

(2007) 12 UK CK 0016
In the Uttarakhand High Court
Case No : Second Appeal No. 806 of 2001

Raghubir Singh Bisht (deceased) by L.Rs. and Another	APPELLANT
Vs	
Smt. Bindra Devi and Others	RESPONDENT

Date of Decision : 14-12-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 145, 9
Sea Customs Act, 1878 — Section 188, 191
Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 —
Section 12, 12(1), 12(4), 12(5), 14
Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Rules, 1972
— Rule 10, 8, 8(2), 9, 9(3)

Citation : (2008) 2 UC 1143

Hon'ble Judges : Rajesh Tandon, J

Bench : Single Bench

Advocate : Sharad Sharma, for the Appellant; B.C. Pandey assisted by, Naresh Pant, for the Respondent

Final Decision : Dismissed

Judgement

Rajesh Tandon, J.—Heard Sri Sharad Sharma, counsel for the Appellant and Sri B.C. Pande Sr. Advocate, assisted by Sri Naresh Pant, counsel for the Respondent.

2. By the present Second Appeal filed u/s 100 of the Code of Civil Procedure, the Appellant has prayed for setting aside the judgment and decree dated 10th August, 1992 passed by District Judge, Pauri Garhwal in First Appeal No. 597 of 1983 Smt. Bindra Devi and Ors. v. Raghubir Singh Bisht and Anr. arising out of Original Suit No. 47 of 1979 Smt. Bindra Devi and Ors. v. Raghubir Singh Bisht and Anr.

3. Present Second Appeal was admitted on 28-8-1992 on the following substantial question of law:

(1) Whether on the facts of the present case, the Defendant-Appellant No. 2-son of the Appellant No. 1 is also helping in the hotel business of the Appellant No. 1

lower appellate Court was correct in holding that it will amount to surrender of tenancy?

(2) Whether in absence of any evidence on record and also specific plea by the Plaintiff Respondents, the lower appellate court was correct in holding that the tenancy has been surrendered by the Defendant-Appellant No. 1?

(3) Whether the learned lower appellate Court was correct in holding that since there is an allotment order in favour of the Defendant No. 2, so the same will amount to surrender of the tenancy by the Defendant No. 1?

(4) Whether on the facts of the present case, particularly when the permission was granted for repairing and only the roof of 1 * floor was reconstructed with certain minor changes on the wall of the 1st floor, lower appellate Court was correct in holding that it amounts to a new construction?

(5) Whether the allotment order under the provisions of U.P. Act No. 13 of 1972 can be challenged in a regular suit u/s 9 Code of Civil Procedure.?

BACKGROUND OF THE CASE

4. Heard counsel for both the parties.

5. Before going to the merits of the case, it may be pointed out that it is a case, where the litigation has started in the year, 1979 i.e. more than 28 years have already passed and the Defendants/Appellants on one or other pretext are delaying the proceedings, although, he surrendered his tenancy in the year, 1977, however, the litigation is still going on.

6. The trial Court has dismissed the suit on 14-10-1983. The appellate Court has allowed the appeal on 10th August, 1992. The Plaintiff has also filed the cross objection regarding the mesne profits.

FACTUAL MATRIX OF THE CASE

7. According to the plaint averments, late Sri Jodh Singh Negi predecessor of the Plaintiffs/Respondents constructed a house forty years back. In the year, 1942, one Raghubir Singh Defendant/Appellant No. 1 was given the premises and he started a Hotel Business in that premises. Sri Jodh Singh Negi expired in the year 1973. The house was in a dilapidated condition, therefore, in the year, 1976, he got the map sanctioned for reconstruction of the building. However, in the year 1977, the Defendant No. 1 surrendered the tenancy and started his own business in his own house. After the surrender of the tenancy, the predecessor of the Plaintiffs demolished the entire structure in order to get fresh construction in accordance with the sanctioned plan.

8. However, the Defendant No. 2 on 1st March, 1977 without the consent of the Plaintiffs put a Tripal as the building was already demolished for fresh construction and started selling tea. Plaintiff-Respondent has put a condition that after the house is reconstructed, only then the same shall be let out to the

Defendant No. 2. However, during the pendency of the construction work on 15th August, 1977, the Defendant No. 2 along with his family members break opened the lock and obtained the possession forcibly. The proceedings u/s 145 were also drawn. However, after demolition and new construction, U.P. Act No. XIII of 1972 has no application on the building in dispute.

9. The Plaintiffs have complained the matter to the District Magistrate, Garhwal on 2nd February, 1978, then the Plaintiffs have come to know that the Defendant No. 2 has illegally obtained the allotment in his favour. The application for allotment was filed on 25-3-1977 and the allotment has also been made on the same date without any intimation to the landlord/ Plaintiffs/Respondents.

10. Plaintiffs-Respondents have sent a notice on 28-11-1978, which was served on 30-11-1978 but the Defendants have neither vacated nor the damages were paid by the Defendants.

11. Defendants have filed the written statement and contested the suit. In paragraph 4 of the written statement, it has been stated that the sanction was made for repairing of the house and Defendant No. 2 always remained in occupation as a tenant and he has never left the possession. In paragraph 7 of the written statement, it has been stated that one portion was demolished and thereafter, another portion was demolished. Relevant paragraph 7 to that effect is quoted below:

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12. On the pleadings of the parties, the trial Court has framed the following issues:

1. Whether there was any agreement between the Plaintiff No. 3 and the Defendant No. 1 in between 12th March and 14th March, 1977. If so whether the Defendant No. 1 had vacated the house in suit by 21st March, 1977 and if so to what effect?

2. Whether the Ikrarnama dated 2-5-1977 referred to para 7 in the plaint was acted upon and pursuant thereto Defendant No. 2 had vacated the house in suit? If so to what effect?

