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**(2011) 09 AHC CK 0446**

**In the Allahabad High Court**

**Case No :** Civil Miscellaneous Writ Petition No. 44145 of 2011

Smt. Bhagwant Kaur

APPELLANT

Vs

Trilok Nath Nanda and Others

RESPONDENT

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**Date of Decision :** 19-09-2011

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 3 Rule 2  
Constitution of India, 1950 — Article 226  
Evidence Act, 1872 — Section 118, 120  
Presidency Small Cause Courts Act, 1882 — Section 25  
Transfer of Property Act, 1882 — Section 106

**Citation :** (2011) 9 ADJ 353

**Hon'ble Judges :** Shashi Kant Gupta, J

**Bench :** Single Bench

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## Judgement

Hon'ble Shashi Kant Gupta, J.—This writ petition is directed against the concurrent judgment and order dated 26.3.2010 passed by the Judge Small Cause Court, Kanpur Nagar and order dated 5.7.2011 passed by Additional District Judge Court No. 10, Kanpur Nagar whereby the suit filed by the respondents for arrears of rent and ejectment has been decreed.

2. Brief facts of the case are as follows:

3. The respondents filed SCC Suit No. 402 of 2004 against the petitioner and her husband. The petitioner and her husband filed their written statement and contested the case. By means of an order dated 27.8.2008, the SCC Suit was decreed in favour of the respondents against which the petitioner preferred a revision u/s 25 of the Judge, Small Cause Court Act which was registered as Revision No. 95 of 2008. The Revisional Court by order dated 27.8.2009 allowed the revision filed by the petitioner and quashed the order dated 27.8.2008, and directed the trial Court to decide the matter as fresh according to law after affording opportunity of hearing to both the parties. Thereafter, Judge Small Cause Court by order dated 26.3.2010 again decreed the SCC Suit No. 402 and 2004 in favour of the respondents and directed the petitioner to vacate the

portion of the disputed premises in her possession. Aggrieved and dissatisfied with the order dated 26.3.2010, the petitioner again filed a revision which was registered as SCC Revision No.39 of 2010 against the judgment and decree dated 28.3.2010 before the Additional District Judge, Court No. 7, Kanpur Nagar which was also rejected by its order dated 5.7.2011 affirming the decree passed by the Judge Small Cause Court. Hence, the present writ petition.

4. Learned Counsel for the petitioner has submitted that the trial Court had exceeded its jurisdiction and has not complied with the direction contained in the judgment and order dated 27.8.2009 passed by the revisional Court in SCC Revision No. 95 of 2008. It was further submitted that the trial Court did not consider the provisions contained under Order 3 Rule 2 of the CPC as well as u/s 118 of the Evidence Act whereby the power of attorney holder cannot be produced as a witness in place of principal. It was further submitted that the Judge Small Cause Court has failed to appreciate that the burden of proof is upon the shoulder of the plaintiff-respondents that the rent was due since 1.1.1991, as such, the decree passed by the trial Court is illegal and cannot be sustained.

5. Per contra, Learned Counsel for the respondents supported the impugned orders passed by the Courts below and submitted that the burden of proof is upon the shoulder of petitioner instead of landlords to prove the payment of rent since 1.1.1991 to the landlords. It was further submitted that on the first date of hearing of the suit, the petitioner did not deposit the rent as provided u/s 20(4) of the UP Act No. 13 of 1972. Notice u/s 106 of the Transfer of Property Act issued by the landlords was admitted by the petitioner and it was also replied by the petitioner. It was also submitted by the Learned Counsel for respondents that the rent was being paid by the petitioner to the wife of the Respondent No. 1, Smt. Urmila Nanda and further placed his reliance on the provision of Section 120 of the Evidence Act.

