
(2012) 08 AHC CK 0027

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 17982 of 2004

Smt. Kamla Devi

APPELLANT

Vs

Special Judge, Ghaziabad and Others

RESPONDENT

Date of Decision : 13-08-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 5
Constitution of India, 1950 — Article 226, 227
Evidence Act, 1872 — Section 58
Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 —
Section 21(1)(b), 24, 26, 26(2), 31

Citation : (2013) 1 ADJ 498 : (2013) 1 ALJ 76 : (2013) 2 AWC 1877 : (2013) 1 RCR(Rent) 421

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Advocate : B.B. Paul, S.D. Sharma, Mahesh Sinha and Vinod Sinha, for the Appellant; K.M. Garg, for the Respondent

Final Decision : Allowed

Judgement

Sudhir Agarwal, J.—Heard Sri Vinod Sinha, learned counsel for the petitioner and Sri K. M. Garg, learned counsel for the respondent. The writ petition is directed against the order dated 19.04.2004 (Annexure 4 to the writ petition) passed by Special Judge (E.C. Act)/Additional District Judge/Prescribed Authority, Ghaziabad.

2. The petitioner Smt. Kamla Devi (landlady) filed application u/s 21(1)(b) of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction), Act 1972 (hereinafter referred as "Act No. 13 of 1972") alleging that she is the owner of the shop situated on the ground floor of building No. 349 at Jawaharganj, Meerut Road, Mukteshwar, District Ghaziabad. It is under the tenancy of respondent No. 3, Shakijan son of Ashraf Khan. The said shop was purchased by petitioner vide registered sale deed dated 10.10.1991 from erstwhile owner Smt. Dropadi Devi wife of Sri Jai Prakash Garg. Respondent No. 3 was tenant from the time of Smt.

Dropadi Devi and after purchase of shop in question, became her (petitioner's) tenant. The shop is in dilapidated condition and likely to fall at any point of time in respect whereof a notice was issued by Nagar Palika, Garhmukteswar to petitioner alleging that the shop is in dangerous state and may fall at any point of time. She prayed that the shop should be required to be vacated so as to be demolished and reconstructed.

3. Respondent No. 3 contested this application by filing written statement (copy whereof has been filed as annexure 1 to the counter-affidavit). He said that the shop in question is in his tenancy for the last 40 years. It is in very sound state and by no stretch of imagination can be said to be in dilapidated condition, having connected walls with other houses which are two or three storey buildings and the allegation that it is in dilapidated condition, is false and incorrect. He further said that the petitioner landlady filed suit No. 3 of 1993 in the Court of Judge Small Causes, Ghaziabad for ejection and recovery of rent which is still pending. This shows that petitioner somehow or the other wants to evict him from the shop in question. He further pleaded that the petitioner landlady had not acted and observed her authority as landlady having committed default in maintenance of the shop in question. The condition of the shop has deteriorated on account of deliberate negligent act on the part of landlady and for that reason, she cannot take advantage of her own wrong.

4. Respondent No. 3 in support of his case that the shop is not in dilapidated condition, got a report of Brij Kumar Mudgal, an Architect/Engineer submitted before the Trial Court.

5. The Trial Court formulated four questions for deciding the aforesaid application which included, whether the shop in question is in dilapidated condition and liable to be demolished or reconstructed.

6. This issue was decided in favour of landlady observing that the roof of the shop is completely dilapidated, liable to fall at any point of time, and is required to be reconstructed, The other incidental issues were also decided in favour of landlady.

7. The Trial Court allowed the application vide judgment dated 9th August, 2000 directing respondent tenant to vacate the premises so that the landlady may demolish and reconstruct the same. He has also observed that the landlady has already expressed readiness to abide by the conditions prescribed in Section 24 of Act 1972 for letting out the reconstructed shop to the respondent tenant after reconstruction.

