
(2011) 04 AHC CK 0254

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 11379 of 1999

Saghir Ahmad and another

APPELLANT

Vs

Judge Small Causes Court, Bijnor and others

RESPONDENT

Date of Decision : 29-04-2011

Acts Referred:

Provincial Small Cause Courts Act, 1887 — Section 18, 25

Citation : (2011) 04 AHC CK 0254

Hon'ble Judges : Rakesh Tiwari, J

Final Decision : Dismissed

Judgement

RakeshTiwari, J.—Heard learned counsel for the parties and perused the record.

2. Before noticing the facts and merits, it would be relevant to note the background of the ease.

3. Facts of the case as averred by the petitioners in the writ petitioner are that the petitioners claim to be the owners and landlords of the property in dispute that a suit was filed by the petitioners being Original Suit No.356 of 1992 against the respondents for eviction was decreed on 25.7.1994 (Annexure no.8 to the writ petition) on the ground that as the tenancy was of open piece of land and the tenant had constructed the shop without permission of the landlord. A notice was served by the petitioners upon him terminating tenancy of respondent no.3 who was tenant of piece of land terminating tenancy. The respondent tenant replied to the notice allegedly denying the title of the petitioners.

4. It is in the aforesaid background that the SCC Suit No.64 of 1996 was filed on the ground of denial of the title which was dismissed by the order dated 27.11.1997 vide Annexure no.6 to the writ petition holding that the original contract of tenancy was of an open piece of land and as no permission was granted by the landlord to construct the shop. Therefore, neither U.P. Act No.13 of 1972 applicable nor the provisions of Section 29A are attracted. Revision No.73 of 1997 filed by the petitioner challenging the order dated 27.11.1997 was

dismissed on 28.11.1998 which is appended as Annexure no.8 to the writ petition.

5. An application was then filed by the petitioners under Section 21(1)(b) of UP. Act No.13 of 1992 was also rejected on the ground that it is not maintainable as the tenancy was open piece of land.

6. Civil Appeal No.91of 1997 (Annexure No. 10 to the writ petition) was filed by the respondents on the ground that as permission was granted by Nagar Palika for construction of shop to the tenantrespondent as such the tenant is entitled for benefit of Section 29A of the said Act and the suit will lie in SCC Court. The appeal was allowed by order dated 26.08.1995.

7. The orders impugned are assailed by the learned counsel for the petitioners on the grounds that the judgments passed by the Courts below are erroneous, perverse and unwarranted in law in as much as, the provision of U.P. Act No.13of 1972 are not applicable for only a piece of land was let out and the shop was constructed by respondent no.3 without getting any permission from the landlord of the property in dispute.

8. It is submitted that the earlier the judgment passed in Appeal No.91of 1994 would not operate as resjudicata in the present matter and that the courts below have wrongly observed that suit was not maintainable. It is stated that assuming that earlier judgment passed in Civil Appeal No.91of 1994 operates as resjudicata even then the suit was maintainable as such the Court below have committed a manifest error of law in not decreeing the suit for the reason that is clear from record itself that the title of the petitioners had been denied by respondent no.3 and this aspect of the matter has not been considered by both the Courts below objectively and judiciously. The counsel has relied upon the following the decision rendered in Brigunath Sahai Sinha and others Vs. District Judge, Ballia and others, 1995 (25)ALR417:1995 (1) ARC 304, in support of his case wherein it has been held that the tenantpetitioner had deposited the entire arrears of rent before the Court and as such in that case he was entitled to protection from being evicted in accordance with the provisions of Section 20(2) (f) of the U.P. Act No.13 of 1972.

9. Counsel for the petitioner further submitted that since the tenant had a bona fide doubt about the title of the landlord he had deposited the entire amount of rent under Section 30(2) of the Act. He has cited a decision rendered in the case of Paramsukh Vs. Ill Addl. District Judge as well as the decision in M.P. Garg Vs. Smt. Vijay Lakshmi and argues that mere deposit of rent under Section 30(2) of the Act would not absolve a tenant from the risk of being evicted on the ground of default; that categorical denial of the title by the tenant establishes that his plea of bona fide need had necessitated him to deposit the rent under Section 30(2) of the Act is selfcontradictory and is demolished by his aforesaid statement of denial of title in the written statement. It is stated that case law cited by the learned counsel for the petitioner is not applicable as the landlord had never

refused to accept the rent which may have necessitated him to deposit it under Section 30(2) of the Act.

10. In reply to the submission of the tenant that since the petitioner had averred in his written statement that the respondent plaintiff is not the sole landlord would not amount to denial of the title of the land; it is argued on behalf of the land that law is settled that under the definition of landlord in Section 3(f) of U.P. act No.13 of 1972 it is the person, who is legally entitled to realize the rent, is the landlord.

