

(1997) 05 AHC CK 0160
In the Allahabad High Court
Case No : C.M.W.P. No. 19215 of 1989

Smt. Razia Khatoon

APPELLANT

Vs

Ist Addl. District Judge and Others

RESPONDENT

Date of Decision : 21-05-1997

Acts Referred:

Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 —
Section 21, 21(1), 22
Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Rules, 1972
— Rule 16

Citation : (1997) AWC 107 Supp

Hon'ble Judges : S.P. Srivastava, J

Bench : Single Bench

Advocate : M.A. Qadeer, for the Appellant; Ajit Kumar and S.C., for the Respondent

Final Decision : Allowed

Judgement

S.P. Srivastava, J.—Feeling aggrieved by an order passed by the appellate authority u/s 22 of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (U.P. Act No. 13 of 1972), whereunder setting aside the grant of the application for release of the accommodation in dispute let out for residential purposes, the application u/s 21(1)(a) of the said Act filed by the Petitioner seeking release thereof was remanded for reconsideration with a direction to make an enquiry in the light of the observations made in the appellate judgment after affording the opportunity to the parties to adduce additional evidence, she has not approached this Court seeking redress praying for the quashing of the appellate order.

2. I have heard Sri M. A. Qadeer, learned Counsel for the Petitioner and Sri Ajit Kumar, learned Counsel representing the Respondent No. 1 and have carefully perused the record.

3. The facts in brief, shorn of details and necessary for the disposal of this case,

lie in a narrow compass, the accommodation in dispute which is situated in Budaun had been let out to the Respondent-tenant for residential purposes at a time when the husband of the Petitioner was employed in Moradabad. He died on 22nd February, 1983. The application seeking release of the accommodation in dispute was filed in the year 1985 asserting that she had no accommodation apart from the accommodation in dispute which could be utilised for residential purposes and after the death of her husband, she had shifted to Budaun. Since the accommodation in dispute had been let out, she had taken one room on rent in Mohalla Sedhi which was not sufficient for accommodating her two sons and the daughter. One of his sons was unemployed and the one room accommodation which had been taken on rent was being utilised for the residential purpose of her daughter and son. The marriage of the son had also been settled but in the absence of accommodation it was being postponed. The land lady wanted the release of the accommodation for the residential purposes of herself and the members of her family. It was also asserted that the tenant was utilising the ground floor portion for his residential purpose and the first floor portion had been sub-let and was deriving income from the same paying only Rs. 7 per month to the land lady towards rent in respect of the entire accommodation. It was alleged that the need set up for the release was bona fide, genuine and pressing and the tenant was not likely to suffer any hardship in the event of the grant of the release sought for.

4. The aforesaid application was contested by the tenant who set up various pleas denying the claim of the land lady.

5. The prescribed authority on an appraisal of the evidence and the materials brought on record, came to the conclusion that while the husband of the land lady was employed at Moradabad her family was residing in an accommodation which was allotted to her husband by the Nagar Palika where he was employed. It was also found that the land lady along with her two daughters and one son Sadarul-Islam Habibi aged about 33 years was residing in a room which was let out to her. The fact that she was residing in a rented accommodation along with her family members as alleged was found to have been established. It was further found that apart from the accommodation in dispute she had no accommodation belonging to her in the district Budaun. It was also found by the prescribed authority that the first floor portion of the building in dispute was being utilised by Shafiqul Hasan and had been sub-let to him by the tenant.

6. The prescribed authority came of the conclusion that the tenant was doing the tailoring business and his shop is in the main market of Budaun and he had employed two or three tailors. The prescribed authority recorded a clear cut finding to the effect that the need for the accommodation in dispute set up by the land lady was genuine, bona fide and pressing. On the question relating to the comparative hardships, it was found that the balance even on this account tilted in favour of the land lady. It may be noticed that although the tenant had set up a plea to the effect that there was dearth of houses in Budaun town and it

was most difficult for him to get any house for residence yet it had not been pleaded that he had made any effort to search out any accommodation for satisfying his requirement. No evidence was led to indicate that he had made any effort in this regard that his effort had failed.

7. It may further be noticed that during the pendency of the case before the prescribed authority the tenant had moved an application asserting that the land lady was running a Nickel Polish machine in Moradabad and had also obtained an electric connection for the purpose in her own name suggesting that she did not require the accommodation at Budaun. In the application it was prayed that the relevant ledger from the office of the Executive Engineer, Hydel department, Moradabad be summoned in order to demonstrate that power connection No. 084248 was granted to Smt. Razia Khatoon, the land lady showing her to be the resident of Asalatpur, Moradabad. The application was rejected by the prescribed authority observing that the tenant could file a certified copy of the order of the Licensing authority who had granted the licence to carry out the industry at Moradabad.

