
(2012) 09 AHC CK 0294

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 4218 of 1998

Ram Lakhan alias Lakhan Lal

APPELLANT

Vs

Awdhesh Kumar Bajpai and Others

RESPONDENT

Date of Decision : 28-09-2012

Acts Referred:

Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 —
Section 12, 12(1), 12(3)

Citation : (2013) 1 ALJ 737 : (2013) 3 AWC 2713 : (2013) 1 RCR(Rent) 409

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Advocate : D.P. Singh, Siddharth Ranjan, Avinash, P.K. Dubey, Siddharth Niranjana, for the Appellant; D.R. Singh, Ramji Srivastava, V.B.L. Srivastava and C.S.C., for the Respondent

Final Decision : Allowed

Judgement

Sudhir Agarwal, J.—Sri. Dharampal Singh, Senior Advocate, assisted by Sidharth Ranjan has advanced his arguments on behalf of petitioner. None has appeared on behalf of respondents No. 1 and 2. The case was taken in revised list and the name of Sri. Ramji Srivastava and Sri. D.R. Singh, Advocates are shown in the cause list as counsel for respondents. However, learned Standing Counsel is present for respondent No. 3. This writ petition is directed against the order dated 27.12.1997 passed by Rent Control and Eviction Officer/Additional City Magistrate (II), Kanpur Nagar (hereinafter referred to as "RCEO") declaring vacancy in house No. 118/387, Kaushalpuri, Kanpur Nagar in respect of a kitchen, adjoining courtyard, latrine and bathroom situated on ground floor, and directing to proceed further for allotment of the said premises.

2. The facts in brief, as given in writ petition, are as under:

3. The accommodation in question was owned by Sri. Gaya Prasad Shukla who had two sons Sri. Naval Kishore Shukla, respondent No. 2 (since deceased and substituted by his legal heir Smt. Vidya Devi, respondent No. 2/1) and Gopal

Krishna Shukla. After death of Gaya Prasad Shukla, property in question devolved on his legal heirs, namely, respondent No. 2 and Gopal Krishna Shukla. The aforesaid accommodation, it is said, was let out to one, Sri. Suraj Bali, father of petitioner much prior to 1960. It is not disputed that Sri. Suraj Bali died on 31.12.1977 and petitioner's mother Smt. Ramshri Devi, widow of Suraj Bali died on 19.06.1998.

4. Respondent No. 1 Awadhesh Kumar Bajpai filed an application dated 03.05.1997 for allotment of premises in question on the ground that the same had fallen vacant after death of Sri. Suraj Bali and his widow, and, the petitioner, is not living in the said premises having his own house i.e. house No. 114/120, Chhota Lakhanpur, Kanpur City.

5. RCEO, consequently, sought report from Rent Control Inspector (in short "RCI"). The report was submitted on 18.06.1997 wherein he verified that petitioner and his family were residing in the premises in question. The report also stated that he (Respondent No. 1, Awadhesh Kumar Bajpai) is residing in the premises since time of his father and is regularly paying rent to the landlord. It was also mentioned that there was a sale deed in respect of house No. 114/120, Lakhanpur, Kanpur City in favour of petitioner's mother and his real aunt (Smt. Vidya Devi wife of Chhannu Lai), both of them having half share each, but, it was in possession of Smt. Vidya Devi. There was a title dispute between the petitioner's mother and aunt giving rise to a Civil Suit which was decreed on 31.01.1981 by the Court of Munsif, Kanpur City. Smt. Vidya Devi was directed to hand over possession thereof to petitioner's mother but the same having not been done, execution is pending, being Execution Case No. 125 of 1988 (Ram Lakhan v. Smt. Vidya Devi). The petitioner also stated that he had no other residential accommodation in his possession except the premises in dispute. The RCI also referred the statement of respondent No. 2 admitting, tenancy of late Suraj Bali, petitioner's father but regarding petitioner, he (respondent No. 2) said that he (petitioner) was residing in house No. 114/120, Lakhanpur, near Vikas Nagar, Kanpur City and, after death of Suraj Bali and his wife, petitioner has forcibly taken possession of the accommodation in question.