11. In the case of Narain Dass Khanna Vs. Jawahar lal Bhatia 1982 (2) ARC Page 1; similar question was considered by this Court and it was held that the denial by the defendant tenant in the written statement that the plaintiff is not the sole landlord of the premises amounts to denial of the title of the landlord hence there was no necessity for determining the tenancy of the tenant under Section 111 (g) of the Transfer of Property Act. The court further held that this controversy was directly covered by the decision in Hashmat Hussain Vs. Sagir Ahmad (supra) wherein the view taken by the apex court was that the defendants renounced their character of tenant as such when they asserted that they were not the tenants of the plaintiff whose tenants they really were. They set up a different tenancy under the plaintiff and Faiyaz Alam. The Bench laid down that the claim that there was a landlord other than the plaintiff, also amounted to denial of the plaintiff's title inasmuch as the denial did not admit the plaintiff to be the sole proprietor and landlord of the accommodation in which the defendants were occupying.

12. Similar is the position in the instant case. It may be true that the defendant had merely asserted that there were also other landlords of the premises in question, but that definitely resulted in denying the exclusive right of the plaintiff to realize the rent. That apart, the denial that the defendant was not the tenant of the plaintiff resulted in renouncing his character of the tenant as such.

13. The judgment in Yograj Vs. Mohd. Yunus Khan relating to the question of applicability of Section 3(1)(f) of U.P. Act III of 1947 was not decided by the Division Bench in the decision of Narain Dass Khanna (supra) above it was referred for decision by a larger Bench as is apparent from para 10 which reads thus:

(10) Counsel for the defendant urged that as the plaintiff had filed an application under Section 21 of U.P. Act No. XIII of 1972 for release of the premises in his favour treating the defendant as a tenant, filing of same resulted in condonation of the defendant's conduct of renouncing his character in the earlier Suit No.2109 of 1971. This argument had been repelled by the single Judge on the footing that merely filing of an application for release, did not amount to abandonment of the right which the plaintiff had acquired because of the written statement filed in Suit No.2109 of 1971. No evidence had been brought that the defendant had been condoned or forgiven for the suit which he had committed

by denying the title of the plaintiff. The Judge Small Causes had discussed the evidence in detail and found that the conduct of the defendant in denying the title of the plaintiff was unjustified. It was only on account of the observations made by Hon''ble Deoki Nandan, J in Jograj v. Mohammad Yunus (supra) that the reference was made to the larger Bench.

14. As regards the deposit of rent under Section 30 of the U.P. Act No.13 of 1972 is concerned, it is submitted that if any amount is deposited by respondent no.3 under the said provisions, the same is illegal in view of the fact that the said miscellaneous case had already been dismissed on 17.10.1996. It is also submitted that the petitioners are the owner and landlord of the property in dispute and they are made to run from pillar to post for getting a decree of eviction against respondent no.3 since 1990. It is stated that the petitioners have filed an application under Section 21(1)(b) of U.P. Act No.13 of 1972 in which it is decided that U.P. Act No. 13 of 1972 is not applicable by the learned II Additional District Judge, Bijnor. They then filed suit before the Judge Small Causes Court in which it is observed that U.P. act No.13 of 1972 is applicable, as such the petitioners have no forum left to raise their grievance and the said question can only be decided by this Court whether U.P. Act No.13 of 1972 is applicable or not.

15. It is in the aforesaid circumstances that the petitioners have prayed for writ, order or direction in the nature of certiorari quashing the judgments and orders dated 27.11.1997 passed by Judge Small Causes Court, Bijnor, District Bijnorrespondent no.1 and 28.11.1998 passed by IV Additional District Judge, Bijnor, District Bijnorrespondent no.2 in Small Causes Suit No.64 of 1996 and Revision No.73 of 1997 respectively. The petitioners have also prayed for a writ in the nature of mandamus directing the respondents to vacate the property in question and hand over its peaceful and vacant possession to them.

16. Per contra, Sri S.M Zaidi appearing for the respondents has submitted that Abdul Wahab (since deceased), respondent no.3 had taken a piece of land at the rent of Rs.7.00 per month from the mother of petitioner late Smt. Amna Khatoon, in the year 1965/66. Thereafter the answering respondent with the permission of Smt. Amna Khatoon and also after taking the permission from the Nagar Palika Chandpur to construct a shop over the aforesaid piece of land, had constructed a shop. The said shop was let out by the mother of the petitioner to the said Abdul Wahab. It was mutually agreed between late Abdul Wahab and late Smt. Amna Khatoon that Abdul Wahab will construct the shop at his own expenses and will make the payment of the rent at the rate of Rs.10.00 per month. The petitioner after death of their mother had filed an Original Suit i.e. O.S. No.356 of 1992 Saghir Ahmad Vs. Abdul Wahab for seeking the eviction of the answering respondent and possession of the land over which the shop in dispute is constructed. The suit was contested by the answering respondent on the ground that the suit for their eviction from the land in dispute was not maintainable because they have constructed the shop in dispute after obtaining

the permission of the mother of the petitioner. Therefore, the provisions of U.P. Act No.13 of 1972 are applicable to the shop in dispute and they are entitled to get benefit of Section 29(A) of the Act No.13 of 1972. The said suit was decreed by the IInd Additional Munsif Magistrate vide its order dated 25.7.1994 appended as Annexure 9 to the writ petition.

