

(2009) 04 AHC CK 0257

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 51321 of 2004

Shashi Prabha Bansal (Dead) Through LRs.

APPELLANT

Vs

Mahavir Prasad Jain and others

RESPONDENT

Date of Decision : 15-04-2009

Acts Referred:

Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 —
Section 12, 16(1), 16(5), 18(3)
Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Rules, 1972
— Rule 8(2), 9(3)

Citation : (2009) 04 AHC CK 0257

Hon'ble Judges : Prakash Krishna, J

Final Decision : Allowed

Judgement

Prakash Krishna, J.—The bungalow No. 49A, Taj Road, Agra which consists of five garages, hall, six small stores, open space and a big tin shed, is the subject matter of the present writ petition. It was let out to M/s. Nav Bharat Automobiles whose partners were Rai Amar Nath and Sri Ram Kishore Bansal. Shri Munni Lal Mehra, the respondent No. 2 herein who has died, was the owner and the landlord of the said property. Rai Amar Nath had one son namely Suresh Chandra Agrawal who predeceased him on 16.9.1999 leaving behind his widow and two minor children. It appears that on 20.10.1989, Shri Munni Lal Mehra agreed to sell the said property to Mahavir Prasad Jain. Armed with the agreement to sell, an application for declaration of vacancy under section 16 (1) of the U.P. Act No. 13 of 1972 was filed within 4 days of the agreement i.e. 24.10.1989. Munni Lal Mehra, it is alleged, was in collusion with the applicant for allotment, gave an affidavit that he has no objection if the accommodation in dispute is allotted to Shri Mahavir Prasad Jain. One Laxmi Narain Mittal who claims himself as certified guardian of minor son and daughter of deceased Suresh Chandra Agrawal also gave no objection certificate that the accommodation in question may be allotted in favour of Mahavir Prasad Jain. The Rent Control and Eviction Officer by the order dated 9.11.1989 allotted the accommodation to Shri Mahavir Prasad Jain

vide Annexure No. 6 to the writ petition. Thereafter, Shri Mahavir Prasad Jain took the possession of the disputed accommodation by breaking the locks on 15.11.1989. The petitioner who is the daughter of Rai Amar Nath and was in possession of the disputed property, thus, came to know about the allotment proceedings and she filed an application as provided for, for reviewing the allotment order under section 16 (5) of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as the Act). She was also advised to file a revision before the Court below. It was registered as Civil Revision No. 14 of 1989. The said revision was initially allowed by the order dated 17.2.2004 *ex parte*. The said order was recalled on the application filed by the respondent No. 1 herein and it was reheard and has been dismissed by the impugned order dated 5.10.2004. Challenging the order dated 5.10.2004, dismissing the revision and the order dated 9.11.1989, allotment order in favour of the respondent No. 1, the present writ petition has been filed.

2. Shri A.K. Gupta, learned Counsel for the petitioner, submits that the entire proceedings leading to the declaration of vacancy and allotment are null and void as no notice was ever issued to the petitioner. Even, it was found by the Rent Control Inspector that the petitioner is in occupation of the disputed accommodation as tenant and steps were not taken by the Rent Control and Eviction Officer to issue a notice to her. It was further submitted that Laxmi Narain Mittal was never appointed as guardian of the minor sons i.e. respondent No. 4 and 5. Elaborating the argument, he submits that the entire proceedings are liable to be quashed with heavy cost. He further submits that, as a matter of fact, the vacancy was never notified. It was also pointed out that the respondent No. 1 has entered into possession like a storm without recourse to the legal proceedings as provided for under the Act. In other words, form "C and "D" were not got issued. The petitioner has been thrown out from the accommodation in dispute in utter violation of law and it is a clear case of house grabbing.

3. The learned Counsel for the respondents, on the other hand, submits that the petitioner had surrendered her tenancy right and therefore, there was a vacancy and no interference is called for in the present case.

