

(2001) 07 AHC CK 0049

In the Allahabad High Court

Case No : C.M.W.P. No's. 11676 of 1981 and 27484 of 1995

Parmanand (Dead) through L.Rs.

APPELLANT

Vs

Prescribed Authority (Munsif City), Meerut and others

RESPONDENT

Date of Decision : 19-07-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 2
General Clauses Act, 1897 — Section 6
Provincial Small Cause Courts Act, 1887 — Section 25
Transfer of Property Act, 1882 — Section 106
Uttar Pradesh (Temporary) Control of Rent and Eviction Act, 1947 — Section 3
Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 —
Section 20, 20(1), 21, 21(1), 43(2)

Citation : (2001) 3 AWC 2302

Hon'ble Judges : J.C. Gupta, J

Bench : Single Bench

Advocate : Ashutosh Srivastava and S.P. Srivastava, for the Appellant; S.C., V.K. Gupta, J.J. Munir and Vinod Sinha, for the Respondent

Final Decision : Allowed

Judgement

J.C. Gupta, J.—Both the above mentioned writ petitions are by tenant. Writ Petition No. 11676 of 1981 is directed against the order dated 24.9.1981 passed by the prescribed authority, Meerut respondent No. 1 while by means of other Writ Petition No. 27484 of 1995 the petitioners have sought quashing of the order dated 15.9.1995 passed by the IIIrd Addl. District Judge, Meerut passed in S.C.C. Revision No. 345 of 1982 and the order dated 21.8.1982 passed by small cause court. Meerut, respondent No. 6 in S.C.C. Suit No. 1524 of 1973.

2. The dispute relates to shop No. 437, Bazar Bajaja. Meerut city whose original tenant was Parmanand, predecessor-in-interest of petitioners of Writ Petition No. 27484 of 1995.

3. An application u/s 3 of the U. P. (Temporary) Control of Rent and Eviction Act, 1947 (hereinafter referred to as the old Act) was moved by the landlords on

9.4.1969 seeking permission for the eviction of the tenant. Parmanand, from the shop in dispute. Eight other applications u/s 3 of the old Act were also moved against other tenants for their eviction. The landlord's case set out in those applications was that they were having a very big and large family and the accommodation in their ancestral house was not sufficient to cater their growing needs. It was further alleged that the landlord's family had in their possession two rented shops wherein Sarafa business was being carried on by their father in one shop and the other four brothers were doing cloth business in the other shop. On account of enlargement of family, additional business accommodation was required as such the landlords purchased the disputed property with the object that they would remodel it and put the same to their personal use. Four shops bearing Nos. 435, 436, 438 and 439 were to be converted into two big shops to be run by the two brothers while one shop bearing No. 437 (the subject-matter of the present proceeding) after its demolition was to be utilized for converting the same into eight feet wide passage by including one foot area on each side from the two adjacent shops. Four residential portions bearing No. 85 to 88 were required to be demolished and reconstructed for residential use for their brothers and their families while the parents and youngest brother were to continue to live as usual in the ancestral house.

4. The Rent Control and Eviction Officer by the order dated 24.4.1970 disposed of all the above applications by a common order granting permission to the landlords to file suit for ejectment of the petitioners as well as other tenants. The landlords consequently served notice u/s 106 of the Transfer of Property Act and filed Suit No. 489 of 1970 in the court of Munsif City against Parmanand as well as other tenants. The revisions filed against the order of R.C.E.O. dated 19.4.1970 filed by all the nine tenants including the petitioner Parmanand were dismissed by the Commissioner by the order dated 24.2.1971. The reference made u/s 7F of the old Act before the State Government against the order of the Commissioner was also dismissed by the order dated 27.8.1971.

5. In the meantime U. P. Act No. 13 of 1972 was enforced with effect from the 15.7.1972. Parmanand tenant filed Writ Petition No. 8177 of 1971 against the order of the State Government but the same was dismissed on 14.4.1972. On 9.5.1973 Suit No. 489 of 1970 instituted against Parmanand was withdrawn by the landlords and fresh suit bearing No. 1524 of 1973 was filed before the Judge small cause court on 6.8.1973, special appeal filed by other eight tenants against the order dismissing their writ petitions was allowed and the order of the State Government u/s 7F dated 27.8.1971 was quashed by the High Court by the order dated 23.7.1974 holding the said order to be vitiated by bias and remanded the matter for fresh consideration by the State Government. The State Government re-considered the matter and by the order dated 31.12.1975 the order of R.C.E.O. granting permission u/s 3 for filing suit for eviction and the order of Commissioner passed in revision were set aside and applications for permission to file suits were dismissed. The order dated 31.12.1975 passed by the State Government was challenged by the landlords in Writ Petition No. 52 of 1976 and

