

(2012) 10 AHC CK 0202
In the Allahabad High Court
Case No : C.M.W.P. No. 15464 of 1984

Udai Pratap Singh and Others

APPELLANT

Vs

IVth Additional District Judge, Varanasi and Others

RESPONDENT

Date of Decision : 09-10-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 103

Citation : (2013) 2 ALJ 279 : (2013) 1 AWC 663

Hon'ble Judges : Sibghat Ullah Khan, J

Bench : Single Bench

Advocate : Sankatha Rai and V.K. Rai, for the Appellant; Rajiv Kumar Singh, S.C. Tripathi and S.C., for the Respondent

Final Decision : Disposed Of

Judgement

Sibghat Ullah Khan, J.—Heard learned counsel for the parties. This is landlords' writ petition arising out of proceedings for eviction/release initiated by them on the ground of bona fide need against tenant original respondent No. 2 Munni Lal since deceased and survived by legal representatives in the form of case No. 28 of 1982. Property in dispute is a shop. Prescribed authority/1st Additional Munsif, Varanasi allowed the release application through order dated 25.11.1982. Against the said judgment and order dated 25.11.1982 passed by the Prescribed Authority tenant original respondent No. 2 filed appeal (Rent Appeal No. 489 of 1982). The appeal was allowed by IVth Additional District Judge, Varanasi on 30.7.1984 and order of release passed by the Prescribed Authority was set aside. The order passed by the lower appellate court has been challenged through this writ petition. This writ petition was dismissed as infructuous on 10.8.2007 holding that as 22 years had passed after the decision of the appellate court circumstances must have been entirely changed during this period. Against the said judgment landlords petitioners filed appeal before the Supreme Court. The Supreme Court allowed the appeal through order dated 6.4.2009 and remanded the matter to the High Court to decide the writ petition again. The appeal was

numbered as Civil Appeal No. 2202 of 2009. Supreme Court directed the High Court to decide the petition on merit. In several authorities including *Sait Nagjee Purushotham and Co. Ltd. Vs. Vimalabai Prabhulal and Others*, Supreme Court has held that normally the need is to be seen as on the date of filing of the release application except in case of death of the person for whose need release application is filed. In the order dated 6.4.2009 it has also been observed by the Supreme Court that petitioners were not responsible for the delay in disposal of the writ petition.

2. Earlier also release application had been filed for need of Anil Kumar one of the landlords which was allowed. However, during pendency of appeal against the said release order Anil Kumar died. Accordingly, appellate court allowed the appeal holding that the need had vanished. However, liberty was granted that in case there was bona fide need for the heirs of Anil Kumar also then fresh release application could be filed. Thereafter fresh release application was filed giving rise to the instant writ petition.

3. The applicants in the release application/original petitioners in this writ petition were/are sons, grandsons and widow of son of Shri Chakkan Singh. Shri Chakkan Singh had a real brother Ratan Singh both being sons of Dwarika Prasad. Dwarika Prasad through Will dated 7.6.1967 had divided the properties among his heirs. The shop in dispute was part of house No. 8/442 which came in the share of the applicants. The need set up was for applicant Nos. 6 and 7 son and daughter of Anil Kumar through their mother.

4. The main defence of tenant was that Ratan Lal had challenged the Will in Suit No. 98 of 1976. The lower appellate court held that the property was ancestral and no Will could be executed in respect of ancestral property. It was also mentioned that Ratan Lal had sent notice to the tenant demanding rent. It was also held that shop was given on rent by Dwarika Prasad to the tenant. Accordingly, it was held that Ratan Lal was also co-landlord hence by virtue of Rule 15 (2) of the Rules framed under the Act application was not maintainable without his impleadment.

5. A Full Bench Authority of this Court in *Gopal Das and Another etc. Vs. Ist Addl. District Judge, Varanasi and Others*, has held that the said requirement is not valid and release application may be filed even by one or some of the co-landlords. The Supreme Court in the following authorities has held that one of the co-landlords can file release application even without impleading other co-landlords who do not object.