4. Considered the respective submissions of the learned Counsel for the parties and perused the record. The first and foremost question which falls for consideration, is whether any notice as required under Rule 8 (2) and Rule 9 (3) of the Rules framed were served on the petitioner or not. It is not the case of the parties that the petitioner was not a sitting tenant.

5. To appreciate the controversy involved in the present writ petition, it is apt to notice the pleadings of the parties in brief. It has been stated in the petition that the property in dispute was taken on monthly rent of Rs. 200/ by the firm M/s. Nav Bharat Automobiles whose partners were Rai Amar Nath and Sri Ram Kishore Bansal from its landlords, respondent Nos. 2 and 5 to 8. Rai Amar Nath is the father of the petitioner and Sri Ram Kishore Bansal is the husband of the petitioner. The respondent No. 2, Munni Lal Mehra, filed a S.C.C. Suit No., 10 of

1978 for ejectment against Rai Amarnath. On the death of Rai Amar Nath, the petitioner was impleaded as one of the heirs of the deceased Rai Amar Nath. Mahavir Prasad Jain, the respondent No. 1, in collusion with Munni Lal Mehra, the respondent No. 2 and Laxmi Narain Mittal, the guardian of minor children of Suresh Chandra Agrawal, moved an application on 24.10.1989 for allotment by misstating the fact that the tenanted property has been vacated by the heirs of late Rai Amarnath and the same is lying vacant and may be allotted to him. An exparte report was submitted by the Rent Control Inspector, without issuing any notice to the petitioner. On the basis of affidavit given by Munni Lal Mehra, the respondent No. 2 and by Laxmi Narain Mittal who claims himself guardian of the minors, the Rent Control and Eviction Officer allotted the disputed accommodation in favour of the respondent No. 1 by the order dated 9.11.1989. The respondent No. 1 after obtaining the allotment order, forcibly entered into the possession of the disputed accommodation and filed the application dated 15.11.1989 informing the Rent Control and Eviction Officer that he has got the possession of the disputed premises. All these proceedings took place behind the back of the petitioner as no notice was given to her. On coming to know of the proceedings, the petitioner filed an application under section 16 (5) of the Act for reviewing the allotment order and the order declaring the vacancy. She under legal advice also filed revision No. 14 of 1989 against the allotment order dated 9.11.1989 which was allowed initially but on the application of the allottee that he was not heard, the said order was recalled. The allegations of fraud against the allottee and collusion of allottee with Munni Lal Mehra and Laxmi Narain Mittal have been made.

6. It has been further stated that on record there is no order declaring the vacancy of the disputed accommodation. The further allegation is that an agreement to sell dated 20.10.1989 has been executed by Munni Lal Mehra in favour of the allottee but till date no sale deed has been executed. It has also been stated that number of pleas as mentioned in para 36 of the writ petition were raised before the Revisional Court who conveniently ignored them.

7. In counter affidavit the averments made in the writ petition have not been denied specifically. Counter affidavit is a very short document and therein only this much has been stated that, in fact, the property was given on rent to Rai Amar Nath alone and not to Ram Kishore Bansal. Regarding the rest of the averments made in the writ petition, reply is that either it is matter of record or do not call for any reply. It has been further stated that the allottee moved an application for allotment of the accommodation in dispute in view of his personal requirement and need. The allegations of fraud and collusion have been denied and only this much has been stated that the petitioner is put to strict proof to prove the alleged collusiveness.

8. On a reading of the pleadings of the parties, the following facts appear to be either not disputed or remained uncontroverted. The allegation made in writ petition that Munni Lal Mehra, colandlord, respondent No. 2 had instituted SCC

Suit No. 10 of 1978 for ejectment against Rai Amar Nath in which Ram Kishore Bansal, respondent No. 9, filed an application for his impleadment and Rai Amar Nath died during the pendency of the suit and the present petitioner, Prabha Bansal, was impleaded as one of its defendants having inherited, the tenancy right has not been denied in the counter affidavit. It follows that the petitioner was tenant of the disputed accommodation after the death of Rai Amar Nath.