the same was allowed in part, the order dated 2.5.1979 whereby the order of the State Government as against other eight tenants was maintained but in respect of Parmanand-tenant, the same was quashed. The landlords preferred SLP No. 6633 of 1979 before the Apex Court against the order of the High Court dated 2.5.1979 and the same was dismissed by the order dated 28.8.1979.

6. Suit No. 1524 of 1973 filed by landlords against Parmanand tenant was decreed by Judge small cause Court on 21.8.1982. The tenant filed revision u/s 25 of the Provincial Small Cause Courts Act but the same was dismissed by the order dated 15.9.1995. In Writ Petition No. 27484 of 1995 these two orders dated 21.8.1982 and 15.9.1995 passed by Judge small cause court and revisional court are under challenge.

7. It may be mentioned here that although the landlords had filed suit No. 1524 of 1973 on the basis of permission granted to them u/s 3 of the old Act and the same was still pending, the landlords on 18.8.1979 also moved an application u/s 43 (2) (rr) of the new Act for the eviction of the tenant-petitioner from the shop in dispute on the basis of permission granted u/s 3 of the old Act. The petitioner contested the said application on various grounds, the main being that the application was not maintainable under the provisions of Section 43 (2) and that the same was barred by time ; that the permission granted under the old Act had become infructuous : and that the same has been rendered un-executable and inoperative in view of applications for granting permission to file eviction suits against all remaining tenants having been rejected finally. The prescribed authority by the order dated 24.9.1981 allowed the said application of the landlords. This order of the prescribed authority has been challenged before this Court in Writ Petition No. 11676 of 1981.

8. The Court has heard Shri Ashutosh Srivastava for the petitioner. Sri Vinod Sinha who represented the landlords stated before the Court on the date of hearing that he had no instructions to proceed with the writ petition perhaps for the reason that the respondent has sold the property in favour of the petitioner. He further stated that the landlords have taken back their brief and as such he has no Instructions.

9. The points for consideration in both the writ petitions are :

(i) what is the effect of the order dated 9.5.1973 whereby suit No. 489 of 1970 was withdrawn ;

(ii) whether fresh suit No. 1524 of 1973 filed on 6.8.1973 after the enforcement of the new Act on the basis of permission granted under the old Act was maintainable ;

(iii) whether the need of the landlords as was set up in the application u/s 3 of the old Act against the present tenant has been rendered infructuous/inoperative and unexecutable on account of subsequent order of the State Government refusing to grant permission to the landlord for the eviction of other

tenants :

(iv) whether in view of the aforesaid subsequent event, the application moved against the present petitioners u/s 43 (2) (rr) of the Act was not maintainable in view of the provisions of Section 21 of the new Act and (v) whether the same is also otherwise barred by time?

Point No. 1

10. Undisputedly after the landlords were granted permission u/s 3 of the old Act to file suit for eviction of the petitioner, they on the basis of that permission filed Suit No. 489 of 1970 before the Court of City Munsif on 2.6.1970. The said suit was, however, withdrawn by the landlords on 9.5.1973. Copy of the order of Munsif, Meerut, has been annexed as Annexure-2 to the Writ Petition No. 27484 of 1995. The order recites "the plaintiff wants to withdraw the suit. Cause shown is genuine. Hence plaintiff is allowed to withdraw the suit with the liberty to file a fresh suit". The order permitting withdrawal of Suit No. 489 of 1970 would thus show that it was passed without application of mind in a cursory and cryptic manner and without considering any formal defect which would compel the suit to fail or any valid ground permitting withdrawal of the said suit was stated therein and the landlords were granted permission to file fresh suit for no cogent reason, in the case of *Bihari Lal Pal v. Smt. Baran Mai Dasi* 1894 ILR 17 All 53 , it was held that where a suit is withdrawn with permission to bring a fresh suit, the effect of such permission, is to leave parties in the same position in which they would have been if no such suit had been Instituted. Similarly, a Full Bench of Calcutta High Court in the case of *Becharam Choudhuri and Others Vs. Purna Chandra Chatterji and Others*, , held that when a suit was allowed to be withdrawn with leave to bring a fresh suit under Order XXIII of the Civil Procedure Code, it should be regarded as never brought. It is available for no purpose. It does not save or give fresh start to limitation nor does it afford a fresh cause of action.