8. The respondent tenant, aggrieved by the aforesaid judgment, preferred Rent Control Appeal No. 87 of 2000 which came to be decided by Special Judge (E.C. Act)/Additional District Judge, Ghaziabad vide judgment dated 19th April, 2004. The appeal has been allowed and Trial Court's order dated 09th August, 2000 has been set aside. The Appellate Court on all the issues which were decided by Trial Court in favour of landlady has concluded otherwise and in favour of the

tenant. It is this appellate judgment and order which has been assailed in this writ petition by the petitioner landlady.

9. Sri Vinod Sinha, learned counsel for the petitioner landlady contended that the local body, namely, Prescribed Authority/District Magistrate, Ghaziabad had already rejected on 11.01.1999 an application No. 6 of 1998-99 of respondent tenant, filed u/s 31 /33 of Act 1972, seeking sanction to file complaint against the petitioner landlady in a competent Court on the ground that shop structure was dangerous, being in dilapidated condition and landlady having shown negligence, be issued notice. The appellate Court, however, has miserably failed to consider implication of the aforesaid order. There was a notice issued by Prescribed Authority, Nagar Palika Parishad, Garh Mukteshwar, District Ghaziabad on 22.07.1997 stating that the shop is in dilapidated condition and required urgent repairs i.e. the roof can fall down at any point of moment. It fortifies landlady's claim that the shop is in dilapidated condition but its consequences and effect had also been ignored by appellate authority. He also drew my attention to respondent's case that the roof of shop was in a very bad condition for which tenant himself had pleaded that the same requires a complete reconstruction. In this regard he himself has requested the landlady to take appropriate steps. This statement in para 17 of written statement shows that the shop was in dilapidated condition. The mere fact that one or two walls of the shop were not in similar bad condition as that of the roof, it cannot be said that the shop was not in "dilapidated condition". He contended, that to be in a dilapidated condition, it does not mean that it is bound to collapse immediately and at any point of time. If condition is bad and requires major construction, it is a building in "dilapidated condition", and, then if the landlady wants it to be demolished and thereafter to reconstruct, and is ready to offer the shop after its reconstruction to the tenant respondent No. 3, the same should not have been denied.

10. On the contrary, Sri K. M. Garg, learned counsel appearing for respondent No. 3 strongly refused all submissions aforesaid and contended that condition of shop is good. It is quite sound, and, not in a dilapidated condition. It has been so approved by a qualified Architect/Engineer. He said that the alleged notice dated 22.07.1997 was given u/s 26(2) of Act 1972 but thereafter no further action was taken which shows that the shop is/was not in a dilapidated condition. The petitioner failed to prove that she had got any sanctioned plan approved from the competent authority for reconstruction. She also could not prove her financial condition for demolition and reconstruction. Since these are findings of facts, recorded by appellate Court, hence, no indulgence should be granted by this Court in writ jurisdiction under Article 226 /227 of the Constitution of India.

11. Sri Garg, learned counsel further pointed out that water was leaking from roof of the shop due to rain, and roof's condition is continuing to deteriorate on account of the own conduct and negligence of petitioner landlady. She cannot be allowed to take advantage of her own wrong. He drew my attention to

Commissioner's report dated 02.12.1997, mentioning that the shop is in sound condition, but its roof has been damaged on account of intentional and deliberate obstruction created by petitioner landlady by stopping free flow of water, and for that reason, it cannot be said to be in "dilapidated condition" but only repairs of roof will do the needful for making the shop absolutely fit for commercial purposes, for which it has been let out to the tenant.

12. The parties have also placed on record certain photographs of the building in dispute along with their respective affidavits which were also placed before this Court during the course of the arguments.

13. The photographs of the roof discloses that virtually there is no roof at all. Wooden shanks are in very bad condition and virtually in a remnant condition. On a very small part, some remaining soil is there but in the major part, virtually there is no roof at all. The shop, therefore, is almost open from the top except some small part. From the front side also, it is evident that construction is quite old.

14. Moreover, pleadings of respondent tenant also show that there was a major leakage from roof of the shop which caused major damage to the tenant. He requested the landlady to get repairs of roof of the shop which was not properly attended by petitioner landlady. The relevant pleadings in paras 17 and 18 in the written statement are as under:

(Vernacular matter omitted.... Ed.)