9. The next question which arises for consideration in the present writ petition, which was also urged before the Courts below is whether any notice of declaration of vacancy or of allotment as required under Rule 8 (2) and Rule 9 (3) of the rules framed under the Act was given to the petitioner or not. The necessary averments in this regard have been made in para 20 of the writ petition. Before the Revisional Court, it was urged that no such notice as required under the aforesaid rules was ever served or given to the petitioner. It may be noticed that in the opening part of the judgment, the Revisional Court noted the said argument of the petitioner. In the second paragraph of the impugned judgment the argument that the allotment order is *exparte*, contrary to law and has been passed without giving any notice or information that she is the daughter of Rai Amar Nath who inherited the tenancy right and was living as a tenant in the disputed accommodation, was argued in support of the revision has been mentioned. The Revisional Court has failed to address the said issue and has dismissed the revision shortly on the ground that she has surrendered the tenancy right. This amounts to putting the horse behind the cart. When no notice whatsoever was given to the petitioner, the Revisional Court was not justified in rejecting the revision on the ground of implied surrender of the tenancy right. The Revisional Court has observed that since she has not paid the rent, the surrender of tenancy right shall be deemed. However, the learned Counsel for the petitioner has disputed this fact and has stated that there is voluminous evidence on record to show that the rent was paid with the result the SCC suit referred to above, filed by Munni Lal Mehra was dismissed. However, it is not necessary for me to dwell this issue any further as argument of the learned Counsel for the petitioner for non compliance of the Rule 8 (2) and Rule 9 (3) is well founded. The learned Counsel for the respondents in spite of his best efforts could not show from the impugned order any finding of the Revisional Court that requisite notice was given to the petitioner. Nor he could refer any material to show that any such notice was ever given to the petitioner. The whole argument of the learned Counsel for the respondents is that on the facts of the present case, the tenancy rights were impliedly surrendered by the petitioner. The relevant statutory provisions may be noticed :

"Rule 8 (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 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 three days from the date of such pasting, and if in the meantime any objection is received, not before the disposal of such objection.

XXXXXXXXXXXXXXXXXXXXXXXXXXXX

Rule 9 (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 buildings on the notice board of the 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 under section 16 in accordance with Rules 10 and 11."

10. It has been held by the Apex Court in *Yogendra Tewari v. District Judge, Gorakhpur and others*, 1984 (10) ALR 285 (SC) that in view of Rules 8 (2) and 9 (3), a duty has been cast upon the Rent Control & Eviction Officer to serve a notice upon the landlord before inspection, as provided for under Rule 8 (2) of the Rules framed under the Act. Further, after declaration of vacancy, a duty has been cast under Rule 9 (3) to issue a notice to the landlord intimating him the date fixed for consideration of question of allotment.

11. The Apex Court in *Yogendra Tewari (supra)* has examined the relevant provisions of the Act, section 12 in particular, and held that allotment by the District Magistrate under section 16 (1)(a) of the Act, consists of two stages. 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 under section 15, or a declaration of deemed vacancy of such building or part thereof, under section 12 (4). The District Magistrate in view of proviso to section 16 (1) in the case of deemed vacancy 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 under section 12 (4) could at all be made in his case before making an order of allotment under section 16 (1)(a). Emphasis has been laid on use of word "shall" in proviso to section 16 (1)(a) of the Act. It has been held that use of word "shall" manifest the legislative intention that it has been used with a view to make section 16 (1) (a) mandatory. In other words, the District Magistrate cannot make an order of allotment under section 16 (1)(a), on the strength of deemed vacancy under section 12 (4) until the landlord or the tenant, as the case may be, had an opportunity of being heard in the matter.

