

Surendra Kumar Vs. Additional District Judge, Nainital and Another

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Court : Allahabad

Decided On : May-10-2000

Reported in : 2000(3)AWC1881

Judge : Sudhir Narain, J.

Acts : Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 - Sections 21(1)

Appeal No. : C.M.W.P. No. 9183 of 1983

Appellant : Surendra Kumar

Respondent : Additional District Judge, Nainital and Another

Advocate for Def. : S.C. and ;Rajesh Tandon, Adv.

Advocate for Pet/Ap. : D.P. Singh and ;Manish Goel, Adv.

Judgement :

Sudhir Narain, J.

1.This writ petition is directed against the order passed by respondent No. 1 allowing the appeal and dismissing the release application filed by the landlord-respondent.

2. The petitioner is landlord of the shop in question situate at Bajaja Line, Ram Nagar of which respondent No. 2 is tenant. The petitioner filed an application for release of the disputed shop under Section 21 (1) (a) of U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act. 1972 (in short 'the Act') with the allegations that there was a family partition under which the disputed shop came to his share. He was engaged in partnership business of selling Sarees with Vijal Kumar, one of his brothers, in the shop which was owned by his brother but after he got married, the relationship between the two, became strained and now he wants to start his own independent Saree business in the disputed shop. It was stated that the tenant-respondent owns a shop at Kashipur and he can shift his business there. The application was contested by respondent No. 2. It was stated that there was no partition in the family and every member of the family is living jointly and the petitioner is carrying on joint family business. The prescribed authority held that there was genuine partition between the parties and the partition was effected by a decree of civil court. The petitioner does not have any vacant shop of his own to carry on business. His need is bona fide. It was further found that respondent No. 2 has his own shop in Kashipur and in case the application of the petitioner is rejected he will suffer a greater hardship. The application was allowed on 14.12.1982 on these findings. Respondent No. 2 filed appeal and respondent No. 1 allowed the appeal on 7.5.1983, reversing the findings of the prescribed authority. The petitioner has challenged this order in the present writ petition.

3. I have heard Sri Manish Goel, teamed counsel for the petitioner and Sri Rajesh Tandon, learned counsel for the contesting respondent.

4. Respondent No. 1 rejected the claim of the petitioner mainly on the finding that the partition decree was collusive. The Court cannot hold a decree as collusive or sham transaction on the basis of its preconceived notions particularly when there is a partition decree between the co-sharers. The parties enter into compromise in a suit and if the decree is passed on the basis of such compromise between the parties, it cannot be taken that it is a collusive or the compromise was entered into between the parties to defeat the rights of any third person. The decree of the civil court is to be accepted unless it is set aside. In *Khem Chand v. IVth Additional District Judge, Bulandshahr and others*, 1989 (2) ARC 344, wherein it was urged

on behalf of the tenant that the partition decree was collusive, the Court repelled the contention and held that as long as the decree passed by the civil court is not set aside, the prescribed authority has no jurisdiction to record a finding that the compromise decree was collusive, it was observed that :

'the main contention of the learned counsel for the petitioner was that the partition decree is a collusive one and it should have been ignored by the authorities below. They have committed a mistake in relying upon the same. His case further was that this compromise was arrived at between the landlord-respondent No. 3 and his father in order to evict the petitioner from the shop in dispute. The contention is misconceived Inasmuch as so long the decree passed by the civil court in Suit No. 107 of 1983 is not set aside, the prescribed authority has no Jurisdiction to record a finding that the compromise decree was collusive. The validity of the decree cannot be challenged in collateral proceedings.'

5. The Court made a distinction between such cases where the partition between co-sharers is pleaded and proved by a party in proceedings under section 21 (1J) (a) of the Act and the other cases where the civil court has passed a decree for partition of the property and on this ground the decision in *B. N. Tiwari v. Additional District Judge and others*. 1989 (1) ARC 526. was distinguished. In *Om Prakash v. Prescribed Authority, Saharanpur and others*. 1998 (2) ARC 335. it was held that the prescribed authority can examine as to whether the property in question came in the share of the persons who had applied for the release but in this case, the applicant had not relied upon any decree passed by the civil court. In *Sk. Sattar Sk. Mohd. Choudhari v. Gundappa Amabadas Bukate*, AIR 1997 SC 998, where a suit was filed for eviction by a co-lessor to whom property was given on partition, it was held that the tenant cannot object to such partition but he can show that the partition was not bona fide and was a sham transaction to overcome the rigours of rent control laws which protected eviction of tenants except on specific grounds set out in the relevant statute. In this case, the landlord had not relied upon any decree for partition passed in his favour.

