

(1998) 05 AHC CK 0044
In the Allahabad High Court
Case No : C.M.W.P. No. 14598 of 1998

Ranveer Singh

APPELLANT

Vs

District Judge, Tehri Garhwal, New Tehri and others

RESPONDENT

Date of Decision : 15-05-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 9, 11
Uttar Pradesh Public Premises (Eviction of Unauthorised Occupants) Act, 1972 —
Section 2, 4, 4(2), 8
Uttar Pradesh Public Premises (Eviction of Unauthorised Occupants) Rules, 1973 —
Rule 10

Citation : (1998) 3 AWC 2134

Hon'ble Judges : D.K. Seth, J

Bench : Single Bench

Advocate : Anurag Bisaria, for the Appellant;

Judgement

D.K. Seth, J.

Through a notice dated 30.11.1995 proceeding was initiated against the petitioner u/s 4 of U. P. Public Premises (Eviction of Unauthorised Occupants) Act, 1952, being Case No. 9 of 1995. The Prescribed Authority by his order dated 22.7.1997 had passed order of eviction against the petitioner. An appeal being Misc, Appeal No. 17 of 1996, was preferred by the petitioner before the learned District Judge, Tehri Garhwal. By an order dated 18th December, 1997 the said appeal was dismissed affirming the order dated 22.7.1996 passed by the Prescribed Authority, Tehri in Case No. 9 of 1995. This order has been challenged in this petition.

2. Sri Anurag Bisaria, learned counsel for the petitioner contends that similar proceeding u/s 4 of the said Act was initiated against the petitioner in respect of the self same property which was dismissed in default. But the respondents did not apply for restoration and setting aside of the order dismissing the proceeding in default. According to him, by reason of Order IX, Rule 9 of the CPC the said

order having not been set aside the respondents are precluded from bringing fresh suit in respect of the same cause of action. According to him the present case is hit by the mischief of Order IX, Rule 9 of the Code. He secondly contends that since the issue was involved in the earlier case, the same cannot be re-opened once again between the same parties in respect of the self same property in view of principle of res Judicata. He next contends that the petitioner having been in possession of the land under valid licence granted by the lessee in whose favour the land was settled by the Government, he is not in unauthorised occupation as defined in Section 2 (g) of the said Act. Therefore, he cannot be evicted pursuant to the said proceeding. He also contends that the notice should give atleast ten days time to reply : as provided in Section 4 (2) (b), whereas in the present case only four days time was given and, therefore, the notice is void and the proceeding based on such notice is nullity. He also contends on the basis of material produced before the Court, that the Court could not have come to the conclusion that the petitioner was in unauthorised occupation. According to him the finding is wholly perverse and cannot be sustained.

3. So far as the question of notice as contemplated u/s 4 (2) (b) of the Act is concerned, the record does not disclose that such an objection was taken in the written statement filed before the Prescribed Authority or even before the Appellate Authority. Sri Bisaria very fairly concedes that such a question was not taken in the written statement nor in any of the Courts below. Section 4 (2) provides particulars of notice specifying grounds on which order of eviction was proposed to be made and all persons concerned are required to show cause why the proposed order should not be made against them specifying the date for showing cause which shall not be a date earlier than ten days, from the date of issue of notice. Relying on Annexure-T to the notice he contends that 4.12.1995 was the date fixed for showing cause while notice was issued on 30.11.1995. The provision contained in clause (b) of sub-section (2) of Section 4 of the Act requires sufficient time for showing cause. Admittedly", in the present case the petitioner had shown cause. It is not the case that he was not given sufficient opportunity to show cause. The fixing of date within four days, may be an irregularity, but the same cannot be an illegality to the extent of rendering the proceeding void. The scheme of Section 4 does not provide that such giving of less than ten days time would render the proceeding void. The reason behind such fixing of ten days embargo was to provide sufficient opportunity to the party concerned. In the present case, it is not alleged that by reason of such short notice the petitioner was unable to show cause or that he was not given sufficient opportunity. On the other hand from the records, it appears that the petitioner had filed written statement and produced all the documents and that he was heard and given opportunity. At the same time the petitioner also did not take this objection either in the written statement filed in the proceeding before the prescribed authority or before the Appellate authority. After having submitted to the jurisdiction and availing of the opportunity of contesting the same it is no more open to him to take such a point for the first time in the writ petition. Then

again the same being an irregularity, and when it is found that he had full opportunity to contest the case, only on such technicalities, proceeding cannot be said to be void.

4. The point raised by Sri Bisaria, with regard to Order IX, Rule 9 of the Code of Civil Procedure, though appears to be very attractive but cannot be sustained. Inasmuch as the CPC as such is not applicable in the proceedings under the said Act. By virtue of Section 8 of the said Act the prescribed authority or the appellate authority are civil courts under the Code of Civil Procedure, in respect of specified matter, as provided in clauses (a), (b) and (c) thereof. From the specific provision made in Section 8 it is clear that it is mentioned therein that to some extent CPC is applicable and not beyond that. When the statute has provided the extent of applicability of the Code of Civil procedure, the same can be applied only to that extent and not beyond that. Therefore. Order IX, Rule 9 of the Code as such cannot apply unless the whole of Order IX of the CPC is made applicable in the proceeding under the said Act. Rule 10 of U. P. Public Premises (Unauthorised Occupation) Rules. 1973, prescribes the extent of application of the Code in such a proceeding. Clause (a) thereof provides that it has power to dismiss the application or appeal in default and to restore for sufficient cause. Relying on this clause Sri Bisaria wants to contend that Order IX, Rule 9 of the Code is applicable because the power to dismiss in default or restoration for sufficient cause is contained in Order IX, and thus Order IX as a whole is applicable to such proceeding.

