
(2007) 04 AHC CK 0192
In the Allahabad High Court

Ved Prakash

APPELLANT

Vs

Suresh Garg and Others

RESPONDENT

Date of Decision : 12-04-2007

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2007) 78 AWC 2201

Hon'ble Judges : Prakash Krishna, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Prakash Krishna, J.—The present writ petition relates to shop Nos. 115 and 116 Maam Road, Bulandshahr (hereinafter referred to as disputed shops). The writ petition arises out of release proceedings in respect of the disputed shops initiated by Jagdish Saran Garg (now dead) against heirs of Gopi Chand who was the original tenant and he left behind him the opposite parties No. 1 to 5 in the release application. The landlord claimed that he needs the disputed shop to establish his son Suresh Chand who is selling medicines of M/s. Baidyanath as agent. The petitioner Ved Prakash was not impleaded as one of the opposite parties in the release application. He filed an application for his impleadment claiming that he is co-tenant of the disputed shops. The petitioner was permitted to be impleaded. The case of the landlord was that Ved Prakash, the petitioner, has no locus standi to intervene in the matter and he has been set up by the heirs of the erstwhile tenant Gopi Chand. According to the landlord, respondents herein, the heirs of Gopi Chand who have inherited the tenancy rights, are not doing any business in the disputed shops, have set up the petitioner.

2. The petitioner in reply claimed co-tenancy right in the disputed property on the allegation that his father late Chiranji Lal was a co-tenant alongwith late Gopi Chand and both of them were carrying on the business in the disputed shop in the partnership. He submitted that earlier one Madan Lal was partner of Gopi Chand and thereafter Shri Chiranji Lal, adoptive father of the petitioner became

partner in the Firm. The rent receipts were being issued in the name of Gopi Chand but, as a matter of fact, both the partners were tenant. The allegation of bona fide need of the landlord was also contested.

3. The prescribed authority found the need of the landlord as bona fide and genuine. The finding of the comparative hardship was also recorded in favour of the landlord and consequently, it allowed the release application by judgment and order dated 31.10.1995. Feeling aggrieved against the aforesaid order, only the petitioner filed an appeal u/s 22 of the U.P. Act No. 13 of 1972 being Rent Control Appeal No. 24 of 1995. The heirs of Gopi Chand did not challenge the aforestated release order passed by the prescribed authority. The appellate court under point No. 3, on the basis of the evidence on record found that the petitioner was not a tenant. The appellate court found that Gopi Chand was the sole tenant of the shop in question and even if it is accepted that Chiranji Lal and thereafter Ved Prakash, (petitioners), were taken as partner in the business. The petitioner or Chiranji Lal could not become co-tenant in the shop in question. It was not even pleaded by the petitioner that he was made co-tenant by the landlord. Even if Chiranji Lal entered into partnership with Gopi Chand, that would not create any right, title or interest in the tenancy rights, as was found by the judgment dated 31st of August, 2006. Feeling aggrieved against the aforesaid judgment and order the present writ petition has been filed.

4. Heard Shri A.K. Mehrotra alongwith Shri Nishat Mehrotra, the learned Counsel for the petitioner and Shri Y.S. Bohra, the learned Counsel for the respondent. The parties have exchanged their pleadings and they jointly agreed that the matter may be heard and decided finally, therefore, the matter was heard and is being decided finally at the admission stage itself. The only point urged by the learned Counsel for the petitioner is that even on the findings as recorded by the court below that the petitioner has been in occupation of the disputed shop may be as partner of Gopi Chand, the application for release u/s 21 of the U.P. Act No. 13 of 1972 was not maintainable and remedy, if any, was to initiate proceedings for declaration of vacancy or filing of a suit u/s 20 of the Act on the ground of subletting.

5. To appreciate the above contention it is apt to notice the background facts of the case relevant to the issue involved in the present writ petition and the findings thereon.