3. Whether the Defendants had illegally occupied the house in suit on 15-8-1977 as alleged in para 9 of the plaint? If so what effect?

3(b). Whether house in suit was incomplete at the time of the alleged illegal occupation and if so to what effect?

4. Whether the order of allotment dated 25-3-1977 in favour of the Defendant No. 2 is void and inoperative for the reason outlined in Para 16 of the Plaint?

5. Whether the Plaintiffs are entitled to mesne profits at the rate of Rs. 800/- per month and if so for what period?

6. To what relief if any are the Plaintiffs entitled?
7. Whether the suit is properly valued and the Court fee paid is sufficient? To what relief if any?
8. Whether the provisions of U.P. Urban Buildings Act 1972 are applicable to the building in suit? If so its effect?
9. Whether this Court has got no jurisdiction to try this suit?
13. On behalf of the Plaintiff, Sri Laxman Singh Negi, Architect Sri A.S. Katariya P.W.2, Sri Sudarshan Singh Negi, Sri Prem Singh and Sri Jang Bahadur have been examined as P.W.1, P.W.2, P.W.3, P.W.4 and P.W.5 respectively. Towards the documentary evidence, Paper No. 14-C, Plan Paper No. 15-C, 16-C, Permission Paper No. 17-C, Plan 18-C, 19-C, Agreement Paper No. 54-C Ex. 3, letter 55-C Ex 10 etc.
14. On behalf of the Defendants, Sri Harish Chandra Singh, Sri Lal Singh, Sri Harendra Singh, Sri Prem Lal and Sri Raghubir Singh have been examined as P.W.1, P.W.2, P.W.3, P.W.4 and P.W.5. Towards the documentary evidence, letter dated 9-8-1977 marked Ex. A-1 and various receipts and bills about the purchase of construction material.
15. While deciding the Issue No. 1, 2, 3 and 3-B as to whether there was any agreement between the Plaintiff No. 3 and Defendant No. 1 in between 12th March and 14th March, 1977, if so whether the Defendant No. 1 had vacated the house in suit by 21st March, 1977, as to whether the Ikrarnama dated 2-5-1977, referred to para 7 in the plaint was acted upon and pursuant thereto Defendant No. 2 had vacated house in suit, as to whether the Defendants had illegally occupied the house in suit on 15-8-1977 as alleged in para 9 of the plaint and as to whether house in suit was incomplete at the time of the alleged illegal occupation, while deciding the aforesaid issues, reliance has been placed on the statement of Laxman Singh Negi P.W.1, Architect Sri A.S. Katariya P.W.2, Sri Sudarsan Singh Negi P.W.3, Sri Prem Singh P.W.4 and Sri Jang Bahadur P.W.5.
16. Further reliance has been placed on Papers filed by the Plaintiffs as Permission Paper No. 14-C, Plan Paper No. 15-C, 16-C, Permission Paper No. 17-C, Plan 18-C, 19-C, agreement Paper No. 54-C Ex.3, letter-55-C Ex.10.
17. The trial Court also taken into consideration, the statement of Harish Chandra Singh D.W.1, Sri Lal Singh D.W.2, Sri Harendra Singh D.W.3, Sri Prem Lal D.W.4 and Sri Raghubir Singh D.W.5 and the papers filed by them i.e. letter dated 9-8-1977 marked Ex-A-1 and various receipts and bills about the purchase of construction material.
18. On the basis of the aforesaid evidence, a finding has been recorded that the building was never vacated by the Defendant No. 2 and therefore, the question of forcible occupation on 15-8-1972 does not arise and the aforesaid issues 1,2,3 and 3-B were decided against the Plaintiffs.

19. While deciding the Issue No. 8 and 9 with regard to applicability of Act No. XIII of 1972, a finding was recorded that there was no material to establish that it was a new construction.

20. Coming to the Issue No. 4 with regard to allotment dated 25-3-1977 in favour of the Defendant No. 2, the trial Court has recorded a finding that the allotment order can be judicially reviewed by the Civil Court only when there is an exercise of fraud or want of jurisdiction and as such this issue was also decided against the Plaintiff.

21. So far as Issue No. 5 with regard to mesne profit at the rate of Rs. 800/- per month is concerned, the trial Court has recorded a finding against the Plaintiffs on the ground that the rent payable by the tenant to the landlord is an appropriate measure for assessing the mesne profit.

22. While deciding the issue No. 7, the trial Court has recorded a finding that under valuation of the suit or insufficiency of the court fees could not be established and thus, the issue was decided in negative.

23. While deciding the Issue No. 6, the trial Court has recorded a finding that as it is abundantly established that there was neither surrender nor lawful termination of tenancy in question, therefore, the Plaintiffs have been held to be not entitled for any relief.

24. On the basis of the aforesaid findings, the trial Court has dismissed the suit of the Plaintiffs on 14-10-1983 with costs.

25. Having lost from the trial Court, the Plaintiffs have preferred an appeal being First Appeal No. 597 of 1983 Smt. Bindra Devi v. Sri Raghubir Singh and Anr.

26. The aforesaid appeal was allowed and the decree for eviction was passed directing the dispossession of the Appellants and also to pay mesne profits.

27. Counsel for the Appellants Sri Sharad Sharma has assailed the finding of the appellate Court has submitted to the following effect:

1) Finding with regard to the reconstruction of the premises so as to exclude the applicability of the Act No. XIII of 1972 is wholly illegal.

2) The Defendant No. 1 has never surrendered the premises and the finding to the contrary is against the evidence on the record.

3) The matter of allotment cannot be a matter of adjudication before the Civil Court due to bar contained u/s 37 of the U.P. Act No. XIII of 1972 and the remedy lies u/s 18 of the U.P. Act No. XIII of 1972.

