

Ashok Kumar Bajpai and anr. Vs. Xvii Additional District Judge and ors.

Ashok Kumar Bajpai and anr. Vs. Xvii Additional District Judge and ors.

SooperKanoon Citation : sooperkanoon.com/471991

Court : Allahabad

Decided On : Aug-24-2009

Reported in : 2010(1)AWC150

Judge : Poonam Srivastav, J.

Appellant : Ashok Kumar Bajpai and anr.

Respondent : Xvii Additional District Judge and ors.

Advocate for Pet/Ap. : Sri. P.K. Sinha

Disposition : Petition allowed

Judgement :

Poonam Srivastav, J.

1. Heard Sri P.K. Sinha and Sri P.N. Khare, counsels for landlord/petitioners and Sri G.N. Verma, Senior Advocate assisted by Dr. Madhu Tandon, counsel for tenant/contesting respondents.

2. Facts giving rise to the dispute is that petitioners purchased disputed house No. 43/73-B Chowk Kanpur Nagar, on 22.4.1996. After lapse of three years, release application under Section 21 (1) (a) of U.P. Act No. XIII of 1972 (hereinafter referred to as the Act) was instituted against respondent Nos. 2 and 3. In fact, dispute relates to a shop situated on the ground floor of the said house where

tenants are carrying on their business. The entire house purchased by landlord/petitioners in fact, is three storied building. Claim of landlords is that entire building is residential save for accommodation on the ground floor, which is a shop on the front side, situated on the main market road towards south and remaining portion of the ground floor, which is on the back side, is being used as godown by landlords. The shop in respect of which, release application was instituted is in occupation of respondent Nos. 2 and 3.

3. The counsel for petitioners has placed map of the entire accommodation with a view to explain actual situation of the shop in dispute. It is demonstrated that there is no passage for egress and ingress to the rear portion on the ground floor or on the first and second floor from front side. There is 2-1/2 x 10 feet passage from road to upper floor, which terminates in a common courtyard of house No. 43/73-B, Chowk, Kanpur Nagar. Copy of map is annexed as annexure No. 1 to the writ petition.

4. Release application was instituted in respect of a shop to set up own business of petitioner No. 2, Sanjai Kumar Bajpai. Petitioner No. 1 being co-owner and co-landlord to avoid unnecessary technical objection also joined hands in release application. Need set up in the release application is only that of petitioner No. 2, who is working as a Manager with his brother-in-law's wife on salary of Rs. 5,000/- per month. An affidavit of Smt. Anita Bajpai, substantiating contention of landlord/petitioners is annexed as annexure No. 5 to the writ petition.

5. The Prescribed Authority allowed release application vide Rent Case No. 21 of 1999 Ashok Kumar Bajpai and Anr. v. Standard Book Depot and Anr., on 17.1.2003. Tenants preferred Rent Appeal No. 3 of 2003 M/s Standard Book Depot and Anr. v. Ashok Kumar Bajpai and Anr., which was allowed by Additional District Judge, court No. 17, Kanpur Nagar, vide judgment and order dated 17.1.2004, coming to a conclusion that the entire building of house No. 43/73-B, Chowk Kanpur Nagar is at the disposal of landlords and they can start their business from that accommodation. Since previous tenants used to conduct their business, therefore, need of landlords was held not to be genuine and bonafide. Question of comparative hardship was also decided against landlords. Rent

Appeal was allowed on 17.1.2004 and judgment and order of Prescribed Authority was reversed, which is impugned in the instant writ petition.

6. First submission of Sri P.K. Sinha, counsel for petitioners while placing map is to demonstrate that since requirement of petitioner No. 2 is for a showroom, which is situated on the ground floor and on the main market road, therefore, rejection of release application by appellate court on the basis that landlord can start his business from accommodation on the first and second floor is illegal and invalid and without taking into consideration that petitioner No. 2 is an employee of M/s Naresh Textiles, brother's wife, Smt. Anita Bajpai and presently working as manager on salary of Rs. 5,000/- per month, which is absolutely inadequate and insufficient to cater to the need and requirement in the present economic set up of petitioner No. 2 and his family. It was also pleaded that previously, petitioner No. 2 was working as Manager with Smt. Anita Bajpai but on account of lapse of time her own son has come of age and Smt. Anita Bajpai requires her son to work for her especially to reduce her financial burden on the concerned business.