6. It is common case of the parties that Gopi Chand was the tenant of the disputed shop. The case of the petitioner is that Gopi Chand subsequently made Madan Lal as partner in the business and that Gopi Chand and Madan Lal jointly carried on their business from the disputed shop. Subsequently, Madan Lal got himself separated from the joint business and in his place Gopi Chand had taken Chiranji Lal, adoptive father of the petitioner, in the business. Chiranji Lal and Gopi Chand jointly carried on the business from the disputed shop and their names are recorded in the electric connection etc. After the death of Gopi Chand, Chiranji Lal continued to carry on the business in the disputed shop with the sons

of Gopi Chand jointly and now the petitioner is carrying on the business from the disputed shop. The further case is that although rent receipts were being issued in the name of Gopi Chand but there is no rent receipt either in the name of Madan Lal or Chiranji Lal. After the death of Gopi Chand his sons carried on the business of Ata Chakki (flour mill) in the disputed shop. In support of the aforesaid plea, the petitioner produced receipts issued by the Electricity Department and the electric bill dated 24.7.1990 wherein name of Madan Lal and Gopi Chand finds place. Similarly, in other bills dated 12.10.1988, 14.4.1985 and 11.10.1982 the name of Madan Lal and Gopi Chand are mentioned in the electric bills. In the municipal assessment name of Gopi Chand and Ved Prakash is recorded in the assessment year 1986 to 1991.

7. The court below framed five points for determination in the appeal and the point No. 3 was with regard to nature of possession of the petitioner over the disputed shop. Under the aforesaid point, the court below examined the respective contention of the parties in the light of the evidence on the record and reached to the conclusion that Ved Prakash, the petitioner never acquired status of tenant with regard to the disputed shop. To arrive at the above conclusion, the court below examined the case from the angle that indisputably Gopi Chand was the sole tenant. The contention of the petitioner that subsequently Gopi Chand took Madan Lal and thereafter Chiranji Lal as partner in the business will not confer on them, "te" either on Madan Lal or Chiranji Lal any interest, right or title in the tenancy of Gopi Chand. In other words, irrespective of the fact that Gopi Chand inducted Madan Lal or Chiranji Lal in the business as a partner, it will not in any way affect the contract of the tenancy in between the landlord and Gopi Chand. At this stage, it is important to note that it was not even the case of the petitioner that Madan Lal or Chiranji Lal ever laid any claim, that they have also become the tenant in the disputed shop. The point, therefore, falls for determination is--What is the effect of taking Madan Lal and Chiranji Lal as partner by tenant Gopi Chand, on the tenancy right of Gopi Chand.

8. Seth Laxmi Chand v. Nathmal Duli Chand 1965 ALJ 1000, a Division Bench decision, of this Court has examined the above controversy in depth. This Court after noticing the earlier pronouncements on the point has held that a mere creation of partnership in the business does not necessarily create any interest in the tenancy. Upon the facts of each case, it is to be seen whether there was any transfer of interest in the tenancy to the members of partnership. A tenant has right to make use of accommodation rented by him in any lawful manner. He may start business and close it down and start fresh business. None of these changing activities can have effect terminating the tenancy or making the accommodation vacant. The crux of the matter appears to be that question of right in the tenancy is entirely different from the use for which the tenant needs the premises in dispute. The Division Bench rejected the submission that a subletting must be deemed to have been created in favour of such a person who was inducted in the business as a partner. Coming to the facts of the present case, it is axiomatic that it was neither believed or accepted nor proved that

Madan Lal or Chiranji Lal had any interest in the tenancy right with Gopi Chand. The allegations made by the petitioner even if taken on their face value, would mean only this much that Gopi Chand jointly carried on the business, firstly with Madan Lal and thereafter with Chiranji Lai. It is not the case of the petitioner that any right in the tenancy right of Gopi Chand, was created either in favour of Madan Lal or Chiranji Lai. In this view of the matter, the finding recorded by the appellate court holding that the possession of the petitioner over the disputed shop is unauthorized one, is in accordance with law and does not suffer with any infirmity and calls for no interference.

9. Shri Mehrotra, then, submitted a novel and interesting argument by making additions and subtractions with the help of Section 12(2) which deals with deemed vacancy of building in certain cases, Section 20(2)(e) which deals with eviction of tenant on the ground of subletting and Section 25 which prescribes subletting. Elaborating the argument, he submitted that the petitioner was admitted as a partner in the firm and in this view of the matter u/s 12(2) of the Act it shall be deemed that the tenant has ceased to occupy the building. In other words, there is a deemed vacancy and if it is so then remedy lies to invoke provisions of Section 12 by filing the appropriate application for declaration of the disputed accommodation as vacant and an application u/s 21 for release of the disputed accommodation is not maintainable. He further, developed argument that in view of Section 25 which prohibits subletting, the petitioner would acquire the status of sub tenant and the remedy lies to file a suit for ejectment u/s 20(2) (e) of the Act. Resultantly an application for release of a tenanted accommodation u/s 21, according to him is not maintainable.

