

(2009) 12 AHC CK 0231
In the Allahabad High Court

Sobharani Dey and Another

APPELLANT

Vs

Prescribed Authority and Others

RESPONDENT

Date of Decision : 24-12-2009

Acts Referred:

Citation : (2009) 12 AHC CK 0231

Hon'ble Judges : Shishir Kumar, J

Final Decision : Dismissed

Judgement

Shishir Kumar, J.—This writ petition has been filed for quashing the order dated 24.11.1994 and 26.2.1998 (Annexures 4 and 6 to writ petition).

2. The brief facts arising out of present writ petition are that predecessor in interest of petitioners Late Guru Prasad Dey and his two brothers namely Sri Guru Das Dey and Guru Saday Dey respondent Nos.3 and 4 were joint tenants of premises No.14 Sardar Patel Marg, Allahabad.

3. Respondent No.2 who is landlord of aforesaid premises wanted to evict petitioners from the premises in dispute. The premises in dispute is on rent way back from 1932. Even since then, petitioners are residing there in the said premises.

4. Respondentlandlord instituted a proceeding under Section 21 (1)(a) of the Act no.13 of 1972 in respect of portion of building, which was being occupied by petitioners. During pendency of application, late predecessor in interest of petitioner namely Guru Prasad Dey died on 21st November, 1991 then application of substitution was filed bringing on record the heirs of late Sri Guru Prasad Dey. In such situation, petitioners were impleaded as respondent Nos. 5 to 8. In this proceeding except defendant No.3 i.e. late Guru Prasad Dey nobody has appeared. It was stated by landlord that defendant Nos. 1 and 2 have constructed their own house and living there comfortably. At that time petitioner No.2 was minor and was aged about 11 years when his father died and he was never impleaded as party. Landlord moved an application for substitution on

17.12.1991. On 21.12.1991, the case could not be taken up and it was transferred to another Court. A direction was issued by Court on 25th March, 1992 that notice issued to heirs be awaited and case was directed to be listed on 14th April, 1992. On 11th May, 1992, landlord was granted seven days time to take necessary steps for service upon heirs of the deceased tenant. Then various dates were fixed but the case could not be taken up. On 4th August, 1992 the Court was not satisfied with the service. Accordingly order was passed issuing fresh notice fixing 17th September, 1992. When the case was listed on 1.2.1993, substitution application was allowed as no objection was filed. Then various dates were fixed and subsequently on 31.1.1994, hearing of the case was adjourned to 26.2.1994 and thereafter it was again adjourned due to strike of advocate. On 26.4.1994, learned counsel for Sri Haro Dey, respondent No.6 appeared in the case and stated that he has no information of the date fixed and he has just received an information, therefore, the case was adjourned for the next date. Subsequently various dates were fixed and ultimately on 24.11.1994, Court has pronounced the judgement.

5. Sri Ravi Kant, learned Senior counsel for petitioners submits that when petitioner came to know regarding the aforesaid order, filed an application for recall which has been dismissed by order dated 26.2.1994. As petitioner was not having any knowledge regarding pendency of the proceeding as he was not served with notice, therefore, when she came to know he filed an application but the same has been dismissed. It has been submitted on behalf of petitioner that judgement passed by court below is no judgement in the eye of law. It is absolutely nonest judgement because the court has not applied his mind to the fact stated in the release application because for the purposes of an order on release application, bonafide need and hardship has to be compared and the Court has to apply its mind and has to record a finding. But nothing has been said, therefore, the judgement and order will be treated to be an nonest order. In the application filed by petitioner for recall of the order, which was moved on 3.4.1996, it was mentioned that Manu Dey petitioner No.2 was minor since no guardian of petitioner was at all appointed, order passed by the court is null and void. It was further stated that they were never served with the notice of the case, therefore, entire proceeding has been conducted in breach of principle of natural justice but prescribed authority without considering all these facts has dismissed the application. Finding to this effect recorded by prescribed authority that since one of the joint tenant appeared in the proceeding, there will be a presumption that entire state has been represented. It has been submitted that said finding recorded by prescribed authority is not correct because admittedly, petitioner No.2 was minor and no guardian was appointed on behalf of petitioner No.2. At any rate, even assuming that decree was voidable minor having filed an application and having challenged the decree, decree at any stage was liable to be set aside. Respondent No.6 has acted most negligently and carelessly in the interest of minor, as he has not cared to file a written statement. As there was no finding recorded regarding service upon hearing, therefore, order is bad. Further