11. Learned counsel for the petitioner further invited the attention of the Court to the provisions of Order XXIII. Rule 2 of the CPC which is re-produced below :

"any fresh suit instituted on permission granted under the last preceding Rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted."

The above Rule clearly lays down that the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted.

12. From the above decision, it is thus clear that the effect of the withdrawal of suit is that the parties are left in the same position which they had occupied if no such suit had been instituted. Even where the Court grants leave to file a fresh suit or proceeding for the same cause of action, the withdrawn suit has no existence in the eye of law. It is available for no purpose and parties are relegated to the same position which they had occupied before the fresh suit was

brought. Point No. 1 is answered accordingly.

Point No. 2

13. Regarding the maintainability of fresh suit No. 1524 of 1973, it was submitted by the learned counsel for the petitioners that when suit No. 489 of 1970 had been withdrawn, the withdrawal had the effect of rendering the notice dated 2.5.1970 served u/s 106 of Transfer of Property Act, futile and exhausted. Therefore, no fresh suit could be filed on the basis of the said notice. Admittedly, no fresh notice had ever been issued or served by the landlords upon the tenant before filing the second suit.

14. In *Shakir Hussain Vs. Siraj Beg*, it was held that once a suit for eviction filed against a tenant fails, notice u/s 106 of Transfer of Property Act gets exhausted and his ejectment by a fresh suit cannot be claimed without terminating his tenancy afresh by a notice u/s 106 of T.P. Act and no second suit can be maintained on the basis of earlier notice. Similar view was taken in the case of *Makkhan Lal v. Chandrawati* 1976 AWC 102.

15. It was next submitted that fresh suit No. 1524 of 1973 having been instituted on 6.8.1973 could not be continued and concluded under the old Act as the new Act had come into force with effect from 15.7.1972. This submission of learned counsel also carries weight. As pointed out above, permission u/s 3 of the old Act was granted on 24.4.1970. Suit No. 489 of 1970 was filed on 2.6.1970 and after the withdrawal of the same, fresh suit No. 1524 of 1973 was instituted on 6.8.1973, i.e., after the enforcement of the new Act which came into operation w.e.f. 15.7.1972.

16. It is thus clear that on the date of commencement of new Act No. XIII of 1972, w.e.f. 15.7.1972, no suit for eviction of petitioner on the basis of permission granted u/s 3 of the old Act was pending because on account of withdrawal of Suit No. 489 of 1970, it would be deemed that no such suit had ever been brought. While dealing with Point No. 1. I have already shown above as to what is the effect on the rights of the parties when the suit is withdrawn. The effect of withdrawal of suit with permission to file fresh suit neither saves limitation nor gives a fresh limitation and it should be regarded as if earlier suit had never been brought. Undisputedly fresh suit bearing No. 1524 of 1973 was instituted on 6.8.1973 and suit No. 489 of 1970 having been withdrawn, it is thus obvious that no suit for ejectment of petitioner was pending or deemed to be pending on 15.7.1972, i.e., the date of commencement of the new Act.

17. Section 43 deals with Repeal and Savings. By virtue of sub-section (1) thereof, old Act No. 3 of 1947 stood repealed from the date of enforcement of the new Act. Subsection (2) deals with savings. Clauses (a) to (g) of the said subsection admittedly have no application to the facts of the present case. However, it has to be examined whether clause (r) of sub-section (2) of Section 43 as originally stood or amended clause (r) could have any application in the present case. Clause (r) before its amendment stood as under:

"Any suit for the eviction of a tenant instituted with the permission referred to in Section 3 of the old Act or any proceeding arising out of such suit, pending immediately before the commencement of this Act, may be continued and concluded as if this Act had not been passed, and likewise, any suit for eviction with such permission referred to in clause (i), clause (l), clause (m) or clause (o) may be instituted after the commencement of this Act."

18. This clause was then amended by the U. P. Civil Laws Amendment Act (U. P. Act No. 37 of 1972) which came into force w.e.f. 20.9.1972. The amended clause (r) is reproduced below :

"Any suit for the eviction of a tenant instituted with the permission referred to in Section 3 of the old Act or any proceeding arising out of such suit pending immediately before the commencement of the U. P. Civil Laws Amendment Act, 1972 (U. P. Act No. 37 of 1972) may be continued and concluded in accordance with the old Act which shall, for that purpose, be deemed to continue to be in force."