10. It is difficult to accept the said contention for the reasons more than one. The point which has been sought to be raised was indisputably not urged either before the prescribed authority or before the first appellate authority. Absolutely no reason has been assigned for not arguing the said plea before the courts below and as such the petitioner cannot be permitted to raise a new point for the first time in the writ petition. Besides the above, the petitioner cannot be permitted to give up the case which was pleaded by him before the courts below and take up entirely a new case at subsequent stages of proceedings, specially in a writ petition. On merits, the said argument presupposes that the petitioner was inducted as a partner in the business by Gopi Chand while there is no material on record to that effect. The landlord respondent filed the release application only against the heirs of Gopi Chand without impleading the petitioner as a party. The petitioner himself applied for his impleadment as a party on the allegation that the shop in question was in the joint tenancy of Gopi Chand with him and as such he has succeeded to the tenancy right by survivorship. The petitioner utterly failed to prove that he was a joint tenant with Gopi Chand and would inherit the tenancy right on the death of Gopi Chand.

11. In his reply, filed before the prescribed authority, the petitioner besides denying the ownership and landlordship of Jagdish Sharan Garg, the landlord

whose heirs are contesting respondents as respondents No. 1 to 4 in the writ petition has pleaded joint tenancy with Gopi Chand in the paras 1 and 2 thereof. In para 15 he has pleaded that electric connection was in the name of Gopi Chand and Madan Lal and Gopi Chand and Madan Lal were different businessmen who were doing the business jointly and after separation of Madan Lal, Chiranjil Lal was doing business jointly with Gopi Chand. In the same paragraph, he has further stated that the rent receipts were being issued in the name of Gopi Chand. The courts below have on the basis of the material on record come to the conclusion that it was Gopi Chand who was the sole tenant of the disputed shop. This is basically a finding of fact based on reappraisal of evidence.

12. Reliance was placed on *Dr. Ashok Kumar v. K.C. Panwar and Ors.* 1979 ARC 193, wherein it was held that a case u/s 16 is different than one covered by Section 21 of the Act. The background facts of the said case is that the sitting tenant was going to vacate the premises in question and an application for allotment was filed by a third person. The landlord instead of filing an application u/s 16(1)(b) of the Act filed an application for release u/s 21 of the Act and the said application was decided in terms of the compromise. In this fact situation, this Court held that the prescribed authority could have recorded a lawful compromise and when an application for allotment had also been filed and the vacancy was imminent, the prescribed authority was not justified in making an order of release u/s 21 of the Act on the basis of compromise. An application according to the above authority can be filed against a sitting tenant. Where vacancy had occurred, the question of making release order does not arise. The ratio decidendi of the above case should be understood in the background facts of that case and not out of the context. The above case was a case of actual vacancy. The U.P. Act No. 13 of 1972 contemplates two types of vacancies, one actual vacancy and the another deemed vacancy. The case in hand, even according to the petitioner at the most may be a case of deemed vacancy and not beyond it. Neither the petitioner nor the heirs of Gopi Chand have come forward that they have vacated the shops in dispute and there is a vacancy. The ruling relied upon by the learned Counsel for the petitioner does not advance the case any further.

13. Section 21 of the Act reads as follows:

The prescribed authority may, on an application of the landlord in that behalf order the eviction of a tenant from the building under tenancy or any specified part thereof if it is satisfied that any of the following grounds exists, namely:

- (a) that the building is bona fide required either in its existing form or after demolition and new construction by the landlord for occupation by himself or any member of his family, or any person for whose benefit it is held by him, either for residential purposes or for purposes of any profession, trade, or calling, or where the landlord is the trustee of a public charitable trust, for the objects of the trust;
- (b) that the building is in a dilapidated condition and is required for purposes of

demolition and new construction.