7. It is undisputed fact that she is running her business in the name and style of Naresh Textiles from the tenanted shop No. 33/9 Chowk, Kanpur Nagar, which is under her tenancy and belongs to her in-laws. Mother-in-law is also running business in the name and style of Naresh Hosiery dealing mosquito nets, umbrella etc.

8. It is also specifically brought to my notice that back side of godown is two rooms accommodation interconnected and there is one door available for entrance. Commissioner's report as well as map are placed before the Court to substantiate this argument. Approach on the first floor is a narrow passage on the back side. Previous tenants, who have now vacated first floor, M/s Ras Bihari Agrawal & Company and Mohan Lal & Company were on the ground floor. Godown and offices were situated on the first and second floor respectively. Upper floor was never used and cannot be used as a showroom. So far third tenant Gulab Chandra Maheshwari who has now vacated house on second and third floor was using it for residential accommodation, which now landlords intend to put for their personal use, therefore, it cannot be used as showroom. So far rejection of

release application by appellate court on the ground of alternative accommodation of house 33/177, situated in Tosi Bazar, Kanpur Nagar, consists of only one room, which is an old construction and is used as godown by petitioner's mother for her business in the name and style of Naresh Hosiery. House No. 8 of 117 Arya Nagar, Kanpur Nagar, is purely ancestral dwelling house.

9. Petitioners' counsel has claimed that affidavit of Smt. Anita Bajpai, (Annexure No. 5 to the writ petition) is uncontrovered piece of evidence and the fact that petitioner No. 2 is working as Manager for Naresh Textiles at monthly salary of Rs. 5,000/- and further that proprietor's son has to join business, therefore, necessity to replace petitioner No. 2 is very natural, since he is a landlord and purchased accommodation in question for his own use in the year 1996. Release application was moved in the year 1999. Thirteen years have gone by but their purpose of purchasing the entire premises has been rendered futile.

10. Sri G.N. Verma, Senior Advocate, submits that two questions always arise in a petition under Section 21 (1) (a) of the Act.

(1) Whether the need of landlord is genuine?

(2) Whether landlord will suffer loss if the petition is dismissed or whether the tenant will suffer better loss in case the petition is allowed.

11. In other words comparative hardship of the landlord has to be balanced by the Court but in the present case three issues which have been framed by the court below only deal with whether the need of landlord is genuine. So far as need of tenants had not been considered by the court probably on the ground that landlord had no need at all. In the present case the court below has found that need of the landlord is not at all genuine. He has plenty of accommodation for carrying on business if he wants to do so. He said in his application that he wants to open showroom but in evidence he has not been able to prove what showroom he needs, what business he wants to carry out. The landlord is doing business in the shop which belongs to his mother Vishna Devi, who is aged about 65 years. She is a house wife. Naturally business is being carried on by sons, the present petitioners in the instant case. The court below has said that landlord has many

shops and all of them are lying vacant. These facts also stand supported by commissioner's report, which has been annexed with writ petition.

12. It is further submitted by Sri G.N. Verma, Senior Advocate, that while considering question No. 2 the court below said that all the accommodation available with landlord is for commercial purpose, therefore, having found that need of the landlord is not at all genuine, he did not record a finding about comparative hardship. Therefore, need of the tenant as against need of the landlord has not been considered which is a consideration and a legal question to be decided before release order can be passed, if at all for any reason the impugned judgment is considered to be wrong then the matter has to be remanded for consideration of comparative hardship vis-a-vis of the tenant and landlord. In the present case, tenant who is carrying retail business of selling books of the students since 1936 will be completely uprooted and if comparative needs of landlord and tenant is considered the equities could be adjusted mainly that the frontage of the disputed premises is 11 to 12 feet and front could be divided half and half so that landlord and tenants both could be accommodated, the tenants would have been satisfied, if in the same premises on the backside some equal accommodation could be provided for storage of the books. Therefore, equities have not been adjusted. The need is not compared; and without such consideration no petition under Section 21 (1) (a) of the Act could be disposed of. In the present case, landlord has 11 accommodations, each in a business premises and the tenants have none, therefore, it would be wholly unjust and inequitable to uproot the tenants from their livelihood.

13. Learned Counsel has also stressed that tenants are occupying the business premises for last 38 year carrying on the business of selling school text books and have acquired goodwill.

14. The last suggestion by learned Senior Advocate is on following alternatives.

1. Landlords may detain half of frontage for his entrance and half of the shop in dispute be allowed to be retained by tenants together with a small godown in the interior of the vacant building. Alternatively.