28. On the other hand, Sri B.C. Pande, Sr. Advocate has made a submission that the Defendant No. 1 Sri Raghubir Singh, who was in occupation of the premises (a) has surrendered the tenancy, (b) the premises having been reconstructed, the Rent Control and Eviction Officer has no jurisdiction to pass any order of allotment, firstly, on the ground that the building was outside the ambit of U.P.

Act No. XIII of 1972, secondly, the allotment order should not have been issued without complying the provisions of Rules 8 and 9 of the U.P. Act No. XIII of 1972.

(1) About the Reconstruction

29. First question arises as to whether the building was demolished and it was reconstructed and the provisions of the Act No. XIII of 1972 are not applicable to the building in dispute, therefore, the Rent Control Authorities have no jurisdiction to allot the building in dispute.

30. Sri Sudarshan Singh Negi RW.3 has stated in his statement to the following effect:

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31. RW.5 Jang Bahadur Singh has stated in his statement to the following effect:

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32. Section 2(2) of the U.P. Act No. 13 of 1972 reads as under:

(2)[Except as provided in Sub-section (5) of Section 12, Sub-section (1-A) of Section 21, Sub-section (2) of Section 24, Sections 24-A, 24-B, 24-C or Sub-section (3) of Section 29, nothing in this Act shall apply to a building during a period of ten years from the date on which its construction is completed]:

[Provided that where any building is constructed substantially out of funds obtained by way of loan or advance from the State Government or the Life Insurance Corporation of India or a bank or a co-operative society or the Uttar Pradesh Avas Evam Vikas Parishad and the period of repayment of such loan or advance exceeds the aforesaid period of ten years shall be deemed to be a reference to the period of fifteen years or the period ending with the date of actual repayment of such loan or advance (including interest), whichever is shorter.]:

[Provided further that where construction of a building is completed on or after April 26, 1985 then the reference in this sub-section to the period of ten years shall be deemed to be a reference to a period of [forty years from the date on which its construction is completed.]

Explanation I.-[For the purposes of this section],?

(a) the construction of a building shall be deemed to have been completed on the date on which the completion thereof is reported to or otherwise recorded by the local authority having jurisdiction and in the case of building subject to assessment, the date on which the first assessment thereof comes into effect

and where the said dates are different, the earliest of the said dates and in the absence of any such report, record or assessment, the date on which it is actually occupied (not including occupation merely for the purposes of supervising the construction or guarding the building under construction) for the first time:

(b) "construction" includes any new construction in place or an existing building which has been wholly or substantially demolished;

(c) where such substantial any new construction in place of an existing building that the existing building becomes only a minor part thereof the whole of the building becomes only a minor part thereof the whole of the building including the existing building shall be deemed to be constructed on the date of completion of the said addition.

33. In *Sudha Rani Garg (Smt.) v. Sri Jagdish Kumar (Dead) and Ors.* 2004 SCFBRC 449, the Apex Court has observed as under:

9. The Explanation I is a deeming provision. The word "deemed" is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible", (per Lord Radcliffe in *St. Aubyn (L.M.) v. A.G.* (No. 2) (1951) 2 ALLE.R. 473 (HL).

34. In view of the aforesaid deeming clause, the building shall be deemed to have been constructed according to Clause (b) of Explanation I that the construction includes the new construction in place of existing building which has been wholly or (substantially) demolished. The evidence on the record fully establishes that it was demolished and according to the sanctioned plan new structure was constructed, therefore, it was not open for allotment.

(2) About the Surrender of Tenancy

35. On the rival submissions of the parties, I have examined the record in order to ascertain as to whether Raghubir Singh-Defendant No. 1 was in occupation after he has surrendered the premises. The premises was got allotted by the Defendant No. 2-Harish Chandra Singh in his own name and therefore, it is obvious that there was a collusion between the Defendants No. 1 and 2 in order to grab the property by getting the allotment in favour of the Defendant No. 2.

36. The allotment order is passed only when there is vacancy or deemed vacancy. The premises shall be treated to be vacant by fiction of law so as to get the premises allotted. The role of a provision in a statute creating legal fiction has been interpreted in *Harish Tandon v. Addl. District Magistrate Allahabad U.P. and Ors.* Supreme Court and Full Bench Rent Cases 1995 Page 123 to the following effect:

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 Dwelling 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.

37. P.W.1 Laxman Singh, son of late Sri Jodh Singh Negi has stated in his statement that on 15-8-1977, the Defendant No. 2 forcibly occupied the premises and the report was lodged to the Police Authorities. Till that time, the house was not fully constructed. On behalf of the Defendants, Sri Harish Chandra Bisht was examined, who has stated that initially the house was in occupation of his father and he was living separately. He got the allotment on 25th March, 1977. Relevant portion of the statement is quoted below:

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38. Sri Raghubir Singh was also examined as D.W.5. He has stated to the following effect:

? 1978 ? | 1970 ? | ? ? ? ? |

39. As will appear from the aforesaid statement that the Defendant No. 1 has surrendered the tenancy and in pursuance of the deemed vacancy, the Defendant No. 2 occupied the premises forcibly and got the allotment on 25th March, 1977 in his favour.

(3) Finding regarding jurisdiction of Civil Court

40. Thirdly, the jurisdiction of the Civil Court is no bar as will appear from the narration of the fact that on 25th March, 1977, the application for allotment was filed and the same was allotted on the same date.

41. Section 16 of the U.P. Act No. XIII of 1972 reads as under:

16. Allotment and release of vacant building.-Subject to the provisions of the Act, the District Magistrate may be order-

(a) require the landlord to let any building which is or has fallen vacant or is

about to fall vacant, or a part of such building but not appurtenant land alone, to any person specified in the order (to be called an allotment order); or

(b) release the whole or any part of such building, or any land appurtenant thereto, in favour of the landlord (to be called a release order):

[Provided that in the case of a vacancy referred to in Sub-section (4) of Section 12, the District Magistrate shall given an opportunity to the landlord or the tenant, as the case may be, of showing that the said section is not attracted to his case before making an order under Clause (a).]