On a plain reading of the aforesaid Section it does not inhibit or restrict the right of a landlord to file a release application on the grounds specified therein against a sitting tenant. The remedies under Sections 21 and 12 are separate and independent and operate in different fields See 1992 (2) ARC 86 and 1998 (2) ARC 577.

14. In *Munni Lal v. Prescribed Authority Agra and Ors.* 1992 (2) ARC 86 : 1992 (3) AWC 1414, Hon''ble G.P. Mathur (as he then was) after examination of the scheme of the Act has held that it contemplates three kinds of proceedings which may be taken by a landlord for recovery of possession of the building which is covered by the provisions of the Act and the proceedings have to be taken before three different authorities. There is no inter se conflict between the nature of the proceedings which may be initiated under the provisions of the Act. It says:

Section 20 of the Act imposes a bar upon the right of a landlord to institute a suit for eviction of a tenant from a building except on one or more of the grounds enumerated in Sub-section (2) thereof. Unless the tenant commits one or more of the offending acts enumerated in Clauses (a) to (g) of Sub-section (2) the suit cannot be instituted. Therefore, the landlord will get a right to institute a suit only if a tenant does one of the offending acts. If the landlord bona fide requires the building for occupation of himself or any member of his family or for any person for whose benefit it is held by him or if the building is in a dilapidated condition and is required for purpose of demolition and new construction the Act gives a right to him to file an application for release of the premises u/s 21 of the Act. In these circumstances the landlord has to satisfy the authority that his need is bona fide and while ordering eviction of the tenant from the building the authority has also to take into consideration, except in the cases covered by the Explanation, the likely hardship to the tenant from the grant of the application as against the likely hardship to the landlord from the refusal of the application. While considering an application covered by Clause (b) the landlord has to satisfy the authority that the building is in dilapidated condition and is required for demolition and new construction. An application u/s 16(1)(b) is maintainable only if the building is actually vacant which means that there is no tenant in occupation thereof or is deemed to be vacant u/s 12(4) of the Act. Sub-sections (1) and (2) of Section 12 create a legal fiction and a building is deemed to be vacant if the conditions enumerated therein are satisfied. If a tenant removes his effects or allows it to be occupied by a person who is not a member of his family or in case of a residential building he as well as members of his family take up residence elsewhere the building is deemed to be vacant. Again if in the case of a residential building a tenant or any member of his family builds or otherwise acquires in a vacant state a residential building in the same city the building under his tenancy is deemed to be vacant except when it is covered by the proviso to Sub-section (3) of the Act. A non-residential building is deemed to be vacant when a tenant, carrying on business therein, admits a person, who is not

a member of his family, as a partner. These provisions show that the building would be deemed to be vacant only if he does one of the offending acts enumerated in Sub-sections (1) to (3) thereof.

15. The background facts of that case may be noted. An application for releasing that building as bona fide required was filed by the landlord u/s 21 of the Act. During the pendency of the said application another application was filed by the landlord for release u/s 16(1)(b) read with Section 12 of the Act against the tenant before the Rent Control and Eviction Officer on the ground that the tenant has closed down his business and has removed all his goods from the premises in question and the same were lying vacant. In this fact situation a plea was raised by the tenant that the release proceedings u/s 21 of the Act may be dropped as two proceedings one u/s 21(1) and the another u/s 16(1)(b) read with Section 12 of the Act cannot simultaneously go on. The Court after examining the scheme of the Act rejected the aforesaid contention of the tenant therein with the observation that the proceedings u/s 21(1)(a) and u/s 12 read with Section 16(1)(b) of the Act can go on simultaneously. The principle of law as laid down therein is a complete answer to the submission of the learned Counsel for the petitioner herein. In Budhu Lal alias Budh Ram (Decd.) through L.Rs. Vs. District Judge, Allahabad and others, similar view has been taken and it has been held that there is no provision in the Act which could bar filing of an application u/s 21(1)(a) of the Act even where there may have occurred a deemed vacancy u/s 12 of the Act.

16. In view of the above pronouncements the argument of the petitioner that the present release application was not maintainable has got no substance.