2. He may vacate the shop under his tenancy which is just in front of the premises in dispute and be allowed to occupy a vacant possession being delivered to the tenants. Alternatively.

3. Landlord to give one of shops lying vacant, as found by lower appellate court as well as commissioner's report which is interior in the gali, with a right to the tenants to fix their signboard over the shop in dispute along with signboard of tenants.

15. I have heard learned Counsels for respective parties and gone through the two judgments. Prescribed Authority considered two questions separately, (1) Bonafide need (2) Comparative hardship, and definite finding arrived at is that for the purpose of opening a showroom for commercial establishment, a clear view of shop from road is essential. No part of entire three storied building has an open vision from road and especially no part of it is apparently shown in the map or commissioner's report where showroom can be established. Besides the fact that it is admitted that landlord/petitioner No. 2 is working as a Manager with sister-in-law Smt. Anita Bajpai on a salary and now he urgently needs to start his own business to fulfill requirement of his growing family as well as since son of proprietor Naresh Textiles where he has been working previously, wants to join his mother as he is now major.

16. The Prescribed Authority recorded findings in favour of landlords on the question of bonafide need. Suggestion given before Prescribed Authority to shift his business on the back side was also not accepted by tenants. Release order was challenged by filing an appeal under Section 22 of the Act.

17. The counsel for landlords argued that it is essential to record finding on the question of comparative hardship to decide release application, therefore, there being no finding on the question of comparative hardship, judgment and order of the court below rendered illegal, appears to be absolutely correct. However, Prescribed Authority considered and given a detailed finding on the question of bonafide need as well as on consideration after relative hardship likely to be incurred by landlords and tenants. After comparing their hardships, shop was released but appellate court only recorded contrary finding on the question of bonafide need and failed to even look into hardship of landlords vis-a-vis tenants.

Agreeing with submission of Sri G.N. Verma, Senior Advocate, it is correct that findings arrived at by appellate court are perverse and call for interference.

18. I have taken into consideration various decision of this Court. In the case of Kalawati and Anr. (Smt.) v. Additional District and Sessions Judge and Anr. 2007 (2) ARC 185, Punit Kohli v. Vinod Kumar Jain and Ors. 2008 (1) ARC 159, the Court was of the view that availability of some commercial complex with the father or mother is no ground to reject release filed by son. No one can be compelled to carry on business or participate in family business and his intention to start a business of his own can be repelled merely for consideration in favour of tenants. Landlord cannot be compelled as well to start his business from any other accommodation, which he did not think suitable enough to start his business, therefore, suggestion of tenants to be forced on landlord.

19. The view taken in the aforesaid decision was followed in the case of Kanahaiya Lal Agarwal v. District Judge, Ballia and Ors. 2009 (2) ARC page 205. Findings on bonafide need and comparative hardship were recorded in favour of landlord and need for starting an independent business was held to be sufficient. Mere fact that son was assisting his father in business is no ground to reject release application. These views were, following decisions of the Apex Court; Akhileshwar Kumar and Ors. v. Mustaqim and Ors. : AIR 2003 SC page 532 , Sushila v. IInd Additional District Judge, Banda : AIR 2003 SC page 780 and Ram Kumar Barnwal v. Ram Lakhan 2007 (2) ARC 577.

20. In the case of Avinash Chandra and Ors. v. VIIth Additional District Judge, Ghaziabad and Ors. 2008 (1) ARC 812, this Court had taken a view that every landlord is entitled to have an independent separate business and he cannot be compelled to participate in the family business. Need of landlord was established. Besides, in the event tenants failed to show that they had made any effort to search for alternative accommodation, comparative hardship has to be decided against tenants. This view was taken in the case of B.C. Bhutada v. G.R. Mundada : AIR 2003 SC 2713.