19. In the case of Vishwanath Misra v. State Government 1973 ALJ 450. Hon"ble H.N. Seth, J., as then he was, held that Section 43 (r) as it stood prior to its amendment further enabled a landlord in certain cases to file a suit for the ejectment of his tenant on the basis of permission obtained u/s 3 of the 1947 Act. But after the Legislature amended clause (r), it is no more possible for a landlord to file a suit for the ejectment of his tenant on the basis of permission obtained u/s 3 of the old Act. The gist of the holding of this case is that after the amended clause (r) came into force with effect from 20.9.1972 (the date of enforcement of the U. P. Civil Laws Amendment Act) filing of fresh suit on the basis of permission granted u/s 3 of the old Act is not permissible. Section 43 (2) (r) could be invoked only in respect of suit which had already been instituted and pending on the date of commencement of the Amendment Act.

20. A Division Bench of this Court in the case of Jadishwar Sahai v. Surajan Singh Pal. 1977 AWC 503, also held that the original Section 43 (2) (r) applied only to suits filed on the basis of permission granted under the old Act which were pending on July 15, 1972 and the amended provision became applicable to suits which were pending on 20th September, 1972 and such suits have to be continued and concluded as if the new Act had not been passed.

21. While dealing with point No. 1 this Court has already held that even where the Court grants leave to file a fresh suit or proceeding on the same cause of action, the withdrawn suit has no existence in the eye of law and it has to be recorded as if such suit had never been brought. Even where suit is withdrawn with permission to file a fresh suit, the permission granted is available for no purpose and the parties are relegated to the same position which they occupied before the fresh suit was filed. From the undisputed facts, it follows that on the relevant day, no suit of the landlords on the basis of permission granted u/s 3 of the old Act was pending which could either attract original clause (r) or the

amended clause. Fresh Suit No. 1524 of 1973 by no stretch of imagination could be deemed to be pending on the date when these provisions came into force, i.e., 15.7.1972 or 20.9.1972 respectively. Clause (r) as it stood before its amendment was applicable only to suits pending immediately before the commencement of the new Act. Amended clause (r) is applicable to suits pending before the date of commencement of the amending Act, i.e., 20.9.1972. The resultant effect of these provisions is that only the suits filed on or before 20.9.1972 could be saved and continued under the old Act. Since Suit No. 489 of 1970 had been withdrawn, it could not be deemed to be pending on 20.9.1972 and there is no question of continuing the same under the provisions of the old Act after its withdrawal and as Suit No. 1542 of 1973 was filed after 20.9.1972, it cannot attract provisions of clause (r) retrospectively.

22. The Apex Court in the case of *The State of Uttar Pradesh Vs. Seth Jagamander Das and Others*, , held that when a Statute is repealed or comes to an automatic end by efflux of time, no prosecution for acts done during the continuance of the repealed or expired Act can be commenced after the date of its repeal or expiry because that would amount to the enforcement of a repealed or a dead Act. In cases of repeat of statutes, this Rule stands modified by Section 6 of the General Clauses Act. An expiring Act, however, is not governed by the Rule enunciated in that section. In the case of *Allahabad Theatres (Pvt.) Ltd. and Others Vs. Smt. Kusum Kumari*, , this Court while agreeing with the view taken by the Calcutta High Court in two Full Bench decisions in *Tarak Chandra Mukherjee and Others Vs. Ratan Lal Ghosal and Others*, and *Rabindra Nath Mahapatra and Others Vs. Gour Mondal*, , held that as the life of the old U. P. Rent Control Act expired on 20.9.1972 the rights and privileges, if any, acquired under the old Act could not ensue for the benefit of the parties after the said date.

23. In view of what has been stated above Suit No. 1524 of 1973 thus could not be continued under the provisions of the old Act as the same was not pending on the relevant dates, i.e., 15.7.1972 or 20.9.1972 nor the same could be deemed to be pending on the relevant dates merely for the reason that earlier suit filed before the commencement of the new Act had been permitted to be withdrawn with liberty to file fresh suit. It may also be mentioned here that fresh suit was also not maintainable as none of the ingredients of sub-section (2) of Section 20 of the new Act was pleaded in the plaint and as such, the suit which was filed after the commencement of the new Act was itself barred by the provisions of subsection (1) of Section 20.

