

(2005) 11 AHC CK 0165

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 11594 of 1985

Shyam Sunder and Others

APPELLANT

Vs

Ist Additional District Judge, Allied Chemicals and
Pharmaceutical (P) Limited and Smt. Satya Gupta

RESPONDENT

Date of Decision : 17-11-2005

Acts Referred:

Transfer of Property Act, 1882 — Section 105

Citation : (2006) 2 AWC 1373 : (2005) 2 AWC 1373

Hon'ble Judges : S.U. Khan, J

Bench : Single Bench

Advocate : B.D. Mandhyan, R.P. Dubey, S.C. Mandhyan and Vinod Sinha, for the Appellant; C.P. Chityal, M.K. Gupta, Manoj Yadav, R.K. Tripathi, R.A. Sharma, Sujeet Kumar and Shashi Nandan and S.C., for the Respondent

Final Decision : Dismissed

Judgement

S.U. Khan, J.—Sita Ram, his wife Vidyawati and their son Shyam Sunder, original petitioner formed a sort of unholy trinity to grab the property in dispute which is a commercial accommodation situate in Ghaziabad. (Shyam Sunder the original sole petitioner has died and has been substituted by his mother Vidyawati and brother Kamal Kishore Jindal).

2. In the front portion of the accommodation in dispute (Municipal Board No. 3 Naya Ganj, Ghaziabad) there is a veranda.

3. M/s Raghbir Saran Sagar Mal were the tenants of the accommodation in dispute. Sagarmal, one of the partners of the tenant firm intimated the R.C.&E.O. through letter dated 23.4.1973 received in the office of R.C.&E.O. on 24.4.1973 that the tenant intended to vacate the tenanted accommodation. The said intimation was filed before R.C.&E.O. on 24.4.1973 alongwith allotment application of Vidyawati. Premises in dispute was allotted to Vidyawati by R.C.&E.O., Ghaziabad on 31.10/3.11.1973. The outgoing tenant Sagar Mal immediately gave possession to allottee directly.

4. In the veranda, in the front portion of accommodation in dispute, it appears that Sita Ram was the tenant and was carrying on some business (on this point there is some dispute in between the parties).

5. The allotment order was set-aside on appeal/revision through order dated 25.1.1978 passed by II A.D.J., Meerut in Misc. appeal No. 462 of 1973 copy of which is Annexure-2 to the writ petition and matter was remanded to R.C.&E.O. for fresh decision after hearing landlord and other parties. Through order dated 25.1.1978 revisional Court had set aside the order of allotment in favour of Smt. Vidyawati on the ground that before declaring vacancy or allotment no notice was issued to the landlady since deceased and survived by respondent No. 3 Smt. Satya Gupta. Thereafter fresh inspection report dated 23.6.1978 was filed. After remand through revisional order dated 25.1.1978 Shyam Sunder original petitioner and respondent No. 2 M/s Allied Chemicals also filed allotment applications. Fresh allotment application was also filed by Vidyawati. R.C.&E.O. on 12.10.1978 allotted the premises in dispute to Shyam Sunder the original petitioner.

6. Before passing of the order of allotment dated 12.10.1978 in favour of petitioner, landlady filed an application before R.C.&E.O. u/s 18(3) of U.P. Act No. 13 of 1972 for possession of the property in dispute on the ground that earlier allotment order in favour of Vidyawati had been set aside by the revisional Court on 25.1.1978. The said application u/s 18(3) of the Act was rejected by R.C.&E.O. on 21.6.1978. The landlady before R.C.&E.O. did not file any release application. She raised objections against allotment to Vidyawati or Shyam Sunder. She indicated her preference for the other allottee i.e. M/s Allied Chemicals (respondent No. 2). The R.C. & E.O. allotted the shop to Shyam Sunder only on the ground that he had filed his allotment application earlier i.e. on 9.2.1978. The allotment application of M/s Allied Chemicals was filed afterwards i.e. on 31.3.1978. Preference to first applicant for allotment can be granted only in respect of residential accommodation and not in respect of commercial accommodation. R.C.&E.O. by order dated 12.10.1978 allotted the shop in dispute to original petitioner Shyam Sunder. By the same order it was directed that allottee i.e. Shyam Sunder would get possession directly from Smt. Vidyawati i.e. his mother.

7. Against the said order of R.C.&E.O. dated 12.10.1978 two revisions were filed one by the landlady bearing No. R.C.R. No. 201 of 1978. The other revision being R.C.R. No. 202 of 1978 against the same order was filed by M/s Allied Chemicals. 1st A.D.J., Ghaziabad consolidated both the revisions and disposed them of by the common judgment dated 24.4.1985 which is under challenge in this writ petition by allottee Shyam Sunder.

8. Landlady had claimed before R.C.&E.O. that M/s Raghuveer Saran Sagarmal did not intimate her about their intention to vacate and they wrongly delivered possession of the shops in dispute to Smt. Vidyawati. Landlady also pleaded that veranda was not in the tenancy of M/s Raghuveer Saran Sagarmal and it was in

tenancy of Sitam Ram husband of Vidyawati and father of Shyam Sundar. It was further stated by the landlady that allotment was obtained by Smt. Vidyawati in collusion with M/s Raghuveer Saran Sagarmal. (It is interesting to note that Sita Ram filed O.S. No. 199 of 1997 against the landlady claiming that he was in tenancy occupation of veranda. The said suit was dismissed in default). Wife of Sita Ram i.e. Vidyawati and petitioner who was son of Sita Ram did not refute in their affidavits the said allegation of the landlady.