(2) No release order under Clause (b) of Sub-section (1) shall be made unless the District Magistrate is satisfied that the building of any part thereof or any land appurtenant thereto 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, calling or where the landlord is the trustee of a public charitable trust, for the objects of the trust, or that the building or any part thereof is in a dilapidated condition and is required for purposes of demolition and new construction, or that any land appurtenant to it is required by him for constructing one or more new building or for dividing it into several plots with a view to the sale thereof for purposes of construction of new building:

Provided that no application under this sub-section shall be entertained for the purposes of a charitable trust the objects of which provide for discrimination in respect of its beneficiaries on the ground of religion, caste or place of birth.

(3) The allotment order shall specify-

(a) whether the building shall be used by the tenant for residential or non-residential purposes;

(b) in the case of business purposes, the names of proprietors or partners of the business; (d) the date, which shall not be earlier than seven days after the date of the order, by which the landlord shall deliver possession to the allottee;

(4) Where the allottee or the landlord has not been able to obtain possession of the building, allotted to him or, as the case may be, released in his favour, or any part thereof, [***] the District Magistrate, on an application of the allottee or the landlord, as the case may be, may by order evict or cause to be evicted any person named in the order as well as every other person claiming under him or found in occupation and may for that purpose use or cause to be used such force as may be necessary and put or cause to be put the allottee or the landlord in possession of the building or part.

(5)(a) Where the landlord or any other person claiming to the lawful occupant of the building or any part thereof comprised in the allotment or release order satisfies the District Magistrate that such order was not made in accordance with

Clause (a) or Clause (b), as the case may be, of Sub-section (1), the District Magistrate may review the order:

Provided that no application under this clause shall be entertained later than seven days after the eviction of such person.

(b) Where the District Magistrate on review under this sub-section sets aside or modifies his order of allotment or release, he shall put or cause to be put the Applicant, if already evicted, back into possession of the building and may for that purpose use or cause to be used such force as may be necessary.

(6) If the District Magistrate finds an application given under Sub-section (5) to be false or frivolous, he shall by order award to the allottee or the landlord, as the case may be, against the Applicant special costs which shall not exceed five hundred rupees.

(7) Every order under this section shall [subject to any order made u/s 18], be final.

(8) The allottee shall, [subject to the provisions of Sub-sections (5) and (9) and Section 18] be deemed to become tenant of the building from the date of allotment or, where he is unable to obtain possession by reason of a stay order or of any other person having occupied or continued to occupy the building from the date on which he obtains possession.

(a) where the building is situated in a hill municipality one-half of the yearly presumptive rent; and

(b) in any other case, one month's presumptive rent and on his failure to make or offer the payment within a week thereof, rescind the allotment order.

Explanation.-In this sub-section the expression "presumptive rent" means an amount of rent which the District Magistrate prima facie considers reasonable having regard to provisions of Sub-sections (2) and (2-A) of Section 9. provided that such amount shall not be less than the amount of rent which was payable by the last tenant, if any.

(10) Nothing in Sub-section (9) shall be construed to required the District Magistrate to take any evidence or hold any formal inquiry before fixing the presumptive rent of the building allotted and the amount mentioned in the allotment order as presumptive rent shall be subject to any agreement in writing between the parties or to any subsequent determination of standard rent after formal inquiry u/s 9:

Provided that until the presumptive rent is so revised by agreement or by an order u/s 9, the tenant shall continue to be liable to pay rent according to the presumptive rent specified in the allotment order, so however, that any subsequent order u/s 9 shall relate back to the date of commencement of the tenancy.]

42. Rule 8 of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 provides as under:

8. Ascertainment of vacancy [Sections 12, 16 and 34(8)].-

(1) The District Magistrate shall, before making any order of allotment or release in respect of any building which is alleged to be vacant u/s 12 or to be otherwise vacant or to be likely to fall vacant, get the same inspected.

(2) The inspection of the building, so far as possible shall be made in the presence of the landlord and the tenant or any other occupant, the facts mentioned in the report should wherever practicable, be elicited from at least two respectable persons in the locality and the conclusion of the inspection report shall be pasted on the notice board of the office of the District Magistrate for the information of the general public and an order of allotment may be passed not before the expiration of the three days from the date of such posting and if in the meantime any objection is received, not before the disposal of such objection.

(3) Any objection under Sub-rule (2) shall be decided after consideration of any evidence that the objector or any other person concerned may adduce.

43. It will appear from sub Rule 2 of Rule 8 that the allotment order cannot be passed on the same date.

44. Rule 9 of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 provides as under:

9. Notice of vacancy (Section 15).-(1) Every notice to the District Magistrate under Sub-section (1) or Sub-section (2) of Section 15 shall contain the following particulars:

(a) The number, if any allotted by the local authority to the building and the street, ward or division in which the building is situated.

(b) The name and address of the landlord.

(c) Whether the building is residential or non-residential.

(d) Details of accommodation available together with the appurtenant land, garden, garages, out-houses, etc.

(e) In case the building falling vacant is part of a bigger building, the names of occupants of the other parts.

(f) the actual or expected date of vacancy.

(g) The name of the person vacating the building, (h) The year of construction of the building.

(i) Whether the building was ever let out. (j) Other information, if any.]

(2) The notice shall be signed and dated by the informant and shall be presented in person at any time during office hours or on any working day or shall be sent by registered post acknowledgment due.