Point Nos. 3, 4 and 5 :

24. All these issues being interlinked are taken up together. In their applications u/s 3 of the old Act seeking permission of the eviction of the petitioners from the shop in dispute, the landlords alleged that they required the shop for carving out a passage to be used as ingress to their residential building which was to be constructed after eviction of four other tenants from their respective tenements.

The shop in question is only six feet wide and is flanked by two shops of the same size on either side. The landlords alleged that they would reconstruct the residential building as per the approved plan. The said plan shows that a passage having a width of eight feet was to be built. For the construction of this passage, not only the shop in dispute required demolition but also two other shops lying adjacent to the shop in dispute, one in the east and other in the west. It is thus clear that formation of passage was possible only if all these three shops were demolished. Permission was also sought for eviction of other tenants for construction of residential house for the use of landlord's brothers and their families. It was further alleged that on account of enlargement of family additional business accommodation was required and, therefore, four shops bearing Nos. 435, 436, 438 and 439 in occupation of other tenants were required to be demolished and converted into two big shops for running business by two brothers of the landlord. Permission to file suit against all the tenants was dismissed by the State Government by the order dated 31.12.1975 after the case was remanded by the order passed by the High Court in writ petitions filed by other tenants. While refusing permission of eviction of the tenants the State Government held that the permission was vitiated on account of bias. The said order was challenged by the landlords before the High Court by means of Writ Petition No. 52A of 1976. This writ petition was dismissed as against other tenants but was allowed in part in respect of the present petitioners. It was argued by petitioners' counsel that as per the own case of the landlords, their need was collective in nature and could be acted upon only if all the tenants were also evicted from the premises in question. When permission in respect of eviction of other tenants stood refused and suit for their ejection were dismissed, the landlords' claim for demolition of other shops and construction of residential and business accommodation did not survive and vanished. Consequently, the landlords' demand of getting the shop in dispute demolished for the purpose of building a passage stood inoperative, unexecutable and non-existent.

25. The above submission of the learned counsel is not devoid of force. The landlords had challenged before the Supreme Court the order of the High Court passed in their writ petition but the same was also dismissed by the Apex Court by the order dated 28.3.1979 whose copy has been annexed as S.A. I to the supplementary affidavit filed on behalf of the petitioners. It is also relevant to mention here that while the second suit bearing No. 1524 of 1973 was still pending in the Court of Judge Small Causes, the landlords moved an application purporting to be u/s 43 (2) (rr) of the new Act for the execution of the order granting permission for the eviction of the petitioner tenant u/s 3 of the old Act. The prescribed authority by the order dated 24.9.1981 has allowed the application of the landlords on the ground that once permission had been granted to the landlords u/s 3 of the old Act, the same has to be enforced u/s 21 of the present Act by virtue of clause (rr) of Section 43 (2) of the new Act.

26. In the case of Tara Chand v. Prescribed Authority, Meerut and others 1984

(2) ARC 288, a Division Bench of this Court held that Section 43 (2) (rr) of 1972 Act confers power on the prescribed authority to summarily eject a tenant if the conditions prescribed therein are satisfied. According to the said provision, a tenant can summarily be evicted if the permission u/s 3 of the 1947 Act had been obtained on any of the grounds specified in sub-section (1) or (2) of Section 21 of the 1972 Act and the order has become final before the commencement of the Act. In the said case, the disputed accommodation consisted of shops belonging to Committee of Digambar Jain Temple. The landlords, made application u/s 3 of the old Act before the Rent Control and Eviction Officer for the grant of permission for eviction of tenants on the assertion that the Digambar Jain Temple needed the shops for extension of the building to construct "Pathshala" and "Tyagi Bhavan". It was held that this ground did not fall either within the ambit of sub-section (1) or subsection (2) of Section 21 of the new Act. Therefore, application u/s 21 read with Section 43 (1) (rr) was held to be not maintainable.