17. That roof of the disputed shop is kachcha (mud roofing), and since the plaintiff purchased this shop, she has not discharged her responsibility as envisaged in Section 26 of the Uttar Pradesh Act No. 13 of 1972. She has created obstruction in exit of rain water from the roof of the disputed shop by putting bricks, as a result whereof the roof began to leak in this very rainy season causing heavy loss to the defendant/respondent. The defendant/respondent repeatedly requested the plaintiff to remove bricks from the roof and to put soil over it as per requirement, but she did not pay any heed to that. Then, on 22.07.1997, the answering defendant gave a notice to the plaintiff seeking permission for putting soil on his own meeting out expenses from two months rental, but she did not permit the defendant/respondent to put soil, despite the fact that it was the responsibility of the plaintiff to keep the disputed shop waterproof, which she did not discharge. Thus, she is guilty of not discharging her responsibility. The defendant/respondent will proceed separately against the plaintiff in this regard u/s 31 of Uttar Pradesh Act No. 13 of 1972.

18. That the disputed shop is not at all in a bad condition nor is it in a condition, necessitating its reconstruction after demolition. Only its roof can be restored to its earlier state by putting soil over it, as has continued to be done for nearly past 40 years.

(English translated by the Court)

15. An Advocate Commissioner was appointed to submit his report who submitted report dated 02.12.1997. The report says that on the roof, there is obstruction in free flow of water which is causing leakage in the western wall of the shop in question. There is a lot of seepage in the shop. The report does not mention much about the condition of roof of the shop which this Court has found evident from the photographs placed on record, which the parties have also not disputed, that the same belong to the disputed shop in question. From the pleadings and documents, I find it difficult to hold that the shop is not in dilapidated condition. Any person of ordinary prudence would form the same opinion.

16. The shop in question has been sought to be vacated from respondent No. 3 by the petitioner landlady on the ground that it is in dilapidated condition and is required to be vacated for reconstruction. The question, therefore, would be when a building is in "dilapidated" condition. Whether a building is in dilapidated condition or not, is a question of fact necessarily to be decided on appreciation of evidence but what would construe a building "dilapidated" involves a question of law also. Therefore, it can be said to be a mixed question of fact and law. Whether the term "dilapidated" means likely to collapse or fall immediately or imminently or whether it is totally inhabitable, and dangerous for life and safety or something otherwise; is a question of law to be decided by the Court.

17. The term "dilapidated" has not been defined in the Act 1972, it has been under consideration for umpteen times before this Court and the judicial consensus borne out therefrom is that the term "dilapidated" does not mean that it is likely to collapse immediately or imminently or in other words it is on the verge of collapse. If such an argument is accepted, besides being wholly unwarranted, it would be a negation of the basic principle of safety and security of a person and his property. To my mind, what is required to attract Section 21(1)(b) of Act, 1972 is that the building has outlived its life and utility and not that it has started falling. The mere fact that after complaint raised by landlord that building is in dilapidated condition, it has continued to survive for sufficiently long time thereafter, is wholly irrelevant to decide the question, whether building is in a dilapidated condition or not.

18. It is no doubt true that onus to prove that a building is in dilapidated condition lies upon the landlord since it is he, who is seeking a relief based on the aforesaid fact but it would not mean that the degree of onus can be extended to the extent of impossibility by asking him to prove something which is not necessary for the purpose.

19. The view I have expressed above is consistent with this Court's precedent in Shyam Lal Goel v. VIth Additional District Judge, Meerut and others, 1979 ALJ 1258; Ram Avtar v. VIIth Additional District Judge, Moradabad, 1982 ARC 124; Smt. Shanti Devi v. Ist Additional District Judge, Kanpur and others, 1983 (1) ARC 21; Mahmood Yar Khan v. Irshad Ali Khan and others, 1985 (1) ARC 298; Kishan Lal Gupta Vs. IXth Additional District Judge, Ghaziabad and others, ;

Harish Chandra Gupta Vs. Swatantra Kumar Jain and others, ; and, Prince Agrawal (Dr.) v. Prasanna Madhav Vyas, 2009 (2) ARC 412.