8. The tenant challenged the order passed by the prescribed authority in the appeal giving rise to the impugned order. Before the appellate authority also an application for summoning the record from the office of the Electricity Board, Moradabad to prove that the electric connection in fact had been issued in the name of Smt. Razia Khatoon was filed. The aforesaid application was opposed by the Petitioner and along with the objection an affidavit was filed by her asserting that Smt. Razia Khatoon had neither applied for any power connection nor had any accommodation at Moradabad nor any electric connection as claimed had been provided to her. Along with the affidavit a certificate was also filed showing that the electric connection referred to by the tenant had been provided to Smt. Razia Khatoon wife of Iqbal Husain and not the land lady. The certificate in this connection had been issued by the Electricity Distribution Division IInd, Moradabad. This certificate issued by the competent authority conclusively demolished the plea set up by the tenant.

9. The appellate authority without taking into consideration the assertions made in the affidavit filed in support of the objection referred to hereinabove, and to the certificate issued by the competent authority indicated hereinabove came to the conclusion that the prayer for summoning the record made before the prescribed authority should not have been rejected. It was also observed that in case the youngest son of the land lady was not residing at Budaun and had installed work-shop at Moradabad the need of the land lady could not be taken to be justified. It was also observed that for living at Budaun, the woman had not produced any rent receipt etc. It was also observed that the prescribed authority had not recorded any clear finding that the need of the land lady was bona fide and genuine and indispensable. The appellate authority came to the conclusion that the question for the consideration of the comparative hardship could only arise after the need of the land-lady had been found to be bona fide, genuine

and indispensable. It was also observed that in case the land lady was residing at Moradabad with her children her need could not be said to be bona fide for the house in question.

10. The appellate authority was of the view that a petition u/s 21 of the Act had to be decided more in the nature of an enquiry of judicial nature rather than a civil suit, and when the tenant pointed out some thing against the landlord a thorough enquiry into the allegations should be made as refusing to make such enquiry will result into miscarriage of justice. It was also observed that the fact that the sub-letting by the upper story portion was not very material in the proceedings u/s 21 as it may only help the landlord when her need is proved to be bona fide and the question of comparative hardship is taken up for consideration. It was further observed that such letting will not afford any ground for the eviction of the tenant in an application u/s 21 of the Act.

11. The appellate authority without taking into consideration the objections to the application filed by the tenant for summoning the record relating to the electrical connection allowed that application. It was also observed that no opportunity to the tenant-Appellant was given by the learned prescribed authority to prove that the land lady Respondent was living at Moradabad with her children. The prescribed authority was directed to make an enquiry as to whether the land lady lived at Budaun or at Moradabad with her children. It was further directed that prescribed authority should make an enquiry as to whether the youngest son of the land lady had established his business at Moradabad after making enquiries on the aforesaid aspects the learned prescribed authority was directed to record a finding that the need of the land lady was genuine and bona fide.

12. With the observations and directions as indicated hereinabove, the appellate authority set aside the order granting the release and remanded the matter for being decided afresh.

13. Learned Counsel for the Petitioner has urged that the impugned order passed by the appellate authority stands vitiated in law on account of its being based not only on irrelevant and extraneous considerations but also on account of wrong approach and further that the observations and directions made by the appellate authority fettering the discretion of the prescribed authority were not only uncalled for but were totally misconceived, and insupportable in law. It has been further urged that the appellate authority has shirked from the responsibility cast upon it under the law and has allowed leading additional evidence providing an opportunity to the tenant to fill up the lacuna in his case and requiring the prescribed authority to embark upon an enquiry of its own for which there could be no justification whatsoever.

14. Learned Counsel for the contesting Respondents however, has tried to support the impugned order asserting that in the facts and circumstances of the case, the appellate authority has exercised the discretion which was not liable to

be interfered with in the present proceedings specially when the question in regard to the existence of the bona fide need and the relative hardships was to be decided afresh after affording an opportunity to both the parties to lead evidence.