1. *India Umbrella Manufacturing Co. and Others Vs. Bhagabandei Agarwalla (Dead) by Lrs. Smt. Savitri Agarwalla and Others*,

2. *Pramod Kumar Jaiswal and Others Vs. Bibi Husn Bano and Others*, and

3. *Mohinder Prasad Jain Vs. Manohar Lal Jain*,

6. Learned counsel for the petitioners has further argued that the dispute in

between petitioners and Ratan Lal has been settled. However, no document regarding that is on record. Ratan Lal never filed any objection in the release proceedings.

7. Even though the lower appellate court has not discussed the question of bona fide need and comparative hardship however on the principle of Section 103. C.P.C. defining the powers of the High Court in second appeal, even in writ petition High Court may if the evidence on record is sufficient determine any issue necessary for the disposal of the writ petition which has not been determined by the lower appellate court or even by both the courts below. Supreme Court in *United India Insurance Co. Ltd. Vs. Kartick Chandra Mandal and Another*, and *R.C. Kesarvani v. Dwarika Prasad*, 2002 (2) ARC 298, has held that when the matter is pending for long remand must be avoided. Supreme Court in its authority of *Smt. Shail Vs. Shri Manoj Kumar and Others*, placing reliance upon *Surya Dev Rai Vs. Ram Chander Rai and Others*, has held that in exercise of writ jurisdiction High Court has the jurisdiction also to pass itself such a decision or direction as the inferior Court or Tribunal should have made.

8. Learned counsel for both the parties have been heard on the question of bona fide need and comparative hardship also. The Prescribed Authority has held that the persons for whose need release application was filed, i.e., legal representatives of Anil Kumar were not having any source of income. Earlier also need of Anil Kumar had been found to be proved (that fact is not decisive for the purposes of the present litigation). Tenant could not point out that legal representatives of Anil Kumar had any other source of income. Accordingly, the question of bona fide need has rightly been decided by the Prescribed Authority in favour of landlords. As far as comparative hardship is concerned the Prescribed Authority held that the tenant admitted in Para 21 of his written statement/objection that towards the front portion of his house he had three shops however, those shops had been let out to different tenants. After filing of release application against him tenant should have initiated proceedings for eviction against his tenants or atleast one of them on the ground of filing release application against him which he did not do. Even otherwise tenant did not show that he made any effort to search alternative accommodation. The trial court held that the widow of Anil Kumar had stated that with the help of servant she would establish provision store in the shop in dispute so that she could maintain her children. The tenant had asserted that family had agricultural land and applicants 1 to 5 were employed. The applicants 1 to 5 could not be asked to maintain the widow and children of their brother out of their salaries. Even otherwise this would have amounted to a sort of charity. Similarly, even if other applicants were doing business on this ground the need of widow and children of Anil Kumar could not be denied.

9. After thoroughly examining the judgment of the Prescribed Authority and the evidence discussed therein and pointed out by the learned counsel for the parties I am convinced that findings of Prescribed Authority on the question of bona fide

need and comparative hardship are perfectly correct.

10. Accordingly writ petition is allowed, judgment and order passed by the lower appellate court is set aside judgment and order of the Prescribed Authority allowing the release application is restored. Tenants respondents are granted six months time to vacate on the following conditions.

1. For this period of six months, which has been granted to the tenants-respondents to vacate, they are required to pay Rs. 6,000 (at the rate of Rs. 1,000 per month) as rent/damages for use and occupation. This amount shall be deposited within one month before the Prescribed Authority and shall immediately be paid to the landlords-petitioners.

2. Within one month from today tenants will file an undertaking before the Prescribed Authority to the effect that on or before 30.4.2013 they will willingly vacate and handover possession of the property in dispute to the landlords-petitioners.

3. If within one month undertaking is not filed or amount of Rs. 6,000 is not deposited then from today till actual eviction tenants shall be liable to pay Rs. 2,000 per month as rent/damages for use and occupation.

4. Similarly, if after filing undertaking and depositing the aforesaid amount of Rs. 6,000 property in dispute is not vacated by 9.4.2013 then since the said date till actual vacation tenants respondents shall be liable to pay rent/damages of Rs. 2,000 per month.

It is needless to add that this direction of payment of Rs. 2,000 per month is in addition to the right of the landlords to get the property vacated through execution.