27. In a recent decision in Kush Saigal and others v. M. C. Mitter and others. 2000 (1) ARC 593, the Apex Court examined the scope and difference between clause (r) and clause (rr) of Section 43 (2) of the new Act. The Apex Court clearly held that clause (r) would apply to a situation where grounds on which the permission was granted is not covered by Sections 21 (1) and 21 (2) of the new Act and, therefore, in that situation, the suit if filed on the basis of that permission has to be continued and concluded under the old Act which has been fictionally kept alive inspite of its repeal. Such a permission will not be executable under clause (rr). On the contrary, if the ground on which permission was granted u/s 3 is covered by any of the grounds mentioned in Section 21 (1) or Section 21 (2), it will be executable under clause (rr). It was further held that both these clauses operate in two different fields. In that case, the landlord moved an application for permission u/s 3 of the old Act for filing suit for eviction of the tenant Smt. Sushila Saigal. The application was allowed by the R.C.E.O. by the order dated 23.4.1960. The revision filed by Smt. Sushila Saigal before the Commissioner was also dismissed. However, the reference made u/s 7F was allowed by the State Government on 27.6.1961 and the application of the landlord for filing suit for eviction was rejected. On the basis of permission granted by R.C.E.O. on 23.4.1960 the landlord instituted a regular suit No. 1654 of 1961 and the same was dismissed by the Addl. Munsif Kanpur as not maintainable. Thereafter another application u/s 3 of the old Act was moved but the same was rejected by R.C.E.O. on 30.11.1966. However, revision filed by the landlord was allowed by the Commissioner on 6.2.1968 and the case was remanded to the R.C.E.O. for fresh disposal. After remand the R.C.E.O. allowed the application and granted permission to the landlord to file suit for eviction. On the basis of that permission a regular suit, was filed for the eviction of tenant. Smt. Sushila Saigal. She filed revision before the Commissioner, Allahabad challenging the order of R.C.E.O. granting permission to landlord but the revision was dismissed in default. The tenant challenged the said order before the High

Court in writ petition and the same was allowed with a direction to the Commissioner, Allahabad to restore the revision to its original number and to dispose of it on merits. During the pendency of revision before the Commissioner, Allahabad, the old Act was replaced by the new Act of 1972. In view of the provisions contained in Section 43 of the new Act the revision was transferred to the District Judge for disposal which was ultimately dismissed on 22.9.1973. This order was challenged by the tenant in Writ Petition No. 6609 of 1973 before the Allahabad High Court. During the pendency of the writ petition, an application was filed on behalf of the landlord that the interim order granted by the High Court be vacated on the ground that he did not want to proceed with the regular suit already instituted by him in the Court of Judge Small Causes, Kanpur. The High Court by the order dated 27.3.1974 directed the Addl. Judge small cause courts to consider the application of the landlady for withdrawal of the suit and pass appropriate orders thereon. The landlord filed an application for withdrawal of the suit and the suit was allowed to be withdrawn. Thereafter on 1.4.1976 landlord filed an application for eviction of tenant Smt. Saigal u/s 43 (2) (rr) of the new Act. The said application was rejected by the prescribed authority and the appeal was also dismissed by the District Judge by the order dated 21.5.1981. Against the said order. Writ Petition No. 10793 of 1981 was filed and the same was allowed by the High Court. Against the said judgment, the tenant filed SLP before the Apex Court. It was contended on behalf of the tenant that since landlord had instituted a suit on the basis of the permission granted to her and that the suit had been withdrawn, the permission granted u/s 3 of the old Act exhausted itself and no fresh suit or proceeding on the basis of that permission could be legally instituted for the eviction of the tenant. It was further contended that Section 43 (2) (rr) is a mode prescribed under the new Act for the execution of the permission already granted u/s 3 of the old Act. But before the permission is to put to execution u/s 43 (2) (rr) it has to be shown that the permission was subsisting on the date on which the application is filed for its execution u/s 43 (2) (rr). It was also contended that before the permission granted under the old Act could be enforced u/s 43 (2) (rr) it must be shown to have been obtained on any of the grounds specified in sub-section (1) or sub-section (2) of Section 21 of the new Act and if it is shown that such a permission, as was granted under the old Act, could not have been granted u/s 21 of the new Act, it could not be executed u/s 43 (2) (rr). The Apex Court after examining various provisions of the old Act and new Act held that the requirements for the applicability of Section 43 (2) (rr) would be :

- (a) There should have been a permission obtained u/s 3 of the old Act.
- (b) The permission should have been obtained on any ground specified in sub-section (1) or sub-section (2) of Section 21.
- (c) The permission should have become final :
- (i) either before the commencement of the new Act, or

(ii) after the commencement of the new Act, under this sub-section.