15. As observed by this Court in its decision in the case of Prem Prakash Gupta v. IInd Addl. District Judge, Allahabad 1993 (1) ARC 77, the connotation of the term requirement" should not be artificially extended nor its language so unduly stretched or strained as to make it impossible or extremely difficult for the landlord to get an order of release, Such a course would defeat the very purpose of the Act which affords the facility of eviction of the tenant to the landlord on certain specified grounds contemplated u/s 21 of the Act. The provisions contained in the Act strike a just balance between the genuine need of the landlord on the one hand and the great inconvenience and troubles of the tenants on the other. Since Section 21 of the Act is meant for the benefit of the landlord, therefore, it must be so construed as to advance the object behind the said provision. The tenant has to establish that if he is evicted he will suffer greater hardship as compared to the landlord and must lead clear evidence to show that inspite of the best efforts he was unable to get another alternative suitable accommodation in the absence whereof the scale of relative hardship may be tilted in favour of the landlord as the inconvenience, loss or trouble resulting from a denial of the order of release in favour of the landlord will for outweigh the prejudice or the inconvenience which may likely be caused to the tenants.

16. In the cases where there is inaction on the part of the tenant in searching for an alternative accommodation by seeking allotment or otherwise inspite of coming to know that the building in his tenancy is genuinely required by the landlord for satisfying his bona fide need, the question of relative hardships envisaged under the 4th proviso to Section 21 of the Act deserves to be considered liberally in favour of the landlord specially when the bona fide need for the grant of release sought for is established. While it is true that a proviso embraces the field which is covered by the main provision and the main part cannot be construed in such a manner so as to render a proviso redundant, yet under the scheme of the Act, the 4th proviso to Section 21 does not appear to fall within those exceptional cases where this proviso may be said to be a part of the substantive provision itself. It should also not be lost sight of that a proviso cannot be permitted to defeat the basic intent expressed in the substantive provision which, as is apparent from the perusal of Section 21 of the Act, is to enquire the availability of the demised premises to the landlord on his successfully establishing the bona fide requirement of the same for the purpose envisaged in that section. It may be noticed in this connection that where the language of the main enactment is clear and unambiguous, a proviso cannot be permitted to have any repercussion on the interpretation of the main enactment so as to exclude from it by implication what clearly falls within its express terms. Failure of tenant to make attempt to find out an alternative accommodation

during the pendency of the release/ejectment proceedings would certainly be a factor against the tenant's case for greater hardship.

17. This Court in its decision in the case of N.S. Datta and Ors. v. VIIth Additional District Judge, Allahabad and Ors. 1984 (1) ARC 113, had observed that the proviso in question requires a mandatory regard being had to the advantages or disadvantages either in the event of the application for release being allowed or otherwise but each party was required to adduce evidence to show that hardship could be caused to him by grant or refusal of the release of the building under tenancy and that the tenant must also adduce evidence to the effect that other reasonable accommodation was not available to him. It was further served that the Court is entitled also to take into account the fact that the tenant has neither alleged nor proved to have made effort to have an alternative accommodation and that non-availability of alternative accommodation to the tenant is not in itself an adequate ground to reject the landlord's application for release. In its decision in the case of Dr. Munni Lal v. IVth Additional District Judge, Etah and Ors. 1984 (1) ARC 378, this Court has clarified that the fact that nothing is brought on record indicating that the tenant had made any effort during the period of the pendency of the release application for getting some accommodation allotted in his favour or otherwise or that he had failed in his attempt is a relevant circumstance while considering the question relating to comparative hardships. Taking into consideration the scheme of the Act, I am of the firm opinion that such an inaction on the part of the tenant constitutes an additional circumstance which entitles the landlord to have a preference shown to him while striking the just balance between the genuine need of the landlord on the one hand and the likely inconvenience or trouble of the tenant on the other. It may further be borne in mind that the use of the phrase "having regard to" as envisaged under the fourth proviso to Section 21 of the Act would clearly show that this provision was not obligatory. The facts mentioned in Rule 16 of the Rules, should, however, have to be kept in mind while deciding the release application. No single factor can be held to be conclusive. As observed in its decision in the case of Mohd. Muslim v. District Judge, Varanasi and Ors. 1978 ARC 328. it is the cumulative effect of all that has to be seen. The inaction of the tenant to search for an alternative accommodation, as already indicated hereinbefore, constitutes an additional factor which may outweigh the hardship, if any, likely to be suffered by the tenant in the event of the grant of the release application in case where the bona fide requirement for the release stands conclusively established.