(3) Immediately after the receipt of intimation of vacancy of any building in the office of the District Magistrate, the vacancy shall be entered in a register which shall be maintained in that behalf and be notified for the information of the general public by pasting a copy of the list of the vacant building on the notice board of that office, specifying therein the date on which the Question of allotment will be considered. He shall also issue a notice to the landlord intimating him the date so fixed. On the date so fixed the District Magistrate shall consider the cases of all Applicants registered in the register mentioned in Rule 10 and shall pass an order u/s 16 in accordance with Rules 10 and 11.

45. It is well settled that if a statute requires that a particular act has to be done in a particular manner, it has to be done in that manner. In *I.T.C. Bhadrachalam Paperboards and Another Vs. Mandal Revenue Officer, A.P. and Others*, it has been observed as under:

If the statute requires that a particular act should be done in a particular manner and if it is found, as we have found hereinbefore, that the act done by the Government is invalid and ineffective for non-compliance with the mandatory requirements of law, it would be rather curious if it is held that notwithstanding such non-compliance, it yet constitutes a "promise" or a "representation" for the purpose of invoking the rule of promissory/equitable estoppel... Such a course would render the mandatory provisions of the enactment meaningless and superfluous.

46. In *Ram Swamp and Ors. v. Shikhar Chand* 1966 ALJ 360, it has been observed as under:

(13)...In our opinion, the bar created by the relevant provisions of the Act excluding the jurisdiction of the civil court cannot operate in cases where the plea raised before the civil Court goes to the root of the matter and would, if upheld, lead to the conclusion that the impugned order is a nullity. Take for instance, the case of an order purported to have been passed by a District Magistrate who is not a District Magistrate in law. If it is shown by a party impeaching the validity of the order in a civil Court that the order was passed by a person who was not a District Magistrate, the order in law would be a nullity and such a plea cannot be ruled out on the ground of the exclusion of the jurisdiction of the civil Court. Similarly, if an order granting permission to a landlord is passed by a District Magistrate of one District when the property in question is situated in another district outside his jurisdiction, a party would be entitled to urge before a civil Court that the permission purported to have been granted by the District Magistrate is wholly invalid and a nullity in law. Let us take another case to illustrate the position. If Section 3 had provided that before a District Magistrate grants permission to the landlord to sue his tenant, he shall

issue notice to the tenant and give him an opportunity to represent his case before the application of the landlord is dealt with on the merits; and in the face of such a statutory provision, the District Magistrate grants permission *ex parte* without issuing notice to the tenant, in such a case, the failure of the District Magistrate to comply with the mandatory provision prescribed in that behalf, would render the order passed by him completely invalid and a plea that an order has been passed by the District Magistrate without complying with the mandatory provision of the Act, would be open for examination before a civil Court. Likewise, in the absence of such a statutory provision, if it is held that the proceedings before the appropriate authorities contemplated by Section 3 are in the nature of quasi-judicial proceedings and they must be tried in accordance with the principles of natural justice and it is shown that in a given case, an order has been passed without notice to the party affected by such order, it would be open to the said party to contend that an order passed in violation of the principles of natural justice is a nullity and its existence should be ignored by the civil Court. Such a plea cannot, in our opinion, be excluded by reason of the provisions contained in Section 3(4) and Section 16 of the Act.

(14) In this connection, we may incidentally refer to a recent decision of this Court in *Shri Bhagwan and Another Vs. Ram Chand and Another*, . In that case, this Court upheld the decision of the Allahabad High Court which had set aside the order passed by the appropriate authority under the relevant provisions of the Act on the ground that in passing the said order, principles of natural justice had not been followed. The view which was taken by this Court in that case was that the proceedings taken by a landlord u/s 3 are proceedings of a quasi-judicial nature and the appropriate authorities, in exercising their power in relation to such proceedings, must act in accordance with the principles of natural justice. It must, however, be made clear that in that case, the Question can be raised in a civil Court having regard to the bar created by Sections 3(4) and 16. But where a plea seeks to prove that the impugned order is a nullity in the true legal sense, that is a plea which does not come within the mischief of the bar created by Sections 3(b) and 16 of the Act, was not raised and has not been considered.

(15) We ought to point out that the provisions contained in Sections 3(4) and 16 undoubtedly raise a bar against pleas which challenge the correctness or propriety of the orders in question. The merits of the order and concluded by the decision of the appropriate authorities under the Act and they cannot be agitated in a civil Court. But where a plea seeks to prove that the impugned order is a nullity in the true legal sense, that is a plea which does not come within the mischief of the bar created by Sections 3(4) and 16 of the Act.

Similarly, if principles of natural justice are not complied with, the order passed in violation of the said principles would be wholly inoperative in law and their validity can be impeached in civil proceedings.

(17) The same principle has been emphasized by the Privy Council in AIR 1940 105 (Privy Council) . In that case, though the words used in Sections 188 and

191 of the Sea Customs Act (1878) were held to exclude the jurisdiction of the civil Courts the Privy Council observed that even where jurisdiction is excluded, the civil Courts have jurisdiction.

To examine into cases where the provisions of the Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

This latter clause presumably covers cases where orders are passed in violation of the principles of natural justice.

(18) In *Kamala Mills Ltd. Vs. State of Bombay*, , while dealing with a similar point, this Court has considered the effect of the two decisions of the Privy Council, one in the case of AIR 1940 105 (Privy Council) and the other in *Raleigh Investment Company Ltd. v. Governor-General in Council* 74 Ind App 50 at pp. 62-63 : AIR 1947 PC 78 at pp. 80-81. The conclusion reached by this Court in *Kamala Mills Ltd. Vs. State of Bombay*, also supports the view which we are taking in the present appeal.

(19) Therefore, while upholding the contention raised by Mr. Goyal that the jurisdiction of the Civil Courts is barred, we wish to make it clear that this contention will not avail Mr. Goyal if the Respondents' plea, if upheld, would render the permission granted by the Commissioner totally invalid and a nullity.

