

Durga Prasad Tiwari Vs. Additional District Judge/Special Judge (S.C./S.T. Act) and ors.

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Court : Allahabad

Decided On : Aug-21-2007

Reported in : 2008(1)AWC238

Judge : Tarun Agarwala, J.

Appellant : Durga Prasad Tiwari

Respondent : Additional District Judge/Special Judge (S.C./S.T. Act) and ors.

Advocate for Def. : Mr. Andley

Disposition : Petition dismissed

Judgement :

Tarun Agarwala, J.

1. Respondent No. 3 issued a notice dated 10.9.2003 to the petitioner/tenant intimating him that he had purchased the building and the shop in question from the erstwhile landlord and owner vide a registered sale deed dated 9.4.2003 for a sum of Rs. 14 lacs and further intimated him that he intends to carry on a trade or business from the premises in dispute and consequently requested him to make all arrangements for finding an alternate accommodation. This notice was issued

in contemplation of the first proviso to Section 21 of the U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as the Act). The said notice was duly received by the petitioner and a reply was also given intimating respondent No. 3 that he was also given a notice from the previous landlord about the sale made by him. On the expiry of the period of three years, the landlord, respondent No. 3, filed an application under Section 21 (1) (a) of the Act for the eviction of the petitioner on the ground of personal need to carry out a trade or business from the premises in question. The respondent contended that he was the owner and landlord pursuant to the sale deed and was in employment in M/s. Kapoor and Friends and that he had purchased the building in order to do business for himself as well as for his son who is coming of age and that he has the financial capacity to do the business. The respondent further contended that he has no other accommodation where he could carry out his business.

2. The petitioner filed his written statement resisting the claim application of the respondent and admitted that he was the landlord of the premises in question but was not an employee of M/s. Kapoor and Friends and in fact was a partner and that he did not have the capacity to pay a sum of Rs. 14 lacs for the purchase of the building. Further, the respondent had no intention to carry on any kind of business from the premises in question and the entire purpose of filing the application was to enhance the rent. The petitioner further contended that he had been carrying on the business for the last 40 years from the premises in question and had earned a goodwill and therefore, he would face hardship if he was evicted. The petitioner further contended that respondent No. 3 had purchased the building from the previous owner who was none other than his employer where he is alleged to be working and that he had purchased the entire building comprising of three floors and that the upper floors could easily be used by the landlord for his business purposes, if any.

3. In the rejoinder-affidavit, the landlord denied the allegations made by the petitioner and further gave proof of his financial capacity and the manner in which he had purchased the building. The respondent No. 3 further submitted that he was not a partner in Kapoor and Friends and was only a petty employee. A

supplementary-counter-affidavit was filed by the petitioner alleging that the value of the building, as disclosed by the landlord, was incorrect and, as per the Government rates, the value was more than Rs. 23 lacs and therefore, contended that the entire sale alleged to have been made by the erstwhile landlord in favour of the present landlord was nothing but a sham transaction in order to file the present application for his eviction.

4. The prescribed authority, after considering the material that was brought on record, held that the landlord's need was bona fide and genuine and that he had invested a sum of Rs. 14 lacs in order to do the business. The prescribed authority also concluded that it could not have been the intention of the landlord to purchase a building after investing a sum of Rs. 14 lacs in order to earn a paltry amount of Rs. 35 per month as rent from the petitioner. The prescribed authority, further concluded that the transaction of sale made by the landlord-respondent No. 3 was not a sham transaction and that, it was a bona fide transaction, inasmuch as, more than Rs. 2 lacs was spent on stamp duty. Consequently, no person could indulge in such a sham transaction only for the purposes of eviction unless there was a genuine need to do the business from the premises in question. The prescribed authority further found that the landlord had the financial capacity and even though he was a paid employee he had regrouped his resources by drawing money from his Personal Provident Fund Account (P.P.F. Account) which had matured and had also borrowed money from his father and wife which was reflected in the bank account of the landlord. The prescribed authority also concluded that the landlord was only an employee in M/s. Kapoor and Friends and was not a partner and that the upper floor of the building was already under tenancy and consequently, could not be used for business purposes by the landlord.