21. I am conscious of the fact that appellate court rejected release application and failed to record any finding on the question of comparative hardship but in the

decision of Avinash Chandra (supra), I think that paragraph Nos. 16 and 17 are sufficient guidelines by the Apex Court where the Apex Court reversed findings of the two courts below on the question of fact. For ready reference, paragraph Nos. 16 and 17 are quoted herein below:

16. Normally, when both the courts below have rejected the release application of the landlord and the writ Court finds the judgments erroneous, the matter is either remanded to the prescribed authority or permission to file fresh release application is granted to the landlord. However, in certain circumstances, particularly when no new enquiry into facts is to be made ultimate final relief may be granted to the landlord in writ petition itself, even though both the Courts below may have rejected the release application. I have discussed this aspect in detail in the authority reported in 2005 (2) ARC 793 Mohd. Arif v. A.D.J. for the said proposition, I placed reliance upon : AIR 2002 SC 200 : 2001 (2) ARC 603 : 2001 SCFBRC 541 'G.C. Kapoor v. Nand Kumar Bhasin' where the Supreme Court out rightly allowed the release application of the landlord, which had been rejected by the Prescribed Authority and the order of the Prescribed Authority had been affirmed by A.D.J. in appeal and High Court in writ petition.

17. Prior to the said authority, I was either remanding or granting liberty to file fresh application to the landlords in the writ petitions filed by them against rejection of their release applications by both the Courts below. One of such judgments delivered by me was reversed by the Supreme Court which is reported in Ram Kumar Barnwal v. Ram Lakhan 2007 AIR SCW 3250 : 2007 SCFBRC 346 : 2007 (2) ACR 577.

22. Findings of the Apex Court are fully applicable in the present case. It is undisputed fact that disputed shop along with entire accommodation was purchased in the year 1996. Release application of the instant shop was filed in the year 1999. It is evident that accommodation of the first and second floor in occupation of the tenants were got vacated in the last 13 years whereas landlords were unsuccessful so far it relates to the shop in question. Release application was filed in the year 1999. Specific ground was that he is working as a Manager on salary of Rs. 5,000/- and proprietor's son wants to join his mother business.

Ten years have elapsed but landlord is still making an effort to get his own accommodation to set up himself in an independent business.

23. If writ petition is allowed and matter is remanded as suggested by Sri G.N. Verma, Senior Advocate, I give a loose rope once again in the hands of tenants to use it and continue in occupation rendering landlord's intention to start his business remain only a figment of his imagination, which might come true in his old age. Nothing has been done regarding any effort or attempt to search out for any alternative accommodation by tenants and accepting the view in the case of *Chhedi Lal v. Kedar Nath* 2009 (2) ARC 24. The tenants are not entitled for any relief whatsoever.

24. In the circumstances, I am of the view that judgment and order of the appellate court is based on illegal analysis without entering into assessment of evidence. Taking into consideration uncontroverted affidavit, a supplementary affidavit has also been filed during course of hearing with an allegation that son of petitioner No. 2 has started business and he has not got it registered from his house No. 8/117, Arya Nagar, Kanpur Nagar. This is absolutely a fact, which could not be taken into consideration. It is not subsequent event to the effect that another family member of the landlord whose need was not set up in the release application, has acquired business from a shop and, therefore, lack of consideration of this fact cannot be said to be worth paying any heed. The appellate court has also not assigned any reason while setting aside specific finding of Prescribed Authority and can hardly be said to be a judgment of disagreement or reversal. It is not judgment of conformance. The appellate court was liable to record specific findings for not agreeing in this respect.

25. Reliance has been placed on Full Bench decision of this Court; *Haji Manzoor Ahmad and Anr. v. State of U.P. and Ors.* 1968 ALJ 809. I would also like to add that option was given to Sri G.N. Verma, Senior Advocate, regarding suggestion made in the trial court for alternative accommodation but nothing has been said accepting it or even making an offer to landlord so that it can be taken into consideration even at this stage.

26. In view of what has been stated above, I do not find any force in the submission made on behalf of respondents that the judgment and order of appellate court impugned in the instant writ petition is liable to be quashed. Release application should be allowed specially the landlord has been contesting since a very long time and required the shop for starting his own business from his own shop after purchase in the year 1996. Therefore, I come to a conclusion that his need is absolutely bonafide. He is in dire necessity of the shop in question to start his own business. It cannot be accepted that landlord would all his life depend upon sister-in-law's business. Admittedly, he would be having his own family and children and, therefore, so called subsequent event is not worth of consideration. So far comparative hardship is concerned, I agree with finding arrived at by Prescribed Authority and also I am of the view that since no effort has been made by tenants to search for alternative accommodation, they are not entitled for any consideration whatsoever. Finding in respect of comparative hardship is recorded against landlord.

27. In view of what has been discussed above, the judgment and order dated 17.1.2004 passed by XVIIth Additional District Judge, Kanpur Nagar, is hereby quashed. The writ petition is allowed.