submission has been made that no reason has been recorded therefore, judgement and order and decree should be treated as nonest and liable to be set aside. Learned counsel for petitioners has placed reliance upon the following judgements.

(2001) 6 SCC, 534 Dhurandhar Prasad Singh Vs. Jai Prakash University & others.

(1993) 2 SCC, 507 Chiranjilal Shrilal Goenka Vs. Jasjit Singhal & others.

(2007) 14 SCC 262 Darshan Singh Vs. State of Punjab

AIR 1970 SC 794 Ferozilal Jain Vs. Manhal & another

AIR 1970 SC 838 Smt. Kaushalya Devi & others Vs. K.L.Bansal

6. Placing reliance upon aforesaid judgements learned counsel for petitioners submits that objections under Section 47 to executability of decree, can be allowed if it is found that decree is void, ab initio and a nullity apart from the ground that decree is incapable of execution. Decree passed without jurisdiction is a nullity and nonest and the question of invalidity can be raised even at the execution stage. It is also settled that execution court cannot go beyond the decree of a Court of competent jurisdiction except in the decree when it is established that it is void, ab initio or decree is without jurisdiction. Therefore, decree passed by Court is void, ab initio and cannot be implemented. Further it has been submitted that admittedly petitioner was not served as petitioner No.2 was minor on that date and provisions of Order 32 Rule 3 was to be complied with, as the same has not been complied with, therefore, judgement passed by the prescribed authority is liable to be quashed. Reliance has been placed upon a judgement of the Apex Court reported in AIR 1989, Supreme Court, Page 147 Dharendra Kumar Garg and others Vs. Smt. Sugandhi Bai Jain and others. Relevant para 4 and 5 which is being quoted below:

4. As has been stated earlier, some of the party respondents in Civil Appeal No. 7A of 1965 including Kamal Kumar, one of the sons of Dammu Lal, were minor and were represented by Mr. Mokasdar, Advocate. In view of the provisions of Order XXXII, Rule 7 of the Code of Civil Procedure, it was essential for the Court to have granted permission to the guardian to enter into the compromise only after considering all the relevant circumstances. From the records of the case it appears that the court before recording the compromise sanctioned leave in the following words:

"As the appellant is prepared to forgo the entire cost of the proceedings, it is in the interest of the minors and benefit of the minors that this appeal be compromised. The minor respondents are represented by senior counsel and his opinion is that it will be in the interest of the minor to compromise the appeal. In view of this, I have no reason to disagree with him. I am satisfied that the compromise is in the interest of the minors, hence, I allow the application and grant the necessary permission under Order 32, Rule 7, C. P.C. To the learned counsel of the minor respondents to compromise the appeal."

7. On the face of it, the compromise was one sided whereby the minors were giving up their right under the trial Courts decree both in respect to eviction as well as arrears of rent and damages. It is said that as a consideration for the compromise the appellants were giving up their right to claim costs which might have been decreed by the appellate Court in case of their success on merits. According to the respondents case which has been accepted by the two Courts below the guardian of the minors was guilty of gross negligence in entering into the compromise by failing to take into account the interest of the minors. On behalf of the appellants it has been contended that during the pendency of Civil Appeal No. 7A of 1965 the M.P. Accommodation Control Act was passed and the decree of the trial Court was likely to be set aside. In that view, it is urged, the minors guardian through Mr. Mokasdar acted rightly in settling the dispute and thus saving a decree for costs which could have been passed against them.

