

(2010) 07 UK CK 0039

In the Uttarakhand High Court

Case No : Writ Petition 4001 of 2001 (M/S)

Nand Kishor Rastogi

APPELLANT

Vs

The 3rd Addl. District Judge, Dehradun and Others

RESPONDENT

Date of Decision : 30-07-2010

Acts Referred:

Citation : (2011) 2 UC 1071

Hon'ble Judges : Tarun Agarwala, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Hon'ble Tarun Agarwala, J.—An application for the release of the shop in question was filed by the landlord u/S 21(1)(a) of fee U.P. Act No. 13 of 1972 in the year 1985 showing the need of the shop for his son Nand Kishor. It was alleged that the landlord had in his possession two rooms for his residential purpose which was located behind the shop in question and, also had a room on the first floor in which his son Nand Kishore alongwith his wife and family were residing and the same room was also being used for business purposes, namely, for the repairs of radio and television which business was carried out by his son after he left his job. It was alleged that the accommodation was insufficient to meet the requirement for his son. It was also stated that the landlord had two sons, their daughter-in-laws and their children who were living in the accommodation in question and that his elder son Subhash had purchased another property and is living in that accommodation. The landlord contended that the accommodation in occupation of the tenant could easily be used to advance the business prospects of his son Nand Kishor.

2. The application was resisted by the tenant contending that the need shown by the landlord was not bonafide and that the landlord had sufficient accommodation for himself and for the family of his son. The tenant submitted that the release application on similar grounds was filed earlier for the release of the shop in question which was rejected, against which, an appeal was filed

which was also rejected. In the earlier release application, the Prescribed Authority held that there was no bonafide need of the landlord since the son was already doing his business from the first floor. It was also alleged that one of the sons has shifted to another premises and, therefore, additional accommodation had now been made available to the remaining family members of the landlord.

3. The Prescribed Authority, after considering the material evidence that was brought on record, allowed the application and released the premises in favour of the landlord for the use of the business purposes for his son Nand Kishor. The trial court gave a finding that a part of the premises of the first floor has been converted into a bath room and, therefore, the accommodation available with the landlord was insufficient to meet the business requirement for his son. The Prescribed Authority further held that the comparative hardship was more in favour of the landlord than in favour of the tenant.

4. The tenant, being aggrieved by the order of the Prescribed Authority, filed an appeal which was allowed and the order of the Prescribed Authority was set aside. The Appellate Court held that no evidence, namely, permission for the construction of a bath room or the sanctioned plan was filed by the landlord to show that the bath room was constructed on the first floor and, in the absence of any evidence to that effect being filed, the Appellate Court concluded that no such bath room was constructed on the first floor. The appellate court also found that the son of the landlord was carrying on the business of repair of radio and television from the first floor which was sufficient for his requirement and that no additional accommodation was required for such purposes. The Appellate Court further concluded that on account of his elder son now residing in another accommodation, additional accommodation has now been created which was sufficient for the landlord's need as well as the need for the family members of the son. The appellate court also held that the son Nand Kishor had sufficient accommodation for his residential as well as for business purposes. The Appellate Court further concluded that the bonafide need was not justified since the landlord had purchased a residential accommodation for his elder son Subhash and, consequently, there was no reason why the landlord could not purchase another accommodation for his second son Nand Kishor and settle him in that accommodation. On this reasoning, the Appellate Court reversed the decision of the Prescribed Authority and rejected the application u/S 21(1)(a) of the Act. The Landlord, being aggrieved by the aforesaid decision, has filed the present writ petition.

5. Heard Shri Anil Kumar Joshi, the learned counsel holding the brief of Shri Sanjeev Tandon, the learned counsel for the landlord/petitioner and Shri B.P. Nautiyal, the learned counsel for the tenant/respondents.

6. The learned counsel for the landlord submitted that the finding of the appellate court is patently perverse and the reasoning adopted in holding that there was no bonafide need is patently perverse and irrelevant. The learned counsel submitted that there was a bonafide requirement for the shop for the

business purpose for the son and that the son would face more hardship, in case, the accommodation was not released. On the other hand, Shri B.P. Nautiyal, the learned counsel for the tenant submitted that mere existence of no bonafide need and the appellate court rightly concluded that the landlord does not have any bonafide need since additional accommodation was made available with the shifting of the elder son to another accommodation and, the landlord having died during the pendency of the writ petition. The learned counsel submitted, admittedly, the son was carrying on his business from the first floor which was sufficient for his requirement and that there was no need for additional requirement for the said purpose. The learned counsel also submitted that on similar grounds the earlier application for the release of the premises was rejected on the ground that there was no bonafide need and, consequently, the findings given in the earlier proceedings operate as *res judicata* which would be squarely applicable and, in support of his submission, the learned counsel placed reliance upon a decision of the Allahabad High Court in the case of *Bengali Vs. District Judge Allahabad and others* 1985 ARC 2.