6. Respondent No. 2 also filed an affidavit before RCEO requesting that after declaring the vacancy, the premises in question should be released in his favour.

7. The petitioner has also placed on record copy of sale deed dated 27.06.1961 in respect of premises No. 114/110, village Lakhanpur, Pargana and district Kanpur. As per municipal assessment record of 1978-1987, the existing construction thereto included three rooms and one courtyard (angan). The RCEO held that it would result in a vacancy u/s 12(3) of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as "the Act") and consequently, he (RCEO) declared vacancy at the premises in question.

8. Sri Dharam Pal Singh, learned Senior Advocate contended that Section 12 of

Act 1972 has no application in the present case, the RCEO has acted illegally, and the impugned order is vitiated in law ex facie. He further submitted that possession of any part of the property in house No. 114/120 Chhota Lakhanpur was not with the petitioner, inasmuch as, the decree passed in Original Suit No. 741 of 1977 was pending-execution in Execution Case No. 125 of 1988 wherein Smt. Vidya Devi wife of Chhannu Lai had filed objection in 1997. It cannot be said that there was any other accommodation acquired or possessed by the petitioner in vacant state so as to attract the provision of Section 12(3) of Act 1972 and learned RCEO having failed to apply his mind on this aspect of the matter, has committed patent illegality rendering the impugned order wholly illegal and bad in law. He also contended that unless another residential accommodation is in possession of the tenant, it cannot be said that he has acquired the same and, therefore, the vacancy in premises in question could not have been declared.

9. Section 12 of Act 1972 deals with certain situations which would result in "deemed vacancy" in a building, occupied by a tenant or a landlord himself which is subject to provisions of Act 1972. For the purpose of present case, Section 12(1) and (3), are relevant and it would be appropriate to reproduce the same:

12. Deemed vacancy of building in certain cases.-

(1) A landlord or tenant of a building shall be deemed to have ceased to occupy the building or a part thereof if-

(a) he has substantially removed his effects therefrom, or

(b) he has allowed it to be occupied by any person who is not a member or his family, or

(c) in the case of a residential building, he as well as members of his family have taken up residence, not being temporary residence, elsewhere.

(2)...

(3) In the case of a residential building, if the tenant or any member of his family builds or otherwise acquires in a vacant state or gets vacated a residential building in the same city, municipality, notified area or town area in which the building under tenancy is situate, he shall be deemed to have ceased to occupy the building under his tenancy:

Provided that if the tenant or any member of his family had built any such residential building before the date of commencement of this Act, then such tenant shall be deemed to have ceased to occupy the building under his tenancy upon the expiration of a period of one year from the said date.

Explanation.-- For the purposes of this subsection -

(a) a person shall be deemed to have otherwise acquired a building if he is occupying a public building for residential purposes as a tenant, allottee or

licensee;

(b) the expression "any member of family", in relation to a tenant, shall not include a person who has neither been normally residing with nor is wholly dependent on such tenant.

10. So far as sub-section (1) is concerned, it contemplates three conditions, namely, if the tenant has substantially removed his effects from a tenanted building or part thereof; or has allowed it to be occupied by any person who is not a member of his family; or in case of a residential building, he as well as members of his family have taken up residence not being temporary residence elsewhere. In the case in hand, RCI report clearly shows that at the time of inspection, he found petitioner and his family residing in the accommodation in question. Neither any otherwise evidence was adduced before RCEO nor he himself has recorded any finding to the contrary to above finding of RCI so as to attract sub-section (1) of Section 12. Therefore, this Court has no hesitation in holding that sub-section (1) has no application in the present case.