5. According to the further case of the respondents the relevant circumstances and the terms of the compromise were never explained to the respondent No. 1 and Mr. Mokasdar asked for the Court's permission to enter into the compromise on behalf of the minor without any instruction from their guardian in this regard. It is also urged that the language of the order whereby the Court granted its permission indicates that the court did not apply its mind independently. However, we do not consider it necessary to decide these points as also several others raised by the parties as in our view the compromise decree must be set aside on the ground of gross negligence.

8. On the other hand, Sri K.L.Grover, learned counsel for respondents submits that this writ petition has been filed only to delay the matter and is abuse of the process of the Court. Admittedly, respondents have not contested the case and some of them have acquired their own houses and some of them have shifted to their own premises. Release application for respondent No.2 was filed. Initially premises in dispute was let out to one Sri K.M.Dey and after his death tenancy got inherited by his legal heirs and representatives of petitioner Nos.1 and 2 and respondent No.3 to 8. During pendency of application, Sri Guru Prasad Dey expired on 21.11.1991 living behind four sons and one daughter and widow. Substitution application was moved. Notices were issued to the legal heirs. It is to be noted that Sri Guru Prasad Dey has not filed any written statement before the prescribed authority till his death. Substitution application was allowed on 1.2.1993. On 17.9.1992 Sri A.N.Misra, learned counsel for late Sri Guru Prasad Dey appeared before the Court on behalf of legal representative. Sri Haro Prasad moved an application for obtaining the copy and he was granted time till 5.5.1994 but no one appeared on the next date fixed. Then an order was passed proceeding ex parte and after a lapse of about one year, the application was filed by wife of late Sri Guru Prasad Dey. After consideration of the objection filed on behalf of answering respondent, application was dismissed and it was observed while rejecting the application that the applicant has failed to give explanation for delay condonation daytoday as required. Admittedly, the son of applicant Haro Prasad Dey appeared in this case through advocate and he is residing with

his mother, therefore, it cannot be imagined that applicant was not aware with the release proceeding prior to 3.4.1996. Therefore, they failed to prove their case and application is liable to be dismissed. Against this order this writ petition has been filed.

9. Sri K.L.Grover, learned counsel for petitioner has further submitted that in view of fact that heirs have already constructed their house and they have shifted to their own house due to shortage of accommodation and they were jointly living together, as such, petitioners have no locusstandi to contest this case. He has placed reliance upon Section 21(1) of the Explanation which is being quoted below:

"(i) where the tenant or any member of his family (who has been normally residing with him or is wholly dependent on him) has built or has otherwise acquired in a vacant state or has got vacated after acquisition a residential building in the same city, municipality, notified area or town area, no objection by the tenant against an application under this subsection shall be entertained.

Note For this purposes of this clause a person shall be deemed to have otherwise acquired a building, if he is occupying a public building for residential purposes as a tenant, allottee or licensee."

10. In view of aforesaid provision and admittedly Sri K.M.Dey was the original tenant and his heirs have built or otherwise acquired in vacant stage a residential building in the same city, therefore, no objection by tenant can be entertained and they have no right to defeat the order of release in favour of landlord and written statement was filed by one of the heirs, therefore, tenancy being a joint tenancy, notice of termination of tenancy given to one or some of the joint tenant is sufficient. Similarly, suit for eviction can be filed against one or several joint tenant and if a decree of eviction is passed, that will be binding upon other joint tenant also. Respondents have placed reliance upon a judgement of the Apex Court reported in 1995(1) ARC, 220 Harish Tandon Vs. District Magistrate, Allahabad. Reliance has been placed upon para 23 and 24 of the said judgement. The same is being quoted below:

"23. The attention of the learned Judges constituting the Bench in the case of H. C. Pandey v. G. C. Paul (AIR 1989 SC 1470) (supra) was not drawn to the view expressed in the case of Mohd. Azeem v. District Judge, Aligarh (AIR 1985 SC 1118) (supra). There appears to be an apparent conflict between the two judgments. It was on that account that the present appeal was referred to a Bench of three Judges. According to us, it is difficult to hold that after the death of the original tenant his heirs become tenant in common and each one of the heirs shall be deemed to be an independent tenant in his own right. This can be examined with reference to Sec. 20(2) which contains the grounds on which a tenant can be evicted. Clause (a) of S. 20(2) says that if the tenant is in arrears of rent for not less than four months, and has failed to pay the same to the landlord within one month from the date of service upon him of a notice of

demand, then that shall be a ground on which the landlord can institute a suit for eviction. Take a case where the original tenant who was paying the rent dies leaving behind four sons. It need not be pointed out that after the death of the original tenant, his heirs must be paying the rent jointly through one of his sons. Now if there is a default as provided in clause (a) of subsection (2) of Sec. 20 in respect of the payment of rent, each of the sons will take a stand that he has not committed such default and it is only the other sons who have failed to pay the rent. If the concept of heirs becoming independent tenants is to be introduced, there should be a provision under the Act to the effect that each of the heirs shall pay the proportionate rent and in default thereto such heirs or heir alone shall be liable to be evicted. There is no scope for such division of liability to pay the rent which was being paid by the original tenant, among the heirs as against the landlord what the heirs do inter se, is their concern. Similarly, so far as ground(b) of Subsec.(2) of Sec. 20, which says that if the tenant has willfully caused or permitted to be caused substantial damage to the building, then the tenant shall be liable to be evicted; against, if one of the sons of the original deceased tenant wilfully causes substantial damage to the building, the landlord cannot get possession of the premises from the heirs of the deceased tenant since the damage was not caused by all of them. Same will be the position in respect of clause (c) which is another ground for eviction, i.e., the tenant has without the permission in writing of the landlord made or permitted to be made, any such construction or structural alteration in the building which is likely to diminish its value or utility, or to disfigure it. Even if the said ground is established by the landlord, he cannot get possession of the building in which construction or structural alterations have been made finishing its value and utility, unless he establishes that all the heirs of the deceased tenant had done so. Clause (d) of subsection.(c) of S. 20 prescribes another ground for eviction that if the tenant has without the consent in writing of the landlord, used it for a purpose other than the purpose for which he was admitted to the tenancy of the building or has been convicted under any law for the time being in force of an offence of using the building or allowing it to be used for illegal or immoral purposes; the landlord cannot get possession of the building unless he establishes the said ground individually against all the heirs. We are of the view that if it is held that after the death of the original tenant, each of his heirs becomes independent tenant, then as a corollary it has also to be held that after the death of the original tenant, the otherwise single tenancy stands split up into several tenancies and the landlord can get possession of the building only if he establishes one or the other ground mentioned in subsec. (2) of Sec. 20 against each of the heirs of original tenant. One of the well settled rules of interpretation of statute is that it should be interpreted in a manner which does not lead to an absurd situation.

24. It appears to us, in the case of H.C. Pandey. G. C. Paul (AIR 1989 SC 1470) (supra) it was rightly said by this Court that after the death of the original tenant, subject to any provision to the contrary, the tenancy rights devolve on

the heirs of the deceased tenants jointly. The incidence of the tenancy are the same as those enjoyed by the original tenant. It is a single tenancy which devolves on the heirs and there is no division of the premises or of the rent payable therefore and the heirs succeed to the tenancy as joint tenants.