7. Having heard the learned counsel for the parties at some length and, having perused the record, one finds that the petitioner's application for the release of the shop was earlier rejected. It is settled law that a second application for the release is maintainable and that the principles of *res judicata* is not applicable but where the need or the desire for additional requirement and the circumstances surrounding it remains static or to put it simply, remains the same, then to some extent, the principle of *res judicata* would come into operation. In the present case, the landlord earlier filed an application for the release of the shop in question for his son, This application was rejected on the ground that the landlord's son was carrying on his business from the first floor and, therefore, there was no bonafide need. The present application for the release of the shop was again filed for the need for the same son for his business purposes but there was changed circumstance. In paragraph 3 of the application, it was categorically stated that the landlord son Nand Kishor was using the first floor for his residential purpose for him-self and for his family and was also using a portion of the room for his business purposes, namely, for the repairs of television and radio. The landlord contended that this accommodation was totally insufficient for his growing need and, therefore, required the shop in question where the son could shift his business. The earlier application was silent on using the first floor for residential purpose. Consequently, there was a change in the circumstances and the need arose for additional accommodation on account of the changed scenario. In this light, the Court is of the view that the principle of *res judicata* will not be applicable. The submission of the learned counsel for the tenant on this aspect of the matter cannot be answered in his favour.

8. Every person has an inherent right to do business from a particular place and from a place of his own choice and the tenant cannot object that the landlord has another accommodation where he could start his business. Similarly, a landlord cannot be forced to purchase another accommodation in order to start a business

for himself or for his family members nor could he be forced to take another accommodation on hire to settle his son when he has his own accommodation which he could use for business purposes. The landlord cannot be forced to do business from a small portion of his residential accommodation. It is settled principle that business cannot be done from a make shift arrangement. The reasoning that since the landlord or his son is already doing business from a make shift arrangement, he should be satisfied and, consequently, the need for additional requirement is not bonafide, in my view, is patently erroneous. The petitioner who is the landlord has an inherent right to carry on his business from his own accommodation. He has a right to carry on his business in his style and should not be allowed to carry on his business in a cramped manner.

9. Admittedly, the application contended that the landlord's son was residing on the first floor alongwith his family members which comprised of his wife and two children and, in that room, he was also carrying on his business of repairs of radio and television. A shop on the ground floor was available but was rejected in the earlier round of litigation. It does not mean that the landlord cannot file a second application. The need keeps on growing; the family keeps on growing; and the requirement keeps on increasing. In such circumstances, the Court is of the opinion that the landlord and his family members who were living like sardines in a can cannot be allowed to live in that kind of a lifestyle forever. The tenant contends that since one of the family members have left the accommodation, additional accommodation has been made available. This reasoning is patently misconceived. If 50 cattle are kept in one room and one cattle is taken out, additional accommodation is not made available. May be, some breathing space is made available but not art additional accommodation. In the present case, the Court finds that even after shifting the elder son and after the death of the landlord, now the son Nand Kishor and family members are residing in the premises in question. The accommodation left by the landlord was two rooms on the ground floor and one room on the first floor. The family as on date is the son Nand Kishor, his two children and his wife. At the time of the filing of the application in the year 1985, they were 6 and 7 years old. Today after 25 years, their age would be 31 and 32 years. A family of four persons living in three rooms in which a business is also being carried out, in my opinion, is wholly insufficient to meet the need as well as the growing need of the family members of the landlord. This Court, consequently, is of the opinion that there existed a bonafide need to set up the business for the landlord's son. The finding that since another residential accommodation was purchased for his elder son Subhash and, consequently, another accommodation could also be purchased for his younger son Nand Kishore and, on this ground, the application u/s 21(1)(a) is patently erroneous. This Court cannot understand the reasoning adopted by the lower appellate court The landlord cannot be forced to purchase another room for setting up the business for his son when the same is already available in the existing accommodation. On a comparative hardship, the Court finds that no attempt was made by the tenant to search for another accommodation.

Consequently, in view of Rule 16, the balance tilts in favour of the landlord rather than in favour of the tenant. The finding of the lower appellate court that the tenant has no other source of income except the premises in question cannot be the sole ground to tilt the balance in favour of the tenant.

10. In the light of the aforesaid, this Court is of the opinion that the order of the lower appellate court cannot be sustained and is quashed. The order of the Prescribed Authority is affirmed. The shop in question is released. The writ petition is allowed.