12. The Apex Court thereafter considered Rule 8 (2). After great deal of discussions of various statutory provisions of the Act, it has been laid down as follows :

".....As vacancy, actual, expected or deemed, is a jurisdictional fact for the making of an order of allotment under section 16 (1)(a) or for an order of release under clause (b) thereof, the District Magistrate must follow the

procedure prescribed under the Act and the Rules framed thereunder. Even in the absence of these provisions viz. Proviso to section 16 (1) and Rules 8 (2) and 9 (3) of the Rules framed under section 41 of the Act, the principle of audi alteram partem would clearly be applicable. The District Magistrate in making an order of allotment under clause (b) of section 16 (1) clearly exercises a quasijudicial function and therefore he has the duty to hear. There must be an impartial objective assessment of all the pros and cons of the case after due hearing of the parties concerned. The impugned order of allotment passed by the Rent Control & Eviction Officer having been made without affording to the appellant an opportunity to have his say in the matter was clearly a nullity."

13. In *Ganpat Roy and others v. Additional District Magistrate and others*, 1985(11) ALR 423 (SC) it has been held that vacancy cannot be declared by a Court without hearing the landlord or the tenant, as the case may be, in view of proviso to section 16 (1) of the Act.

14. The aforesaid decisions of the Apex Court leave no room of doubt that providing opportunity of hearing to the landlord or the tenant, as the case may be, before passing of allotment order is mandatory. The said proposition was not and could not be disputed by the learned Counsel for the respondent No. 3.

15. It is not necessary for me to dwell upon this issue any further, except to notice the cases which have been relied upon by the learned Counsel for the petitioner in support of above proposition of law. They are as follows :

1. *Smt. Mitam Patel and another v. V. Additional District Judge, Kanpur and others*, 2008 (73) ALR 78 (HC).

2. *Kusum Lata Yadav (Smt.) v. Additional District Judge, Moradabad and others*, 2005 (58) ALR 198.

3. *Chandra Kant Nagarkar v. Vth Additional District Judge, Gorakhpur*, 2004(56) ALR 651.

4. *Ratan Lal Poddar v. Vth Additional District Judge, Gorakhpur and others*, 2003 (53) ALR 729.

5. *Jyoti Prasad Gongal (Sri) v. IInd Additional District Judge, Agra and others*, 2009 (74) ALR 725.

6. *Jagdish v. District Judge, Kanpur Nagar and others*, 2002 (46) ALR 677.

16. In the case of *Kusum Lata Yadav (supra)*, this Court after taking into consideration various pronouncements of the Apex Court including *Yogendra Tewari v. D.J.*, 1984 (10) ALR 285 (SC) and *Ganpat Roy v. A.D.M.*, 1985 (11) ALR 4234 (SC) has held that an allotment order is bad in law and without jurisdiction in any of the following contingencies :

(i) Inspection is made by R.C.I., without notice to landlord in violation of Rule 8.

(ii) No notice is issued to the landlord before declaring vacancy.

(iii) No notice is issued to the landlord after declaring vacancy and before allotment.

(iv) Allottee takes possession from the previous tenant."

17. Reverting to the facts of the present case, the question which arises is whether the inspection was made by the Rent Control Inspector with or without notice to the petitioner. A copy of the report of the Rent Control Inspector has been annexed as Annexure3 to the writ petition. He found that at the time of inspection, the gate was locked and the armed Guard opened the gate who informed that earlier there was agency of Mercedes in the premises in question which business has been closed and no activity is being carried out from the said building. The tenor of the said inspection report does not show that any notice was given to the petitioner or to anybody.