5. The prescribed authority further found on comparative hardship that the landlord would suffer more if the premises was not vacated since he had invested a huge amount and had purchased the building only to do some business. On the other hand, the prescribed authority concluded that no effort was made by the tenant to find an alternative accommodation and concluded that the provisions of Rule 16(2)(a) of the Rules was not mandatory and that other factors could also be taken into consideration while considering the comparative hardship between the

landlord and the tenant. The prescribed authority concluded that the need of the landlord was greater and genuine since he had purchased the building by investing a huge amount for the purpose of doing business and had not purchased the building to get a meagre rental amount. Consequently, the prescribed authority found that the need of the landlord was bona fide and further held that he would suffer more than the tenant. The prescribed authority, consequently, directed for the release of the accommodation in question.

6. Aggrieved, the petitioner filed an appeal which was also dismissed. The appellate authority also arrived at the same conclusion and confirmed the findings, of the prescribed authority. The petitioner has now filed the present writ petition under Article 226 of the Constitution of India.

7. Heard Sri Yogesh Agarwal, the learned Counsel for the petitioner assisted by Sri S. N. Tripathi, advocate and Sri A. K. Gupta, the learned Counsel appearing for the landlord-respondent No. 3.

8. The learned Counsel for the petitioner submitted that the sale made by the erstwhile landlord in favour of respondent No. 3 was a sham transaction. The value of the building was more than Rs. 23 lacs whereas it had only been purchased for Rs. 14 lacs. Consequently, the bona fide need of the landlord-respondent No. 3 was a camouflage whereas, in fact, the release application was made for the benefit of the previous landlord. The learned Counsel further alleged that the landlord was unable to disclose the source of his income of Rs. 14 lacs for the purchase of the building, since he admitted that he was a paid employee earning approximately Rs. 4,500 per month and therefore, it was not possible for respondent No. 3 to collect a huge amount of Rs. 14 lacs. Consequently, the learned Counsel contended that there was no bona fide need of respondent No. 3 and that he was a partner in M/s. Kapoor and Friends Company and was not an employee and consequently, it was a strategy adopted by the previous landlord to evict the petitioner by showing a bona fide need of the present landlord-respondent No. 3. On comparative hardship, the learned Counsel contended that the provisions of Rule 16 (2) (a), being mandatory had not been considered by the courts below and therefore, on this count itself, the orders of the courts below was

liable to be set aside. Further, the release application was liable to fail as necessary parties were missing. The learned Counsel contended that Smt. Krishna Tiwari was the tenant who died on 16.5.1998 and upon her death, the petitioner alongwith his brothers and sisters inherited the tenancy as joint tenants and therefore, the release application could only be filed against all the tenants and not against the petitioner alone. Consequently, the entire proceedings initiated by respondent No. 3 was void. In support of his submissions the learned Counsel placed reliance on *Sk. Sattar Sk. Mohd. Choudhari v. Gundapa Ambadas Bukate* , on the question that even a sham transaction can be considered in proceedings under Section 21 (1) (a) of the Act and further placed reliance upon a decision of a Division Bench of this Court in *Ramesh Chand Bose v. Gopeshwar Prasad Sharma* , wherein it was held that the heirs inheriting the tenancy rights are tenants in common and are not joint tenants and therefore, a notice to quit must be given to all the heirs in order to terminate the tenancy.

9. On the other hand, Sri A. K. Gupta the learned Counsel for the landlord submitted that the plea of sham transaction was patently erroneous and an afterthought. No such plea was ever raised by the petitioner in his written statement. In any case, the transaction was a bona fide and genuine transaction wherein consideration had been paid and had been received by the previous owner and that a stamp duty of more than Rs. 2 lacs had been paid to the Government. Further, a sum of Rs. 14 lacs paid by respondent No. 3 had been duly explained which is borne out from the documentary evidence brought on the record. Further, both the courts below have given concurrent findings of fact on the question of bona fide need and comparative hardship and therefore, these findings of fact could not be reappraised or reconsidered in a writ jurisdiction since these findings are based on cogent evidence brought on the record. The learned Counsel submitted that the sale consideration of Rs. 14 lacs was based on a fair value assessed by the parties in question and submitted that it is common knowledge and known fact that the building housing an old tenant fetches a lower price than the actual market price prevailing in that area. The learned Counsel further submitted that heirs who inherit the tenancy are not tenants in common and are joint tenants and this matter has been concluded by a decision of the Supreme' Court in *Harish Tandon v. Additional District Magistrate, Allahabad* and

Ors. 1995 (1) ARC 220 : 1995 (1) AWC 106 (SC).