17. The answering respondent has challenged the aforesaid judgment and decree by means of filing Civil Appeal No.91 of 1994 before the Civil Judge (Sr. Division), Bijnor. The appellate court after considering the entire submissions made on behalf of both the parties allowed the appeal vide its judgment and order dated 26.8.1995, by recording the specific findings that the shop in dispute was constructed with the permission of the mother of the petitioner and there is no evidence that Saghir Ahmad is the owner of the same. The shop in dispute was given by his mother on rent to the answering respondent, who has constructed the same with her permission. Reliance has been placed by the respondent on para 9 of the writ petition which reads thus:

18. The petitioner did not challenge the aforesaid judgment and order passed by the appellate court and the same has become final between the parties. He thereafter approached to the Judge Small Causes Court and filed JSCC Case No.64 of 1996 for eviction of the answering respondent from the property in dispute and possession of the same on the ground that the provisions of U.P. Act No.13 of 1972 was not applicable to the shop in dispute. It was submitted on behalf of the petitioner that the answering respondent has denied the sole title of the petitioner and their mother had not given any permission for raising the construction of the shop in dispute, therefore, the answering respondent cannot get the benefit of provision of Section 29(A) of the U.P. Act No.13 of 1972. The answering respondent had contested the same and denied the averments made in the plaint by filing the reply of the same. The answering respondent had specifically stated that he is the tenant of the shop in dispute which was constructed with the permission of the mother of the petitioners. It was further submitted that the provisions of U.P. Act No.13 of 1972 are applicable to the said shop and he is entitled to get the benefit of the provisions of Section 29A of the said Act. It was further submitted that the civil court has already recorded the said finding vide its judgment and order dated 26.8.1995 which has become final. Therefore, in view of the said fact the suit is not maintainable. It is submitted that the trial court after going through the entire evidence on the record has dismissed the suit of the petitioners vide its judgment and order dated 27.11.1997. The revision filed by the petitioners against the same was also dismissed by the court below, holding that the provisions of Act No.13 of 1972 is applicable to the shop in dispute and the suit was not maintainable in view of the provisions contained in the U.P. Act No.13 of 1972 and the suit is also barred by resjudicata.

19. Having heard learned counsel for the parties and on perusal of record, following two questions arise for decision by the Court are:

1. Whether the petitioner/landlord has a remedy on the civil side of the suit or before Judge Small Causes Court?

2. Whether the provisions of Act No. 13 of 1972 are applicable or not and if they are attracted whether the tenant is not entitled to protection of Section 29A of the Act?

20. It appears that SCC Suit No.64 of 1996 was not maintainable as the Civil Court had recorded specific finding in this regard in Appeal No.91 of 1994 (appended as Annexure 2 to the writ petition) arising out of Suit No.356 of 1992, Saghir Ahmad Vs. Abdul Wahab. According to him, all the controversies in the writ petition have been settled by the Civil Court in Suit No.356 of 1992.

21. Admittedly, the petitioner had earlier filed Suit No.356 of 1992, Saghir Ahmad Vs. Abdul Wahab in which he had raised all these pleas which have been taken by him in the present writ petition. In that case a finding of fact was recorded that the land was given by the landlord to the tenant at the rate of Rs.7/ per month and thereafter he had raised construction with the permission of the landlord and accordingly the rent was increased to Rs.10/ per month. In Appeal No.91 of 1994 filed by the petitioner, the controversy was decided in favour of the tenant by the order and judgment which was not challenged by the petitioner and became final. It is apparent that instead of challenging the order in appeal, the petitioner filed SCC Suit No.64 of 1996 from which the present proceeding arise. Therefore, the finding recorded by the appellate court which had become final to the effect that the provision of Act No.1 of 1972 are applicable, hence the petitioner is not entitled to raise this plea of Section 29A of the Act now in the writ petition. According to the tenant, the plea in the civil suit was limited to land and that had not been denied by the landlord and that the tenant is not claiming ownership of the shop and is entitled to protection of Section 29A of the Act. Admittedly, the finding of fact has been recorded in civil suit that the construction has been raised with the permission of the landlord and this plea having become final cannot be raised again in Suit No.64 of 1996. The two questions raised before this Court are decided accordingly. The writ petition fails and is dismissed. No order as to costs.