5. I am unable to agree with the contentions of Sri Bisaria, for the simple reasons that Rule 10 cannot supersede Section 8. Rule 10 has been prescribed only to further the purpose, as has been sought to be provided u/s 8 of the Act. If there is any inconsistency between the rules and section, rule should be given effect to the extent of section only and it cannot be extended beyond the scope of the section. Then again this rule also does not say that Rule 9 or Order IX, of the Code, will be applicable. It only specify the power to dismiss in default and the power to restore on sufficient cause and to the limited extent of this power the Court is to deem as civil court. If it was the intention of the Legislature that Order IX as a whole would be applicable, in that event instead of making such limited application it could have specified that the prescribed authority or the appellate authority would be empowered to exercise jurisdiction as prescribed under Order IX. Clause (b) thereof provides power to proceed ex parte or to set aside ex parte order for sufficient cause. Therefore, it has clearly provided the extent of power that is to be exercised by the prescribed authority or by the appellate authority to the extent as mentioned in the said clause. There" was no intention of the legislature to empower the Court as a Court under the Code of Civil Procedure, as a whole. Only for a limited purpose as provided in Section 8 read with Rule 10 the prescribed authority or the appellate authority is a civil court. It cannot exceed power beyond what has been prescribed in Section 8 read with Rule 10. Therefore, the principle laid down in Rule 9 cannot be attracted in a proceeding under the said Act.

6. Sri Bisaria has relied on the decision in the case of *Smf. Manormawati v. City Magistrate, Prescribed Authority, Jaunpur* 1995 (2) ARC 497, in support of his contention. But in the said case it was observed that the statement or object makes it clear that enactment was made for speedy remedy and summary procedure for eviction of unauthorised occupants of public premises, in order to avoid lengthy process of usual litigation in the Civil court. It was further observed that Rule 10 prescribes power of the civil court under the CPC which can be exercised by the prescribed authority. Thus the ratio decided in the said case does not help Sri Bisaria. Inasmuch as in the said case only to the limited extent to which CPC is applicable has been specified, as has been mentioned in Section 8 read with Rule 10 and not beyond that.

7. Then again the preclusion of bringing the fresh suit under Order IX. Rule 9 of the Code is in respect of same cause of action. In the present case unauthorised occupation is a continuous cause. The previous proceeding was initiated on the basis of earlier notice seeking to evict unauthorised occupants. The proceeding having dismissed in default unauthorised occupation continued from which the petitioner was sought to be evicted by fresh notice giving rise to fresh cause of action for initiation of fresh proceeding. Since the cause of action has been continuing and the petitioner had been sought to be evicted by fresh notice it cannot be contended that It was the same cause of action on which earlier proceeding was based. This fact also brings the case away from the mischief of Rule 9. Order IX of the Code.

8. So far as the question of *res judicata*, as contended by Sri Bisaria, is concerned, it appears from the record that first proceeding did not include whole of the public premises, as involved in the present proceeding. Admittedly, it was in respect of portion of the public premises involved in the present proceeding, was subject-matter in the earlier proceeding, which according to Sri Bisaria was dismissed in default three and half years back before the second notice was issued. Admittedly, proceeding was dismissed in default. The principle of *res Judicata* applies only when an issue which is directly and substantially, in issue in an earlier proceeding has already been decided between the parties. In the present case there was no decision on the issue since the proceeding was dismissed for default. Therefore, in absence of any decision on any issue the same would preclude application of principles of *res judicata* as contained in Section 11 of the Code. In the present case, admittedly parties are the same and part of the property was also the same, but in the absence of any decision on any issue the principles of *res judicata* cannot be attracted.

9. So far as the question raised by Sri Bisaria in respect of definition of "unauthorised occupation" as contained in Section 2 (g) of the Act, is concerned, the petitioner claims to be in authorised occupation by reason of a licence granted to him by the lessee to whom the land was settled. He relies on the lease deed, Annexure-2 and the Licence, Annexure-3. The said lease deed contains a clause that the petitioner is not entitled to sub-let and if it is sub-let

the same should be informed to the authority. There is nothing on record that any such information was passed on to the authority that the lessee had sub-let the same or part thereof to the petitioner. Then again there is nothing to show that the lease is still continuing and the lessee to whom it was granted, though he was a party to the proceeding, he did not come forward to challenge the proceeding. There is nothing on record to show that the lessee had any right to grant licence in respect of said property or the said licence has been accepted or confirmed or approved by the authority concerned. The licensee cannot claim better title than that of the lessee. If the lessee does not defend, in that event the licensee cannot claim any right without the right vested in the lessee. The lessee having not supported the licensee, as it appears from the fact that the present writ petition has been filed only by the licensee, the licensee cannot claim any right that he is in authorised occupation, where he has a right to continue in possession legally and neither that has not been spelt out either in the Court below or before the appellate authority and both the Courts below have come to a concurrent finding of fact with regard to the question that the petitioner's occupation falls under unauthorised occupation. Nothing has been shown to this Court that such finding cannot be arrived at on the basis of the material on record, by a reasonable person or it has not been brought to the notice of this Court that any material was omitted to be considered. Nothing has been shown that the order impugned suffers from perversity.

10. Further after having gone through the order impugned, I do not find any perversity in it. The reasons given in the said order leads us to arrive on the same conclusion with regard to the facts of this case.

11. For all these reasons, I am not inclined to interfere with the order Impugned. The writ petition therefore, fails and is accordingly dismissed. There will, however, be no order as to costs.