9. The revisional Court held that R.C.&E.O. committed an error of law by not deciding the question as to whether veranda was included in the tenancy of M/s Raghuveer Dayal Sagarmal or not (para-8). Revisional Court also held that the principle of first come first serve was not applicable to non-residential accommodations (para-11). The revisional Court in para-9 of its judgment also held that Smt. Vidyawati was unauthorized occupant/trespasser and in her allotment application dated 24.4.1973 she had stated that she intended to carry on her own business from the shop in dispute alongwith her son Shyam Sundar hence Shyam Sundar was also unauthorized occupant/trespasser hence he could not be allotted the shop in dispute.

10. In the second report of R.C.I, dated 23.6.1978 it was mentioned that at the time of inspection Shyam Sundar was present at the shop in dispute and he intimated that just after the allotment order in favour of his mother Smt. Vidyawati (dated 3.11.1973) his mother i.e. Vidyawati got possession from Sagarmal. Annexures 4 and 5 to the counter affidavit are copies of allotment applications filed by Shyam Sunder and his mother Vidyawati after the remand order dated 25.1.1978. Shyam Sunder in his application gave his address of the accommodation in dispute itself and further mentioned that he was residing therein with his family consisting of his mother, brother and sister. It was further stated that accommodation in dispute was in possession of applicant's mother. Smt. Vidyawati also gave her address of the accommodation in dispute itself. She further mentioned in her application that she required the accommodation in dispute, which was in the form of two rooms and veranda, for continuing the business which she was carrying on for last four and half years. Under para 11 of the application she stated that in the business/proposed business her daughter and two sons i.e. Shyam Sunder and Kamal Kishore will be partners. (Annexure-5 to the counter affidavit does not bear any date however in para-9 of its judgment, revisional Court has mentioned that it was filed on 7.2.1978.

11. In the allotment order dated 12.10.1978 no rent has been fixed. However, in this writ petition stay order was modified on 26.9.1986 and it was directed that petitioner shall pay the arrears of rent from June 23, 1978 and shall also keep on paying monthly rent by the 7th of each succeeding month. Learned Counsel for the petitioner has supplied photocopy of money order coupons dated 4.10.1986 through which rent of Rs. 4,000/- was sent at the rate of Rs. 40/- per month. According to the learned Counsel for the petitioner Rs. 40/- per month rent was being paid by previous tenant M/s Raghuveer Dayal Sagarmal.

12. Revisional Court set aside the allotment order dated 12.10.1978. Revisional Court further observed that:

It will however be open to the R.C.&E.O. to redetermine the vacancy after considering the objections of the landlady that the veranda was not included in the tenancy of M/s Raghurir Saran Sagar Mal and pass a fresh allotment order after observing the provisions contained in Rules 8,9 and 10.

From the report of R.C.I. dated 23.6.1978 in which it was stated that Shyam Sunder original petitioner was found in possession of the shop in dispute and from the allotment applications of Shyam Sunder and Vidyawati (Annexure C.A. 4 and 5) it is quite clear that both sons and mother were jointly doing business and their interest was same. In such situation it was utterly illegal on the part of R.C.&E.O. to allot the shop in dispute to Shyam Sunder after holding that his mother Smt. Vidyawati was unauthorized occupant and she could not be allotted the shop in dispute. In such situation whether the shop is allotted to Smt. Vidyawati or to Shyam Sunder it will be equally illegal. According to the allotment application filed by Smt. Vidyawati, Shyam Sunder was also partner in the business which she was carrying on from the shop in dispute or proposed to continue/carry on from the shop in dispute.

13. The second blunder which R.C.&E.O. committed was that he directed delivery of possession directly from Vidyawati unauthorized occupant to Shyam Sunder allottee. First the possession should have been directed to be delivered to the landlady. Even the application of landlady for possession u/s 18(3) of the Act before allotment order in favour of petitioner was wrongly rejected by R.C. & E.O. When tenant vacates the building, possession must first be delivered to the landlord and allottee can be delivered possession only from the landlord. I have discussed this point in detail in the authorities reported in C.K. Nagarkar v. A.D.J., Gorakhpur 2004 (2) A.R.C. 349 and Kusum Lata Yadav v. A.D.J. 2004 (2) A.R.C. 789.

14. Non fixation of any rent in the allotment order also vitiates the same by virtue of Section 105 T.P. Act and Section 16(9) of UP. Act No. 13 of 1972.

15. Accordingly, I do not find any error in the judgment and order passed by the revisional Court dated 24.4.1985 setting aside the allotment order dated 12.10.1978. Writ petition is accordingly dismissed.

16. It is further directed that landlady-respondent No. 3 shall be delivered possession of the accommodation in dispute on filing application u/s 18(3) of the Act before R.C.&E.O.

17. Accommodation consists of two shops and is situate in Ghaziabad which is adjacent to National capital Delhi. Accordingly, it is directed that with effect from 23.6.1978 till the date of actual vacation petitioners shall pay damages for use and occupation to the landlady respondent No. 3 at the rate of Rs. 300/- per month (after deducting the amount paid at the rate of Rs. 40/- per month under

interim order dated 26.9.1986 passed in this writ petition). The damages may be recovered under Rule 24 of the Rules framed under U.P. Act No. 13 of 1972. For the purposes of the recovery of the said amount certified copy of this order shall be treated to be certificate of recovery in Form G under Rule 24(2) of the aforesaid Rules.