18. As clarified by this Court in its decision in the case of Smt. Tara Devi v. IIIrd Additional District Judge, Allahabad and Ors. 1995 (1) ARC 273, a distinction appears to have been maintained, therefore, not only under the provisions of the Act but also under the Rules framed thereunder in respect of an application contemplated u/s 21 of the Act or its reply and the affidavits which may constitute evidence in support of such an application or its reply. Considering, the aforesaid provisions, it seems to me that parties in a proceeding u/s 21 of the

Act are required to set out all the material facts clearly on the basis whereof the relief is sought or is opposed and the authorities under the Act have to decide the question which arises for determination in the case on such pleadings. The emphasis is on the questions which arise in the case for determination taking into account the pleadings of the parties in regard to material facts. If material facts are omitted, a party should not be allowed to raise a contention on a particular point even if some materials are available in the evidence. If on the other hand, material facts have been pleaded but full particulars have not been given, the parties may be permitted to raise the points on the basis of the evidence unless the opposite party is thereby materially prejudiced. The first obviously relates to a question of jurisdiction and the second to one of the procedure.

19. It is settled law that though liberal consideration to the pleadings is to be given so as to allow any question to be raised and discussed covered thereunder, yet a relief cannot be granted or refused on the basis of the facts and documents neither stated nor referred to in the pleadings relied upon. It was observed by the Privy Council in the case of AIR 1930 57 (Privy Council) , that where a claim has never been made, no amount of evidence can be looked into upon a plea which was never put forward. A decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. It should, however, not be lost sight of the consideration of form cannot override the legitimate consideration of substance. If a plea is not specifically made and yet it is covered by an issue by implication and the parties know that said plea was involved, in that event the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence.

20. In the matter relating to release u/s 21 of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 the parties have to remain confined to their pleadings. The issues that arise on the pleadings have to be decided on the basis of the evidence led by the parties in support of their respective cases.

21. An additional evidence should not ordinarily be allowed to be let in merely to facilitate filling in a lacuna in the case of the party unless such an evidence is of unimpeachable character and has a direct bearing on the controversy and in the opinion of the appellate authority, it is required to be brought on record in the interest of justice in order to enable it to pronounce the judgment. A remand should be an exception and not a rule. If the order passed by the original authority based on the conclusions reached on an appraisal of evidence brought by the parties on record and on the exercise of its discretion should not be normally interfered with where the finding of fact depends on the credibility of the witnesses there being conflict of oral evidence led by the parties, unless there are compelling reasons. The appellate authority should not ordinarily interfere in the appraisal of evidence by the original authority where it has

exercised its discretion in accepting one evidence rejecting the other in the absence of compelling circumstances. In the present case, what I find is that the prescribed authority had recorded a clear-cut finding on the question in regard to the relative hardships finding that the landlady was likely to suffer greater hardship in the event of the grant of the release. In support of this finding, the prescribed authority had taken notice of the sub-letting of the first-storey of the building in dispute by the tenant and also the fact that the tenant had made no effort to search any other alternative accommodation for satisfying his requirements. The questions arising on the pleadings of the parties had to be decided on the evidence led by the parties and the burden of proof in this regard had to be discharged by the parties themselves. The prescribed authority while proceeding to decide an application u/s 21 of the Act is not required to embark upon an enquiry into any disputed question of fact suo motu and has to confine to the pleadings of the parties and the evidence brought on record.

22. A perusal of the impugned order indicates that it is based on mere conjectures and surmises than on the evidence and the materials on the record. The whole approach of the appellate authority stands vitiated as the scope of enquiry in a proceeding u/s 21 of the Act has been understood to be wider than the pleadings of the parties. The question in regard to the burden of proof has been given a go-by by the appellate authority. This is not permissible. The appellate authority has proceeded on the assumption that the prescribed authority had not recorded any finding on the question relating to the existence of the bona fide, genuine and pressing need. This observation is manifestly erroneous.

23. Taking into consideration the facts and circumstances brought on record, I am clearly of the opinion that the impugned order of remand along with the observations and the direction contained in the impugned judgment are wholly unjustified and uncalled for,

24. In the circumstances, sufficient ground has been made out for interference by this Court,

25. In the result, this writ petition succeeds in part. The impugned order passed by the appellate authority is quashed with a direction to restore the appeal to its original number. The appellate authority shall proceed to decide the appeal taking the findings returned by the prescribed authority on the question relating to the existence of the bona fide, genuine and pressing need for the release of the accommodation in dispute to be final.

26. The question in regard to the relative hardships shall be considered on the basis of the evidence and the materials on the record in accordance with law.

27. The appellate authority shall ensure that the appeal is finally disposed of within a period of two months from the date of the production of a certified copy of this order before the said authority.

28. There shall however, be no order as to costs.