge in his order has observed as under :

19. So the Commission has been issued to collect complete facts including the subsequent developments since after the issuance of first Commission by the trial Court, particularly when both the parties had stated that there has been deterioration to the building, while according to landlord the portion of the building fell down and so deteriorated in natural course while according to the petitionertenant, the landlord had done some acts of dismentalling certain portions. That the building deteriorated or suffered loss whether because of the acts that the landlord as alleged tenant or in due course is a different question to be examined but definitely the question of subsequent developments in the building towards deterioration where the facts for completion of determination for which as well as the appeal the appellate Court considered it proper to issue Commission to collect to complete picture of fact and developments which did. It had jurisdiction to issue Commission which it did and the doctrine of stage resjudicata did not apply or deter it from collecting or from getting those facts collected by the Commission. So in my opinion there is no substance in the contention of the learned Counsel for the petitioner that the order dated 1851993 was bad in law, or that it has been barred by doctrine of res judicata. The contention of the learned Counsel is, as such, rejected.

20. While dealing with the petition under Article 226 of the Constitution of India

this Court has to see whether the order impugned suffers from error of jurisdiction or error of law apparent on record and whether the order impugned has got any tendency of causing injury of substantial nature to the parties aggrieved. The impugned order in my opinion does not suffer from any error of law or error of jurisdiction, nor has it got tendency of causing any substantial injury to the petitioner when the Commissioner report is filed. There is no doubt that the petitioner tenant will be allowed to file objection against the same as well as to produce evidence in rebuttal, if any is required to be produced or desired to be produced by the tenant.

21. The learned Counsel for the petitioner failed to show any mala fide on the part of the Court which passed the order.

22. In this view of the matter, the writ petition, is hereby dismissed with costs.

(Petition dismissed.)