11. Now the only scope of consideration would be whether the present case attracts sub-section (3) of Section 12 or not. It says, if the tenanted building is a residential one; the tenant or any member of his family builds or otherwise acquires in a vacant state or vacated a residential building in the same city, municipality, notified area, or town area in which the building is under tenancy is situated, he shall be deemed to have ceased to occupy the building under his tenancy. The proviso applies to cases where such residential building was built before the date of commencement of Act 1972 and in such a case, deeming clause under subsection (3) of Section 12 shall be attracted after a period of one year from the date of commencement of the Act. The Explanation (b) is also relevant. It says that expression "any member of family" in relation to a tenant, shall not include a person who has neither been normally residing with nor is wholly dependant of such tenant.

12. In order to attract sub-section (3), first of all, it was necessary to prove that there existed a residential building, as a result of either construction raised by the tenant or any member of his family or an already constructed building, if acquired by them or anyone of them, but, simultaneously, it is also necessary that the same must be in a vacant state. Unless a finding comes about existence of a residential building in a vacant state, coming in control of the tenant or landlord or their family member, sub-section (3) of Section 12 shall not be attracted.

13. In the present case, petitioner contended that there is no building at all since it was already damaged badly in 1961, as is also mentioned in the sale deed, and, rest of the part had fallen down subsequently, and it is in these circumstances, he stated in his statement filed before R.C.I. that, in case possession of plot is received by him from Smt. Vidya Devi, his aunt (chachi), in respect whereto his execution is pending in Civil Court, he would raise

construction of building thereat. He tried to suggest that presently, there is no question of residing thereat. However this has not been found correct by R.C.E.O. On the basis of municipal assessment record of 1978-87 showing possession of existing construction at House No. 114/110 Naya Chota Lakhanpur, where there are three rooms and a courtyard (angan), he has found the construction existing thereat. The said finding having not been shown perverse or contrary to record, I find no reason to interfere therein.

14. Next submission is that the term "builds" or "acquires" does not include a premises which has been succeeded by petitioner's, inasmuch as, "acquire" means "to obtain" or "to buy" and not by way of devolution. Similarly, it is not a case where the petitioner has built anything so as to attract sub-section (3) of Section 12.

15. The submission is thoroughly misconceived. The term "otherwise acquires" is very wide and covers every aspect and every mode and manner in which the tenant or his family gets residential building in a vacant state so as to attract sub-section (3) of Section 12. It would cover a case of succession/devolution.

16. However, this itself would not answer the question up for consideration in the present case for the reason that the very language of sub-section (3) of Section 12 shows that it is prospective and deals with a situation likely to occur in present or in future after the Act 1972 has come into force. It is only the proviso which has extended Act 1972 to past transactions also but there is a substantial difference between language of sub-section (3) of section 12 itself and proviso. The distinction is that in section 12 (3), the legislature has used two words namely, "builds" or "otherwise acquires" but in the proviso the legislature in its wisdom has used only one word i.e., "built". The term "otherwise acquires" has not been used in proviso and it is only the proviso which has applied Section 12 (3) retrospectively. In other words, it can be said that the deeming provision u/s 12(3) would apply after commencement of Act 1972 covering almost every kind of situation where a tenant or any member of his family has got another residential accommodation in the same city etc., either by getting it constructed or obtaining or otherwise acquiring an already constructed building. In respect of cases where such acquisition or construction of building relates to a period before commencement of Act 1972, Section 12 (3) will cover only those cases where the tenant or any member of his family has "built" a residential building but would not apply to a case where the tenant or any member of his family had "acquired" a building instead of getting it constructed.