It was then held :

"If the above conditions are satisfied, then the landlord, may even though a suit on the basis of the permission was filed or not filed, apply to the prescribed authority for the eviction of the tenant and the prescribed authority shall order eviction of the tenant from the accommodation in his tenancy. In this process, it will not be necessary for the prescribed authority to satisfy itself afresh as to the existence of "any ground aforesaid". The words, namely, "any ground aforesaid" refer to the grounds mentioned in the earlier part of this clause which in its turn refers to the grounds specified in sub-section (1) and sub-section (2) of Section 21. That is to say, if the permission granted under the old Act can be co-related or is referable to any ground specified in sub-section (1) or sub-section (2) of Section 21, it will not be necessary for the prescribed authority to be satisfy afresh of the existence of those grounds. In this situation, therefore, what is to be seen is whether the ground on which permission was granted to landlord u/s 3 of the old Act is a ground specified in Section 21 (1) or Section 21 (2) of the new Act."

In that case tenanted accommodation was residential. Second proviso to sub-section (2) of Section 21 creates a bar that application under clause (a) shall not be entertained in case of any residential building for occupation for business purpose. Since in that case the landlord had sought eviction of tenant from her residential portion for occupation for business purpose, the release application was barred under second proviso to sub-section (2) of Section 21. The landlord had applied for permission u/s 3 for instituting a suit for eviction of the tenant on the ground that the landlord would shift his nursing home already running in some other building, to the residential portion in occupation of Smt. Saigal. The application was allowed and the suit which was instituted on the basis of that permission was ultimately withdrawn and after withdrawal an application u/s 43 (2) (rr) was filed for the eviction of the tenant on the basis of permission granted u/s 3 of the old Act. It was held that the said application could not be entertained u/s 43 (2) (rr) as the landlord wanted to have the tenant residential portion of the building for non-residential purpose. It could not be a ground for release within the meaning of Section 21 (1) or Section 21 (2) by virtue of the prohibition contained in the second proviso to Section 21 (2) of the Act, and, therefore, the application u/s 43 (2) (rr) was held to be not maintainable.

28. In view of the aforesaid decision of the Apex Court, it is thus clear that before permission granted u/s 3 of the old Act could be put to execution by moving an application u/s 43 (2) (rr) of the new Act, it should be shown that the ground on which the permission was granted u/s 3 of the old Act is covered by any of the grounds specified in Section 21 (1) or Section 21 (2) of the new Act.

29. In the present case, permission for eviction of the present petitioners was granted on the ground that the shop in question was required by the landlords

for the purpose of its demolition and construction of a passage for his residential house which was to be built after eviction of other tenants and demolition of their tenanted accommodation. The landlords had also sought permission for eviction of other tenants for demolition of their shops for construction of two big shops and for widening of the aforesaid passage and for construction of residential house for the use of their two brothers, it is an undisputed fact that the permission which was earlier granted for eviction of other eight tenants was ultimately refused by the State Government when the case was remanded by the High Court in the special appeals filed by other tenants against the order dismissing their writ petitions whereby the order of the State Government dated 27.8.1971 passed u/s 7F of the old Act was affirmed. The State Government by the order dated 31.12.1975 rejected landlord applications made u/s 3 of the old Act for the eviction of all the tenants and the order of R.C. and E.O. and Commissioner were set aside. The order of the State Government dated 31.12.1975 was challenged by the landlords in Writ Petition No. 52A of 1976 and the same was dismissed vis-a-vis other eight tenants. The landlords preferred SLP No. 6633 of 1979 before the Supreme Court but the same was also dismissed by the order dated 28.8.1979. The resultant effect of all these proceedings was that the applications moved by the landlords u/s 3 of the old Act for granting permission to evict those eight tenants stood refused and consequently, the landlords could not proceed for the eviction of those tenants whose accommodations were required for the purpose of construction of residential house, two big shops and a portion of passage which was to be used as ingress of their residential house.

30. Sub-sections (1) and (2) of the new Act are reproduced below :

"1. The prescribed authority may, on an application of the landlord in that behalf, order the eviction of a tenant from the building under tenancy or any specified part thereof, if it is satisfied that any of the following grounds exists, namely :

(a) that the building is bona fide required either in its existing form or after demolition and new construction by the landlord for occupation by himself or any member of his family, or any person for whose benefit it is held by him, either for residential purposes or for purposes of any profession, trade or calling, or where landlord is the trustee of a public charitable trust for the objects of the trust :

(b) that the building is in a dilapidated condition and is required for purposes of demolition and new construction.