17. It was also contended that tenancy of Chiranji Lal, adoptive father of the petitioner, stands regularised u/s 14 of the U.P. Act No. 13 of 1972. For ready reference the said section is reproduced below:

14. Regularisation of occupation of existing tenants.--Notwithstanding anything contained in this Act or any other law for the time being in force, any licensee (within the meaning of Section 2A) or a tenant in occupation of a building with the consent of the landlord immediately before the commencement of the Uttar Pradesh Urban Building (Regulation of Letting, Rent and Eviction) (Amendment) Act, 1976, not being a person against whom any suit or proceeding for eviction is pending before any court or authority on the date of such commencement shall be deemed to be an authorised licensee or tenant of such building.

18. On an analysis of the aforesaid section it is clear that it prescribes number of ingredients to be fulfilled for regularisation of accommodation of existing tenant and those ingredients are (1) the tenant is in occupation of a building with the consent of landlord ; (2) he should be in possession immediately before the commencement of U.P. Urban Building (Regulation Of Letting, Rent and Eviction) (Amendment) Act, 1976 which came into force w.e.f. 5th of September, 1976 ; (3) no proceeding for eviction is pending against such person before any court or

authority on the date of such commencement. Shri Mehrotra, advocate, fairly accepted that there is no pleading nor proof on record to show that the petitioner or his adoptive father fulfils the aforesaid ingredients of Section 14. It was not pleaded by the petitioner that his father was in occupation of the disputed accommodation with the consent of the landlord on 5th of September, 1976. In absence of essential facts it cannot be said that the petitioner's case fulfils the parameter/ingredients of Section 14 of the Act. It follows that the petitioner cannot claim regularisation of his tenancy right, if any, due to lack of pleadings and evidence on the record.

19. In this view of the matter, the reliance placed on Shyam Babu Vs. District Judge, Moradabad and Others, wherein it has been held that sub tenancy created with the consent of the landlord, the subtenant's possession would not be illegal and he should not be deprived of the protection of the 4th proviso to Section 21 will not be attracted.

20. Reliance was placed on the judgment of the Apex Court in Nutan Kumar and Ors. v. IInd Addl. District Judge 2002 (2) ARC 645 : 2003 (1) AWC 213 (SC), wherein the Apex Court has held that a person who occupies, without an allotment order in his favour shall be deemed to be unauthorized occupant of such premises. The suit for ejectment of a trespasser to get back possession from a trespasser could always be filed. Emphasis was laid by the learned Counsel on the following observations made in para 12 of the report:

A suit for ejectment of a trespasser to get back possession from trespasser could always be filed. Such a suit would not be on the contract/agreement between the parties and thus would not be hit by principles of public policy.

21. Also emphasis was laid that in such circumstances the remedy of the landlord was to file a suit against the petitioner as he is treated to be a rank trespasser. It is difficult to accept the aforesaid submission. It is well settled that observation made in a judgment should not be interpreted and understood as a statutory provision. The aforesaid observation made by the Apex Court should be understood in the light of the controversy involved therein and the said observation cannot be torn out and read out of the context. The controversy involved therein was whether suit for ejectment can be filed by landlord against a person who was inducted by him as tenant without an allotment order. It was held that the occupant is bound by the contract of tenancy though the said contract of tenancy may not be binding on the District Magistrate. I fail to understand as to how the aforesaid judgment of the Apex Court has any application on the case in hand.

22. There is yet another aspect of the case.

23. The petitioner according to the findings of the courts below and even according to the learned Counsel for the petitioner is an unauthorized occupant of the disputed shop. The learned Counsel for the petitioner could not give any satisfactory reply as to why a writ court should extend its helping hand to a

person to protect his possession who is unauthorized occupant. Unauthorized occupant, itself, smells that a person has violated law. Writ courts are meant to enforce law.

24. The learned Counsel for the respondents rightly submitted that the release application was filed in the present case way back on 7th of October, 1989 and it has been taken for decision about 18 years. The impleadment of the petitioner was allowed on 19th of September, 1990. The petitioner has been enjoying the disputed property without paying any damages or rent. There is sufficient force in the argument of the learned Counsel for the contesting respondents that no case for interference under Article 226 of the Constitution of India has been made.

25. No other point was pressed by the learned Counsel for the petitioner.

26. In view of the above discussion, there is no merit in the writ petition. The writ petition is dismissed summarily. Cost of Rs. 5,000 (Rupees five thousands only) will be paid by the petitioner to the contesting respondents.