47. The Apex Court has rightly held that if the order impugned is a nullity in the true sense, therefore, the mischief of the bar created by Section 37 of the Act No. XIII of 1972 does not come into picture at all. In the present case the order has been passed without any notice to the landlord. It will amount to violation of natural justice.

48. The procedure for allotment has also been interpreted by the Apex Court from time to time in various decisions.

49. In *Dr. (Smt.) Keshav Devi v. Girdhari Lal Pahwa* 1987 ARC (1) 6, the Apex Court has observed as under:

5. When a building or a part of a building falls vacant or is likely to fall vacant, the District Magistrate u/s 16(1)(a) of the act has jurisdiction to issue allotment order requiring the landlord to let the building or part thereof to the person specified in the order. The landlord may apply to the District Magistrate for release of the whole or any part of such building u/s 16(1)(b) of the act, if the release application is allowed, the landlord is permitted to occupy the building or part thereof as the case may be. But if release application is dismissed, the District Magistrate is empowered to issue allotment order in favour of an Applicant and in pursuance thereof the allottee is entitled to take possession. Before applications for allotment are considered by the District Magistrate it is mandatory for him to serve notice of the vacancy on the landlord informing him the date on which the allotment is to be considered as prescribed by Rule 9 of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Rules, 1972

(hereinafter referred to as the Rules). Rule 9(3) requires service of notice and intimation of the date fixed for considering the allotment of the premises which may have fallen vacant or is likely to fall vacant. This is mandatory as has been held by this Court in *Yogindra Tiwari v. District Judge. Gorakhpur* and Ors. (1984) 2 SCC 723 : 1984 (2) ARC 728 (SC) : 1984 SCFBRC 37 (SC) and in catena of cases the High Court of Allahabad, has taken the same view, it is not necessary to burden the judgment by referring to all those decisions. The object and purpose of the notice to the landlord regarding the date fixed for allotment proceedings is to enable him to file his objections if any, to the allotment proceedings or to make application for release of the premises as contemplated by Section 16(1)(a) of the Act or to nominate a tenant of his choice if he himself is in occupation of a portion of the building. An allotment order made without giving notice to the landlord as required by Rule 9

(3) would be rendered illegal. We therefore agree with the view taken by the High Court.

50. In *Yogendra Tiwari v. District Judge Gorakhpur* AIR 1984 SC 1150, the Apex Court has observed as under:

The first stage is actual vacancy of a building or a part thereof in consequence of an intimation given by the landlord or the tenant u/s 15, or a declaration of deemed vacancy of such building or part thereof u/s 12(4). It is clear from the terms of the proviso to Section 16(1) that in the case of a deemed vacancy u/s 12(4) of the Act, the District Magistrate is required to give an opportunity to the landlord or the tenant, as the case may be, of showing that no declaration of deemed vacancy u/s 12(4) could at all be made in his case before making an order of allotment u/s 16(1)(a). The use of the word "shall" in the proviso to Section 16(1) makes the requirement mandatory. The District Magistrate, therefore, cannot make an order of allotment u/s 16(1)(a) on the strength of deemed vacancy u/s 12(4) until the landlord or the tenant, as the case may be, has an opportunity of being heard in the matter. The District Magistrate is required in terms of Rule 8(2) to give an opportunity to the landlord to file his objection or make his submission, if any, to the making of an order of allotment u/s 16(1)(a). In the case of deemed vacancy referred to in Section 12(4) he is entitled to show that none of the Clauses (a) to (c) of Section 12(1) comes into play. The second stage is reached when there is a deemed vacancy u/s 12(4) or actual vacancy in consequence of an intimation u/s 15. Under Rule 9(3), the District Magistrate is required to serve a notice on the landlord intimating on the date on which the question of allotment will be considered.

51. In *Ganpat Roy and Ors. v. Addl. District Magistrate and Ors.* 1985 (2) ARC 73, where it has been observed as under:

8. The Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Rules, 1972, prescribe the procedure for ascertainment of vacancy and for allotment or release in respect of any building which is alleged to be vacant u/s

12 or to be otherwise vacant or to be likely to fall vacant, the District Magistrate is required to get the building inspected. The inspection of the building, so far as possible, is to be made in the presence of the landlord and the tenant or any other occupant. The facts mentioned in the inspection report are, wherever practicable, to be elicited from at least two respectable persons in the locality and the conclusion of the inspection report is to be posted on the notice board of the office of the District Magistrate for the information of the general public and an order of allotment is not to be passed before the expiration of three days from the date of such posting and if in the meantime any objection is received, not before the disposal of such objection. Any objection received is to be decided after consideration of any evidence which the objector or any other person concerned may adduce.

52. In the case of Sunil Chatterjee and Anr. v. Rent Control and Eviction Officer/ City Magistrate and Ors. in Civil Misc. Writ Petition No. 9605 of 1995 decided on 24-5-1995, his Lordship Justice M. Katju has held as under:

In the present case from the facts I am satisfied that no real notice was served under Rule 8 of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Rules, 1972, hereinafter referred to as the rules, on Sukumar Chatterjee, owner of two disputed premises. It has been held by the Supreme Court in Yogendra Tewari v. District Judge 1984 (2) A.R.C. 7 that the Rent Control and Eviction officer must follow the procedure prescribed under Rule 8 of the Rules. This Court in Smt. Kante Gupte v. Addl. District Judge 1987 (2) A.R.C. 108 has held that the procedure prescribed under Rule 8 of the Rules has to be followed before declaring vacancy and in my opinion this procedure was not followed in the present case. In Roman Catholic Diocese v. Rent Control and Eviction Officer 1991 (2) A.R.C. 204 it has been held that if no notice is issued under Rule 8(2) of the Rules the inspection report is wholly illegal. In paragraph 20 of the said decision it has been held that service of notice under Rule 8(2) of the Rules is mandatory as has also been held by several other decisions referred to therein. In Achal Singh v. Addl. District Judge 1987 (2) A.R.C. 88 this Court held that the inspection has to be done under Rule 8(2) of the Rules only after notice to the landlord.