6. Now, it has to be examined whether the decree in Suit No. 36 of 1973 was collusive and obtained with ulterior motive. Rajendra Kumar, brother of the

landlord-petitioner filed the suit on 2.5.1973 against his father, brother and mother in the Court of District Judge, Nainital for a declaration that the partition, which was effected by the parties mutually on 1.1.1973. is binding upon them. In the plaint, it was stated that all the parties had mutually partitioned their property on 1.1.1973 as per details given in the plaint. It was open to the parties to mutually agree to partition the property and arrive at a settlement but such oral settlement may be proved by filing a suit. The mere fact that the parties entered into compromise in the suit or admitted certain facts averred in the plaint, itself does not show that the decree passed by the civil court is fictitious or made only to defeat the rights of any third person. The decree was passed in the year 1973. The application under Section 21 (1) (a) of the Act was filed by the petitioner against respondent No. 2 in the year 1981, after about 7 years and during this period the Income-tax Authority, Sales-tax Authority accepted the partition and passed assessment orders accordingly. Respondent No. 1 assumed that the partition was made only to avoid income-tax or sales-tax in their business, was without any evidence. Respondent No. 1 further examined the shares allotted to the parties in the partition decree and it inferred that the division was not equal and that indicates that the partition was fictitious. The Court was not entitled to look into as to the shares in properties allotted to the parties when the parties themselves have never challenged the partition on the ground of inequality in the division of the Joint family property. There may be various circumstances when the parties may agree to relinquish the property or accept a minor share. One of the factors taken by the respondent No. 1 is that the wives of the brothers had purchased a house in the year 1980 jointly in their name but this was hardly relevant to show that the partition which was effected in the year 1973 was invalid. Even after the partition of the property, the persons who were members of the joint family still can purchase another property jointly. One of the considerations taken is that one N. D. Binowal, Senior Supply Inspector, submitted a report wherein it was stated that the ration card was in the name of Amar Nath. father of the petitioner. It remained joint till 19.4.1981. The Court presumed that only for the purpose of filing this application, the petitioner got separate ration card made. Respondent No. 1 did not record any finding as to in which house the family of the petitioner and that of his brothers and father were living. The Court cannot record a finding that the decree is fictitious merely on

surmises and conjectures. The decree of civil court has sanctity and is binding on the parties and has to be accepted unless it is shown to be totally a sham transaction. There was no evidence on the record to show that the decree passed eight years before filing application under Section 21 (1) (a) of the Act was a sham transaction. The petitioner had not filed the application for release immediately after the decree was passed by the civil court in the year 1973.

7. The next question is whether the need of the landlord for the disputed shop is bona fide. The case of the petitioner is that he was carrying on joint business in the shop owned by Vijai Kumar, his brother but on account of difference of opinion between him and his brother, he wants to carry on his own independent business. There was no dispute that the shop in which the petitioner was carrying on business was exclusively owned by Vijai Kumar as he had purchased the said property in the year 1974. The petitioner has no right to carry on business in the said shop nor he can be forced to continue in the business in the said shop even if there may not be difference of opinion between them. If a landlord wants to carry on independent business in his own shop, his application cannot be thrown out on the ground that he is carrying on business in partnership with another person and he should continue in partnership with such person. The petitioner needs the disputed shop in possession of respondent No. 2 to carry on his independent business.

8. The further contention of the petitioner was that the tenant owns a shop situated in Kashipur which was let out to a tenant. A statement was made on behalf of respondent No. 2 that the said shop has been sold. Even if a tenant does not own any shop, the application of the landlord cannot be thrown out on the ground that the tenant has no alternative accommodation. In *Bega Begum and others v. Abdul Ahad Khan and others*, AIR 1979 SC 272, it has been held that the application of the landlord is not to be rejected simply on the ground that the tenant has no other alternative accommodation where he can shift his business.

9. In view of the above the writ petition is allowed. The impugned order dated 7.5.1983 is hereby quashed. Respondent No. 1 is directed to decide the appeal afresh keeping in view the above observations and in accordance with law within

three months from the date of production of a certified copy of this order. Considering the facts and circumstances of the case, the parties shall bear their own costs.

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