11. Further reliance has been placed upon a judgement of this Court reported in 2009 (2) ARC, 208 Mohamad Ashhaq Vs. Ist Additional District Judge, Bijnor and another. Reliance has been placed upon para 6 and 7 of the judgement. The same is being quoted below:

"6. Suit for possession was dismissed by the revisional Court only on the ground that the original tenant Mohd. Yamin had left behind two sons, i.e. defendant respondent No.2 and Mohd. Yaseen. Mohd. Yaseen was examined as witness of the defendant (D.W.2). Lower appellate Court held that after the death of the original tenant Mohd. Yameen, both of his sons, i.e. Mohd. Naseem, defendant respondent No.2 and his brother Mohd. Yaseen inherited the tenancy was only given to respondent no.2 and suit was also filed only against respondent No.2, hence suit for eviction could not be decreed. For the said proposition, reliance has been placed upon some authorities of this Court. However, afterwards Supreme Court in AIR 1995 SC 676 :1995 (1) 220 "Harish Tandon v. Addl. District Magistrate, Allahabad, U.P." and A.C. Jucker v. K.P. Mantri, AIR 2001 SC 2251 has held that after the death of tenant, all of his heirs inherit the tenancy jointly. In case of joint tenancy, notice of termination of tenancy given to one or some of the joint tenants is sufficient. Similarly, suit for eviction can be filed against one or several joint tenants and decree of eviction if passed is binding upon other joint tenants also.

7. Accordingly, the view of the revisional Court that suit was bad for nonjoinder of Mohd.Yaseen is patently erroneous in law."

12. In view of aforesaid fact, learned counsel for respondents submits that present writ petition is liable to be dismissed.

13. After considering the submissions made on behalf of parties and after perusal of record, it is clear that initially building was let out to one K.M.Dey and after his death tenancy devolve upon heirs. After his death substitution application is made and notices were issued and one of the heir has appeared before the Court through an advocate and subsequently he was not appeared. In such situation, court have no option except to proceed exparte. From the record it appears that notice to heirs was issued by the prescribed authority and various dates were fixed and on 17.9.1992 one advocate has appeared on behalf of Guru Prasad Dey, one of the heir of the deceased tenant, therefore, there is a presumption under the law that all tenants had notice and they have deliberately not participated in the proceeding and as soon as exparte order has passed, they immediately made an application of setting aside the exparte order but the prescribed authority found that when son of applicant Sri Haro Prasad Dey appeared through counsel on 12.3.1991 he was residing with his mother,

therefore, it cannot be imagined that petitioners were not having any knowledge regarding pending proceeding. Further it has also come from the record that it was a joint tenancy and two family members have already constructed house as House no.93/D/1 Tagore Town Allahabad and 18A Elgin Road, Allahabad. Therefore, in view of Section 21(1) explanation (1) if one of the family member who normally resides with the tenant has constructed house in the same city, is not entitled to get the benefit and his claim cannot be considered. As regards the notice and opportunity is concerned, this Court as well as the Apex Court has held that if tenancy is joint, notice of termination as well as decree of eviction if passed against one or several joint tenants that will be binding upon them.

14. As regards, the submission made by petitioners that order passed by courts below dated 24.11.1994 is an order void ab initio cannot be accepted as in spite of notice, tenant has not appeared then prescribed authority after considering the need of landlord has recorded a finding that respondent, one of the heir has purchased the house No.18A Elgin Road, and respondent No.1 has constructed a House no.93D/1 Tagore Town in such situation they don't need the accommodation and in such circumstances, need of landlord is more genuine and bonafide and in such circumstances, application has been allowed. In the opinion of Court, as soon as it came to the knowledge of the prescribed authority that tenant or one of the family of the tenant who ordinarily resides with him has constructed a house in the same city and occupying the same then immediately explanation of 21(1)(a) will come into play and the prescribed Authority rightly in the aforesaid circumstances has passed the order, therefore, the contention of petitioner that judgement passed by the prescribed authority is void ab initio, cannot be sustained in eye of law, is not acceptable to the Court.

15. Further as regards the service upon respondents is concerned, this controversy has been settled now in view of decision cited above that if tenancy is joint and notice has been served upon one of the tenant then notice as well as decree of eviction if passed will be binding upon the other joint tenant also. Further the prescribed authority while rejecting the application has recorded a cogent finding on the basis of evidence of record, as such, in my opinion, it needs no interference.

16. Writ petition is devoid of merits and is hereby dismissed, however, without imposing any cost.