18. In para 35 of the petition it has been stated that the petitioner was deliberately not made party to the vacancy and release proceedings as she would have contested the plea for vacancy as there was no vacancy. The reply of the said paragraph has been given in para 23 of the counter affidavit. A combined reply of paragraphs 30 to 35 of the writ petition has been given in para 23 of the counter affidavit on the ground that these paragraphs are wholly misconceived and irrelevant. The petitioner was never in possession of the property in dispute and she cannot be termed as tenant in the property in dispute. It has been stated that her husband was not a tenant of the disputed property at any point of time. Obviously, the said reply is incorrect as in the SCC Suit No. 10 of 1978 referred to the above, the petitioner claimed that she was impleaded as a party in the suit as one of the heirs of Rai Amar Nath Agrawal. A copy of the plaint of the said suit has been filed as Annexure1 to the writ petition and the name of the petitioner finds place as 1/2 in the array of the parties in place of Rai Amar Nath Agrawal. Even it has not been found by the Revisional Court that the petitioner has not inherited the tenancy right. The Revisional Court has proceeded to decide the revision on the footing that the petitioner has surrendered her tenancy rights, but the said finding is wholly conjectural and is based on presumptions and assumptions. There is no material on record to show that the petitioner impliedly surrendered her tenancy rights. The Revisional Court after noticing the facts of the case and the arguments of the Counsel for the parties and the relevant case laws, without making any analysis of the facts of the case jumped to the conclusion that the petitioner has impliedly surrendered her tenancy. In absence of any finding that the plea of the petitioner that notice as required under Rule 8 (2) and 9 (3) was served on her, the judgment of the Revisional Court is vitiated and cannot be allowed to stand. No effort was made by the Rent Control and Eviction Officer to associate the petitioner either before the declaration of vacancy or in allotment proceedings.

19. The plea of collusion between the respondent Nos. 1, 2 and Laxmi Narain Mittal, the certified guardian of two minors has been put forward. A copy of the agreement in between the allottee before the allotment order with the

respondent No. 2, the colandlord, has been annexed as Annexure14 to the writ petition. In para 3 of the said agreement it has been stated that the vendee may get the property vacated actually and/or released in its favour or get it allotted and take the possession of the same from the tenant. The vendor would give his consent in writing wherever necessary and will also file affidavit as may be required from him by the vendee from time to time. Thereafter, in the allotment proceedings initiated at the instance of the respondent No. 1 in whose favour the property in dispute was actually allotted, a consenting and supporting affidavit was filed by the respondent No. 2. Not only this, an affidavit of the certified guardian of the minor children was also filed. On the basis of these documents; the allotment order was procured by the respondent No. 1. All these proceedings were concluded with undue haste and concluded within a fortnight commenced on 24.10.1989 by filing application and concluded on 9.11.1989 by passing of order of allotment. Shri Mahavir Prasad Jain who claims himself the guardian of minor children of Suresh Chandra Agrawal son of Rai Amar Nath who predeceased him, acted against the interest of minors and readily gave the consent for allotment of the disputed accommodation in favour of the respondent No. 1. Thus, the allegations of the petitioner that the allotment order has been obtained collusively and fraudulently, is not without substance. The speed with which the allotment order was passed, itself shows that the allotment proceedings so conducted was a guarded secret and was made behind the back of the petitioner and her husband. The Court below was exercising the revisional jurisdiction which is in the nature of jurisdiction of superintendence. The Revisional Court should have recorded a categorical finding as to whether the vacancy and/or allotment proceedings were exparte, without notice to the petitioner, or were collusion. The Revisional Court has failed to address the said issue. It was also called upon to decide as to whether the case of deemed vacancy under section 12 of the Act has been made out or not. Without applying its mind to the relevant issues, the revision has been disposed off in a slipshod method and thus, caused grave injustice to the petitioner.

20. In view of the above discussion, the impugned order dated 9.11.1989 allotting the accommodation in dispute to the respondent No. 1, having been passed in violation of the principles of natural justice and without following the procedure of law is held void and illegal and the same cannot be allowed to stand.

21. In the result, the writ petition succeeds and is allowed. The impugned order dated 5.10.2004 passed by the Revisional Court and the order dated 9.11.1989 passed by the Rent Control and Eviction Officer are hereby set aside.

22. Under section 18 (3) of the Act it is provided that if an allotment order is set aside, the possession shall be restored back to the person concerned by the District Magistrate.

23. In view of the fact, that the allotment order has been rescinded, the respondent No. 1 is hereby required to deliver back the possession of the accommodation in dispute to the petitioner on or before 15.5.2009, failing which

the District Magistrate shall restore back the possession to the petitioner.

24. It is made clear that it shall be open to the authority concerned to consider the allotment application filed by the respondent No. 1 afresh after giving an opportunity of hearing to the petitioner, in accordance with law.

25. The writ petition succeeds and is allowed. No order as to costs.