2. The prescribed authority may, on an application of the landlord in that behalf, order the eviction of a tenant from any surplus land appurtenant to the building under tenancy if it is satisfied that the land is required for constructing one or more new buildings or for dividing it into several plots with a view to the sale thereof for purposes of construction of new buildings and in either case, that the competent authority under any law for the time being in force has approved a plan for the said purpose.

Sub-section (2) on the face of it cannot be pressed into service on the facts of the present case.

31. So far as sub-section (1) is concerned, a bare perusal of this provision makes it clear that eviction of a tenant can be asked for on the ground that tenanted building is bona fide required either in its existing form or after its demolition and new construction for occupation by himself or any member of his family either for residential purpose or for the purpose of any profession, trade or calling.

32. A plain reading of this sub-clause shows that a tenanted accommodation can be released in favour of the landlord only for two specified purposes and for no other purpose. These are :

(a) residential purpose, or

(b) for the purpose of any profession, trade or calling.

33. In the instant, case permission u/s 3 of the old Act was granted on the ground that the shop in dispute in occupation of the petitioner-tenant was required after its demolition for the purpose of construction of passage. This purpose was neither residential nor of any profession, trade or calling. It is, thus, absolutely clear that the ground on which permission u/s 3 of the old Act was granted to the landlords is neither specified under sub-section (1) nor sub-section (2) of Section 21 of the new Act. Thus, in view of the Apex Court decision in *Kush Saigal and others v. M.C. Mittar and others* (supra), the landlords' application u/s 43 (2) (rr) was not maintainable.

34. One may argue that where eviction of a tenant is sought for the construction of a passage for beneficial enjoyment of landlords' residential house, the purpose would be residential. Be that as it may, in the present case admittedly the landlords could not succeed in evicting other tenants with the result that their plan to construct their residential house after eviction of other four tenants was lost and frustrated with the dismissal of their applications moved u/s 3 of the old Act against the tenants. Thus, even on that basis application moved u/s 43 (2) (rr) could not be legally executed as the landlords' claim of having the passage for beneficial enjoyment of landlords' residential house no more existed and eviction for the purpose of constructing passage alone is not specified in sub-section (1) or (2) of Section 21 of the new Act.

35. In the present case, on undisputed facts even equity leans in favour of the petitioners because need of the landlords in relation to the disputed shop was collective and dependant upon eviction of other tenants as without their eviction, it was not possible for them to demolish their shops and reconstruct their residential house. Since applications for eviction of all other eight tenants were dismissed, the landlords desire to construct residential house did not survive any longer and became non-existent. Thus, the very purpose of getting the shop in question released for constructing passage for newly constructed residential house was lost and frustrated. The purposes for which shop in question and other

shops were sought to be released were so mixed and intermingled that it will be most inequitable to separate them in two different apartments." Once the basic need of constructing residential house did not remain alive, the residuary need for constructing the ingress passage for that house also became crippled and cannot be given effect to.

36. In *Sri Gautam Chand Jain and others v. Smt. Sushila Kumari Jain and others* 1985 ALJ 1008, two adjacent shops were given on rent to two shop keepers. The landlady sought the release of both the shops on the ground that shops would be rebuilt into a convenient place for housing the clinic of her son. The prescribed authority granted release of both the shops but the appellate authority set aside the order in respect of one shop on the ground that there was an alternative accommodation available to the landlady which was more suitable for clinic. It was held by the Apex Court that the said finding of the appellate authority in the connected matter completely destroyed the claim of the landlady and made the application for release of the adjoining shop sans bona fide.

37. The discussion made above leads to the conclusion that the prescribed authority has committed a manifest error of law in allowing landlords' application made u/s 43 (2) (rr) of the new Act.

38. Before parting, I must say that I was verily benefited by the remarkable contribution made by Shri Ashutosh Srivastava, advocate, who admirably argued the case and placed the relevant law before the Court for arriving at the decision. I record my appreciation for the labour put in by him.

39. For the reasons stated above, both the writ petitions are allowed and the order dated 21.8.1982, 15.9.1995 and 24.9.1981 passed by Judge Small Causes, Addl. District Judge and the prescribed authority respectively are quashed. Suit No. 1524 of 1973 shall stand dismissed and the application of the landlords moved u/s 43 (2) (rr) of the U. P. Act No. 13 of 1972 is rejected. In the circumstances of the case the parties are directed to bear their own costs.