53. In Express Newspaper v. Union of India AIR 1986 SC 72, it has been held by the Apex Court that where there is a mala fide exercise of power, it renders the impugned action void and ultra vires. In paragraph 118 of this decision following observation of Lord Denning in Lazarus Estates Ltd. v. Beasley (1956) 2 QB 702 has been quoted:

No judgment of a Court, no order of Minister can be allowed to stand if it has been obtained by fraud. Fraud unravels everything.

54. In nutshell as will appear from the aforesaid that it was a case of house grabbing, the allotment order was void ab initio and did not confer any right upon the Appellants to carry any benefit out of it, therefore, the Civil Court has

jurisdiction to entertain the suit.

55. Counsel for the Appellant has referred the following cases:

- (1) State of Gujarat Vs. Shantilal Mangaldas and Others, .
- (2) Chandra Kishore Jha Vs. Mahavir Prasad and Others, .
- (3) The Godhra Electricity Co. Ltd. and Another Vs. The State of Gujarat and Another, .
- (4) Hira Lal Vallabhram v. Sheth Kasturbhai Lalbhai and Ors. AIR 1987 SC 1853.
- (5) Krishna Laxman Yadav and Others Vs. Narsingh Rao Vithal Rao Sonawane and Another, .
- (6) Moinuddin v. Ch. Mohammad Imam-Uddin Ashraf.
- (7) Gobardhan Singh Vs. Barsati, .
- (8) Ram Chandra Gupta v. IV Addl. District Judge Allahabad and Ors. 1979 ARC 222.
- (9) Ram Saroop Rai v. Smt. Lilawati 1980 ARC 466 SC.
- (10) Suresh Chandra v. IVth Addl. District Judge Aligarh and Ors. 1984 (1) ARC 590.
- (11) Rahim Bux and Others Vs. Mohammad Shafi, .
- (12) Chandra Kishore Jha Vs. Mahavir Prasad and Others, .
- (13) Lal Chand Shah v. Kunwar Raj Singh 1985 (1) ARC 401.
- (14) K. Sreenivasa Rao and Anr. v. K.M. Narasimhaiah AIR 1972 Mys 90.

56. State of Gujarat Vs. Shantilal Mangaldas and Others, , which has been referred by the counsel for the Appellant is against the facts of the present case and goes against the Appellant.

57. Chandra Kishore Jha Vs. Mahavir Prasad and Others, goes against the Appellant and in favour of the Respondent as relevant paragraph 17 provides as under:

...It is a well settled salutary principle that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner. (See with advantage : Rao Shiv Bahadur Singh and Another Vs. The State of Vindhya Pradesh, , State of Uttar Pradesh Vs. Singhara Singh and Others, .

58. As will appear from the aforesaid, when a statute provides a particular to be done in a particular, therefore, the allotment order is nullity as neither Rule 8 nor Rule 9 has been complied with and no allotment order can be passed without expiry of three days.

59. The Godhra Electricity Co. Ltd. and Another Vs. The State of Gujarat and Another, is a case of electricity Act and the same is not applicable with the facts of the present case.

60. Hira Lal Vallabhram v. Sheth Kasturbhai Lalbhai and Ors. AIR 1987 SC 1853 is not applicable to the facts of the present case, as it was a case of determination of tenancy after the contractual tenancy comes to an end.

61. Krishna Laxman Yadav and Others Vs. Narsingh Rao Vithal Rao Sonawane and Another, is a case of floods and it does not determine the tenancy and further the same is not applicable in this case.

62. Moinuddin Vs. Ch. Mohammad Imam-Uddin Ashraf, is a case of material alternation, hence, the same is not applicable to the present case.

63. Gobardhan Singh Vs. Barsati, is a case of Section 148 and thus, the same is not applicable with the facts of the present case.

64. In Ram Chandra Gupta v. IV Addl. District Judge Allahabad and Ors. 1979 ARC 222. Division Bench of the Allahabad High Court has held as under:

12. The next question that arises of is about the applicability of Section 14 of U.P. Act No. 13 of 1972. The courts below had found that Jagannath Bharti was entitled to the benefit of Section 14 of the U.P. Act No. 13 of 1972 and as such, his tenancy would be deemed to have been regularized. As Section 14 of the Act provided that if any person was in possession of the premises before the commencement of U.P. Act No. 13 of 1972 with the consent of the landlord and against him no proceedings u/s 7-A were pending, such a person would be entitled to get the benefit of Section 14 of U.P. Act No. 13 of 1972.

65. Admittedly in the present case, new construction has been raised, thus, the allotment order passed in favour of the Appellant is legal nullity and the civil Court has jurisdiction to entertain the suit.

66. The judgment of Suresh Chandra v. IVth Addl. District Judge Aligarh and Ors. 1984 (1) ARC 590 is not applicable in the present case as there was no question of the applicability of deeming clause as it was a new construction and the Act No. XIII of 1972 is not applicable.

67. In Rahim Bux and Others Vs. Mohammad Shafi, , the premises in dispute has been demolished in pursuance of the notice issued by the Municipalities Act and thus the same is fully distinguishable.