20. When both the parties have filed reports of architects expressing different views, the appreciation and reliance thereof as to which one is more believable than the another one is within the domain of Trial Court and within the domain of assessment of evidence to record a finding of fact. Unless such findings of fact recorded by Court below is shown perverse or violates any statutory provision, it is not to be interfered under Article 226 /227 of the Constitution sitting in like an appellate Court.

21. Rule 17(1)(a) of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Rules, 1972 (hereinafter referred to as the "Rules, 1972") contemplates that "Prescribed Authority" while considering an application on the ground of Section 21(1)(b) shall satisfy itself that the building requires demolition. Therefore, it is the satisfaction of "Prescribed Authority" regarding condition of building that it is dilapidated and only then he can form an opinion about its demolition. The satisfaction of Prescribed Authority, in my view, has been required under the Rules only to reassert the factum about condition of building, whether dilapidated or not and to avoid any mischief on the part of a scrupulous landlord to oust a tenant from a building which is though otherwise safe and in a good condition, but to seek his ouster, the plea of condition of building being dilapidated is taken. The satisfaction of Prescribed Authority in these cases only protects from a mere pretext on the part of landlord and brings into picture an impartial third person who can look into the matter independently and objectively to form opinion about condition of building as to whether it can be said to be in dilapidated condition or not.

22. Such satisfaction if recorded by two Courts below with concurrent findings the same ought not be disturbed lightly unless there are strong reasons to justify such interference.

23. However, where the Prescribed Authority has recorded the finding in one way but the Appellate Authority has taken the view otherwise, the matter has to be examined by the Court to find out who is correct and for this purpose, to some extent, this Court will have also to peep into the facts and evidence to discuss the same. Considering the pleadings and evidence including photographs of the shop in question, this Court finds no difficulty in observing that the shop in question qualifies to be declared in dilapidated condition.

24. It is not a case where the Appellate Authority after having its own personal inspection of the premises has recorded its satisfaction otherwise. It has basically relied on the report of the Advocate Commissioner who though admitted deplorable condition of roof but has observed that for bringing such condition of roof, the landlady is responsible. In my view, the Appellate Court has given undue reliance to the Advocate Commissioner's report and has ignored to consider a statutory notice, sent by a local body, telling the landlady that the

shop in question is in dilapidated condition. There was no reason to doubt correctness and truthfulness of such a notice sent by a statutory body unless it is shown and, that too, by adducing cogent evidence, that the statutory body has acted for the reasons other than bona fide, in issuing such notice. Nothing of the sort has been pleaded and proved by the respondent tenant. Secondly, the tenant himself approached District Magistrate to take up a complaint u/s 31 /33 of the Act 1972 which was rejected by him. The important aspect is that in the complaint made before District Magistrate, on 08.11.1997, the tenant has not stated anywhere that by any positive act, landlady is causing damage to the roof. On the contrary, his complaint is that she is not looking up for regular and annual repairs. There is no allegation in the complaint that there is any positive act on the part of the landlady to cause damage to the roof of the shop.

25. Moreover, Advocate Commissioner's report was not submitted in the case in question but it was a part of Suit No. 275 of 1997 and there is nothing on record to show that the same was accepted by the Court below as part of record of present case or it acquired the nature of evidence. Besides, it has also not been shown that such a report could have been treated to be an evidence in the present case wherein it was not obtained.

26. Learned counsel for the respondent vehemently contended that the Appellate Authority has recorded a finding that shop's condition has deteriorated due to deliberate lapses on the part of landlady and therefore, she should not be allowed to take advantage of her own wrong and in support thereof, he placed reliance on Apex Court's decisions in Raj Kumar Soni and Another Vs. State of U.P. and Another, and this Court's decisions in Ram Kumar v. IIIrd Addl. District Judge, Faizabad and others 1986 (2) ARC 275 , Smt. Shashi Goyal Vs. IInd Additional District Judge and Another . He is further contended that Advocate Commissioner's report, filed in Suit No. 275 of 1997, should be treated to be an admission on the part of landlady. The Appellate Court has rightly applied its power to decide the question in issue accordingly, and for this purpose relied on Apex Court's decision Mahendra Manilal Nanavati Vs. Sushila Mahendra Nanavati, .