17. When the legislature has used different words in the same provision or statute and in the same provision it has chosen to use two words at one place but only one word at another place, it means that legislature intended to make a distinction in respect of cases covered by two words or phrases, as the case may be, and such intention has to be given effect in its entirety without assuming or presuming any mistake or lapse, that is called casus omissus. A casus omissus cannot be supplied by the Court. There is no presumption that a casus omissus

exists and language permitting the Court should avoid creating a *casus omissus* where there is none. It would be appropriate to recollect the observations of Devlin, L.J. in *Gladstone v. Bower*, (1960) 3 All ER 353(CA):--

The Court will always allow the intention of a statute to override the defects of working but the Court's ability to do so is limited by recognized canons of interpretation. The Court may, for example, prefer an alternative construction, which is less well fitted to the words but better fitted to the intention of the Act. But here, there is no alternative construction; it is simply a case of something being overlooked. We cannot legislate for *casus omissus*.

18. The Hon'ble Apex Court in *Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others*, quoted with approval the following observation of Lord Simonds in the case of *Magor & St. Mellons R.D.C. v. Newport Corporation*, (1951) 2 All ER 839 (841):--

The duty of the Court is to interpret the words that the Legislature has used. Those words may be ambiguous, but, even if they are, the power and duty of the Court to travel outside them on a voyage of discovery are strictly limited.

19. It would be appropriate at this stage to remind another principle that though a Court cannot supply a real *casus omissus*, it is equally evident that it should not so interpret a statute as to create *casus omissus* when there is really none. Recently in *Vemareddy Kumaraswamy Reddy and Another Vs. State of A.P.*, the Court reiterated that while interpreting a provision the Court only interprets the law and cannot legislate. If a provision of law is misused and subject to the abuse of process of law, it is for the legislature to amend, modify or repeal it if deemed necessary. The legislative *casus omissus* cannot be supplied by judicial interpretative process.

20. In taking this view, I am fortified by a decision of this Court in *Lalta Prasad v. Rent Control and Eviction Officer, Allahabad and others* 2005 (3) ARC 214, where relying on its earlier decision in *B.P. Sewal v. D.J. Dehradun & others* (1982 ARC 504, paras 9 and 10), this Court in paras 123, 124 and 125 has said as under:--

123. Proviso to sub-section (3) of Section 12 of the Act shows that if the tenant or any member of his family had built any such residential building before the date of commencement of the Act, then such tenant shall be deemed to have ceased to occupy the building under his tenancy upon the expiration of a period of one year from the said date.

124. The language of the said proviso clearly shows that the said proviso applies only in a case where the tenant or any member of family builds any residential building before the date of commencement of the Act. The said proviso is not applicable where the tenant or any member of his family otherwise acquires a residential building in a vacant state or gets vacated a residential building. Therefore, the language of the said proviso itself shows that while the Legislature has made subsection (3) of Section 12 of the Act retrospective, and applicable in

case of construction of a residential building by the tenant or any member of his family before the date of commencement of the Act (i.e. U.P. Act No. XIII of 1972), sub-section (3) of Section 12 of the Act has not been made retrospective and applicable in case of acquisition of a residential building in a vacant state or getting a residential building vacated before the date of commencement of the Act (i.e. U.P. Act No. XIII of 1972) by the tenant or any member of his family.

125. Therefore, even if the tenant or any member of his family had acquired in a vacant state or got vacated a residential building before the date of commencement of the Act, then sub-section (3) of Section 12 of the Act shall not be attracted.

21. In the present case it is nobody's case that petitioner or any member of his family built any residential building in the same city etc., before or after enforcement of Act, 1972. "Acquisition" of building before Act, 1972 i.e. in 1961, shall not attract the provision of "deemed vacancy" under proviso to Section 12(3) of Act, 1972. That being so, the impugned order is clearly illegal and without jurisdiction. It cannot sustain.

22. In the result writ petition succeeds and is allowed. The impugned order dated 27.12.1997 (Annexure 9 to the writ petition) passed by respondent No. 3, Rent Control and Eviction Officer/Additional City Magistrate, Kanpur Nagar in Case No. 61 of 1997 is hereby, quashed. No order as to costs.