6. Heard the Learned Counsel for the parties and perused the record.

7. There is no dispute with regard to landlord and tenant relationship between the parties. The petitioner in paragraph 3 of her written statement has treated Urmila Nanda (wife of Respondent No. 1) as her landlady to whom he used to pay rent. The receipt of notice issued u/s 106 of the Transfer of Property Act has not been denied by the petitioner. Moreover, reply to the said notice has also been given by the petitioner and the same has also been admitted by the petitioner.

8. Both the Courts below after perusal of pleadings and evidence on record have held that the petitioner has failed to establish that any rent was being paid by her to the landlords after 1991. It has been admitted by the petitioner that she used to treat Urmila Nanda (wife of the Respondent No. 1) as the landlady of the disputed premises and rent was also paid by her in view of Section 120 of the Evidence Act, as such, Smt. Urmila Nanda was well within her right to depose in

the witness box in place of plaintiff-Respondent No. 1. At this juncture, it would be relevant to refer to the provisions of Section 120 of the Evidence Act. The above provision clearly provides that in all civil proceedings the parties to the suit, the husband or wife of any party to the suit, shall be competent witnesses. In the present case, apart from the fact that Smt. Urmila Nanda was the wife of plaintiff No. 1 was also being treated as landlady by the petitioner herself and according to her, the rent was being paid by her to Smt. Urmila Nanda. Therefore, in these circumstances, it cannot be said that the averment made by Smt. Urmila Nanda as P. W. 1 is not admissible or is not on the basis of personal knowledge.

9. Learned Counsel for the petitioner has referred to the decision of this Court in the Case of Smt. Rajni Shukla v. Special Judge (E. C. Act) and another, 2007 (10) ADJ 136. I am afraid to say that the facts of the said authority is not at all applicable to the facts of the present case. In the present case, Smt. Urmila Nanda, apart from being the wife of plaintiff No. 1 was also being treated as the landlady of the premises in dispute and allegedly, it was claimed by the petitioner that rent was being paid by her to Smt. Urmila Nanda, as such, Smt. Urmila Nanda was well within her right in view of the Section 120 of the Evidence Act and therefore, being the wife of the plaintiff-respondent No. 1 was rightly treated as a landlady by the petitioner-tenant and she was justified in deposing in the witness box on behalf of her husband (respondent No. 1).

10. Both the Courts below have recorded a finding of fact holding the petitioner to be defaulter in payment of rent and have also held that the petitioner failed to deposit the rent amount on the first date of hearing of the suit as provided u/s 20(4) of the UP Act No. 13 of 1972. The said findings are based on the evidence available on record. Both the Courts below have given cogent, convincing and satisfactory reasons while passing the order in favour of the respondents. The findings recorded by the Courts below are neither perverse nor based on any extraneous or irrelevant consideration. The Courts below have on meticulous evaluation of evidence and material available on the record decreed the suit. this Court under Article 226 of the Constitution of India cannot substitute its own opinion for the opinion of the Courts below unless it is found that the conclusion drawn by the lower Court is erroneous being contrary to the mandatory provisions of law or based on inadmissible evidence.

11. No other point has been pressed by the Learned Counsel for the petitioner.

12. I do not find any illegality or infirmity in the impugned orders. In the result, the writ petition is dismissed.

13. After the judgment was dictated, Learned Counsel for the petitioners urged that at least six months" time may be granted to them for vacating the premises in question. The Learned Counsel for the respondents did not raise any objection to it.

14. As urged by the Learned Counsel for the petitioners, six months" time is

granted to the petitioner to vacate the premises in dispute provided the petitioner gives her undertaking in the form of an affidavit before the prescribed authority within one month from today specifically stating therein that she will handover the peaceful possession of the said accommodation to the respondents without inducting any third person within a period of six months from today and will pay the entire arrears of rent including the current rent at the rate of Rs. 100/- per month upto the date of delivery of the vacant possession of the disputed premises within one month from today.

15. In the event of default of any of the aforesaid conditions, the respondents will be at liberty to proceed to evict the petitioner, if necessary by coercive process with the aid of police force.