68. In Lal Chand Shah v. Kunwar Raj Singh 1985 (1) ARC 401, the date of assessment is not available and further there is admission that the building in question was destroyed. Relevant paragraph 9 and 10 of the judgment is quoted below:

10. Sri Swami Dayal, Senior Advocate, appearing on behalf of the Applicant, has contended that the finding in regard to the applicability of the Act recorded by

the court below was vitiated in law. The submission of the learned Counsel is that the first part of Section 2(2) Explanation 1 Clause (a) was applicable to the facts of the present case and the courts below erred in taking the date of the first assessment as the date of completion of the construction. Section 2(2) Explanation I Clause (a) is as under:

2(2) I(a). The construction of a building be deemed to have been completed on the date on which the completion thereof is reported to or otherwise recorded by the local authority having jurisdiction and in the case of a building subject to assessment, the date on which the first assessment thereof comes into effect and where the said dates are different, the earliest of the said dates and in the absence of any such report, record or assessment, the date on which it is actually occupied (not including occupation merely for the purposes of supervising the construction of guarding the building under construction) for the first time:

Provided that there may be different dates of completion of construction in respect of different parts of a building which are either designed as separate units or are occupied separately by the landlord and one or more tenants or by different tenants.

11. The above Clause (a) provides that the construction of a building shall be deemed to have been completed on the date on which the completion thereof is reported to or otherwise recorded by the local authority having jurisdiction and in the case of a building subject to assessment, the date on which the first assessment thereof comes into affect and where the said dates are different, the earliest of the said dates. In the instant case, the court below has categorically recorded a finding that the date of the first assessment is 1st April, 1975. The only question, therefore, to be examined is as to whether the first portion of Clause (a) would apply in the first instance and whether there was any material on the record show that the date of completion was reported to or otherwise recorded by a local authority having jurisdiction.

69. The judgment of K. Sreenivasa Rao and Anr. v. K.M. Narasimhiah and Anr. AIR 1972 Mys 90 is fully distinguishable in as much as it was also a case of surrender of tenancy rights according the own admission, the business is being carried on by the Defendant No. 1 and the same was allotted to Defendant No. 2. Allotment can take place only if the statutory provision is complied with. Thus, the aforesaid case law is not applicable in the present case.

70. Facts of the aforesaid case are fully distinguishable, thus, the same is not applicable in the present case. It has been held in Oriental Insurance Co, Ltd. v. Smt. Raj Kumari and Ors. AIR 2007 SCW 7149 to the following effect:

12. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's Theorems nor as provisions of the statute and that too taken out of their context.

These observations must be read in the context in which they appear to have been stated. Judgment of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes. In *London Graving Dock Company Ltd. v. Hortojn* (1951 AC 737 at p. 761), Lord Mac Dermot observed:

The matter cannot, of course, be settled merely by treating the ipsissima verba of Willes, J. as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language actually used by that most distinguished judge.

71. None of the cases have any application in the present case, in view of the fact that allotment order was passed behind the back of the Plaintiff/ Respondents, against the provisions of the statute, against the natural justice and further of the building of which Act No. XIII of 1972 has no application and therefore, the same is illegal and will amount to house grabbing.

ABOUT THE COUNTER CLAIM

72. Landlord has also filed a counter claim for realizing the mesne profits according to the market rate. In the plaint it has been stated that the premises can be let out on Rs. 800/- per month. Relevant paragraph of the counter claim is quoted below:

II. Because the Plaintiffs have filed list (40-C) of the adjoining shops showing their current rent, current assessment of the building showing rental value, valuer's report (81-C) and examined Laxman Singh (RW.1) A.F. Katariya (P.W.2) and Prem Singh Clerk of Nagar Palika Pauri (P.W.4) all these witnesses clearly proved that rent of the disputed plot can not be less than 800/- per month.

73. Further in the written statement, the Defendant-Appellants have stated to the following effect:

74. In *Atma Ram Properties (P) Ltd. Vs. Federal Motors Pvt. Ltd.*, after relying upon various judgments, it has been held as under:

13. In *Shyam Charan Vs. Sheoji Bhai and Another*, , this Court has upheld the principle that the tenant continuing in occupation of the tenancy premises after the termination of tenancy is an unauthorized and wrongful occupant and a decree for damages or mesne profits can be passed for the period of such occupation, till the date he delivers the vacant possession to the landlord.... After determination of the tenancy, the position of the tenant is akin to that of a trespasser and he cannot claim that the measure of damages awardable to the landlord should be kept tagged to the rate of rent payable under the provisions of the Rent Control Order. If the real value of the property is higher than the rent

earned then the amount of compensation for continued use and occupation of the property by the tenant can be assessed at the higher value.

75. Relying upon the judgment of Atma Ram Properties (P) Ltd. v. Federal Motors (P) Ltd. JT 2004 (1) SC 410 : 2005 (1) SCO 705 : 2005 SCFBRC 99 in Achal Mishra v. Ram Shankar Singh reported in 2005 (1) ARC 887 it has been observed as under:

We make it clear that the Respondents shall be liable to pay the rent equivalent to mesne profits with effect from the date with which they are found to have ceased to be entitled to retain possession of the premises as tenant for such period the landlord's entitlement cannot be held pegged to the standard rent. Reference may be had to the law laid down by the Court in Atma Ram Properties (P) Ltd v. Federal Motors (P) Ltd. JT 2004 (1) SC 410 : 2005 (10) SCC 705 : 2005 SCFBRC 99.

76. In view of the aforesaid proposition of law, the court is entitled to fix the damages at the market rate even in the defence of the counter claim.

77. Landlord has submitted that the accommodation in question can fetch rent of Rs. 800/- per month, but taking into consideration the point that the matter is an old one and the Defendant has admitted the liability @ at rate of 175/- per month, therefore, in the interest of justice the Appellants are directed to-pay the damages at the rate of Rs. 250/- per month from the date of actual and illegal occupation of the premises by the Defendant/Appellant No. 2 i.e. from 15th August, 1977 till the actual delivery of possession.

78. Consequently, appeal is dismissed. Fixing the damages to the extent of Rs. 250/- per month, the Counter Claim is decided accordingly.