27. I find it difficult to accept the above contentions, advanced in defence. In the context of a shop, it is difficult to hold that virtually, even when there is no roof; almost it has collapsed; compelled the tenant to place a polythene sheet under the remnants of roof structure to save his belongings from nature's forces, yet the shop cannot be said to be in "dilapidated condition". The judgment of Appellate Court appears to have gone to this extent, to which I find very difficult to accept. In my view, the Appellate Court has gone to the extent of perversity. The notice dated 22.07.1997 clearly shows that roof of the shop has gone seriously damaged. If not immediately repaired, it is likely to fall. I mean that the condition of roof is/was extremely bad. To the same effect is the complaint of tenant himself in his application filed before District Magistrate u/s 31 /33 of the Act 1972. Regarding manner, in which a shop can be repaired or reconstructed,

the Appellate Court says that proper soling and making it wind proof and water proof will be sufficient to protect it from collapse but the condition of shop, shown in the photographs does not justify the above observations. The Appellate Court has found the tenant's Architect's report more reliable than that of landlady's Architect but for that purpose no reason at all has been assigned to disbelieve landlady's Architect's report except a bare observation that it does not appear to be reliable. Even otherwise, once it is evident that condition of the roof, in a single room shop is extremely bad and there is severe leakage, and, even according to tenant's own contention, it is likely to fall at any point of time, unless some extra reason is found, I do not find any justification to hold that such a shop would not qualify to be a dilapidated building.

28. In fact, the decision in Mahendra Manilal Nanavati Vs. Sushila Mahendra Nanavati, relied by Sri Garg, goes against the tenant himself, where the Apex Court has said, "Section 58 of the Evidence Act inter alia provides that no fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing or which by any rule of pleading in force at the time they are deemed to have admitted by their pleading. Rule 5 of O. VIII, C.P.C. provides that every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleadings of the defendant, shall be taken to be admitted except as against a person under disability."

29. The Trial Court judgment shows that in the written statement filed by tenant he himself complained about extremely bad condition of roof of the shop and also referred to the notice dated 22.07.1997. He further said that a lot of damage has been caused to the roof of the shop. This is nothing but an apparent admission of tenant.

30. So far as the allegation that the roof has been damaged by landlady is concerned, it is a self contradictory pleading in the written statement and no evidence in support thereto has been adduced before the Courts below except Advocate Commissioner's report received in another case i.e. Suit No. 275 of 1997 which was dismissed by the Trial Court on 08.10.1999. From the judgment of Trial Court, it also appears that in the said suit, respondent tenant was not a party but therein one Shiv Raj Singh was a party who had filed the said suit which was dismissed. This is also evident from paragraph 2 of the judgment of Appellate Court. That being so, this Court finds it difficult to understand how that report can be read in evidence against the landlady in the present proceedings. There is another Amin's report relied by petitioner landlady which has also suggested that the roof of the shop is in a very bad condition. In order to record a finding that the landlady has deliberately caused damage to the roof of the shop, I find that there was no evidence at all. The Appellate Court has drawn consequences and inferences on the basis of documents which were either not admissible in evidence in the present case, having not been proved therein or cannot be treated to be an admission of landlady herself. Therefore, the entire

findings recorded in this regard are perverse. The judgments therefore, relied by Sri Garg, learned counsel for the respondent in support of his submission that the landlady petitioner cannot be allowed to take advantage of her own wrong, would not help him.

31. In the ultimate result, this Court is of the view, that Appellate Court's judgment and order dated 19.04.2004 cannot sustain. The writ petition is accordingly allowed. The impugned appellate Court order dated 09.08.2000 is set aside and the judgment dated 09.08.2000 of Trial Court is hereby confirmed. The petitioner landlady shall be entitled to cost which I quantify to Rs. 1,000/- (One thousand rupees only).