10. The learned Counsel further placed reliance on the question of bona fide need and comparative hardship, namely, Mst. Bega Begum and Ors. v. Abdul Ahad Khan (dead) by LRs. and Ors. ; Bhoolchand and Anr. v. Kay Pee Cee Investments and Anr. : Ratti Ram v. A.D.J./Fast Track Court 4, Dehradun and Ors. 2006 (4) ARC 83 and Dr. Ranbir Singh v. Asharfi Lal .

11. Upon hearing the contention of the rival parties and upon giving my considerable thought in the matter, this Court is of the opinion, that the petitioner is not entitled for any relief. The findings of fact on bona fide need recorded by the courts below is based on sound reasoning arrived at after considering the stand of the rival parties and the evidence brought on record. The courts below, have given a categorical finding that respondent No. 3 was a paid employee and that he had purchased the building from his savings and from the loan taken from his wife and father, in order to do business for himself and to set up a business for his son. While coming to this conclusion, the courts below have found that the intention of the respondent No. 3 for purchasing the building was to do a business from the premises in question and not to earn a paltry rent of Rs. 35 per month. The Court found that the landlord had invested a huge amount of Rs. 14 lacs for the purpose of doing business and had also paid a sum of Rs. 2 lacs towards stamp duty. Therefore, the need of respondent No. 3 was bona fide and that the transaction was not a sham transaction. The submission of the counsel for the petitioner that the sale made by the previous landlord to the present landlord was a sham transaction is patently erroneous. The submission that the building was worth of Rs. 23 lacs and not Rs. 14 lacs is not supported by any documentary evidence. No proof of the valuation of the building has been given by the petitioner before the courts below. Merely making a bald allegation, in a supplementary-counter-affidavit, is not sufficient for the purpose of holding that the sale was a sham transaction. Further, the allegation that the landlord was a partner in the firm of the previous landlord and was not an employee, is again belied by documentary evidence, namely, the income tax returns that was brought on the record, which clearly showed that respondent No. 3 was only an employee in the firm of the previous landlord. Another factor which weighed heavily in favour of respondent

No. 3 is that he had explained his finances in purchasing the building in question. This Court has also perused the pass book of the bank account of respondent No. 3 as well as P.P.F. pass book which showed that a sum of Rs. 13,66,265.39 had matured on 7.4.2003 which was transferred to the respondent's bank account. This amount alongwith other amounts transferred from his wife and father, enabled the respondent No. 3 to purchase the building from the previous owner. It has also come on record that more than Rs. 2 lacs was paid towards stamp duty. Consequently, it can safely be held that a bona fide transaction was made and that a sum of Rs. 14 lacs was paid towards the sale consideration. The court below was, therefore, justified in coming to the conclusion that a bona fide purchase was made by respondent No. 3 for setting up his business. Consequently, in my view, the findings of bona fide need given by the courts below need no interference.

12. The submission of the learned Counsel for the petitioner that the provisions of Rule 16 (2) (a) of the Rules are mandatory which has not been followed by the courts below while considering the comparative hardship and therefore, the impugned orders suffers from non-compliance of these rules is patently erroneous. The provisions of Section 21 (1) of the Act indicates that the prescribed authority shall take into account the likely hardship caused to the tenant from the grant of application as against the likely hardship caused to the landlord from the refusal of the application and, for that purpose, shall have regard to such factors as may be prescribed. The factors which has been prescribed under Rule 16 (2) of the Rules are quoted hereinunder:

(2) While considering an application for release under Clause (a) of Sub-section (1) of Section 21 in respect of a building let out for purposes of any business, the prescribed authority shall also have regard to such facts as the following:

(a) the greater the period since when the tenant opposite party, or the original tenant whose heir the opposite party is, has been carrying on his business in that building, the less the justification for allowing the application;

(b) where the tenant has available with him suitable accommodation to which he can shift his business without substantial loss there shall be greater justification for allowing the application;

(c) the greater the existing business of the landlords own, apart from the business proposed to be set up in the leased premises, the less the justification for allowing the application, and even if an application is allowed in such a case, the prescribed authority may on the application of the tenant impose the condition where the landlord has available with him other accommodation (whether subject to the Act or not) which is not suitable for his own proposed business but may serve the purpose of the tenant, that the landlord shall let out that accommodation to the tenant on a fair rent to be fixed by the prescribed authority; and

(d) where a son or unmarried or widowed or divorced or judicially separated daughter of a male lineal descendant of the landlord has, after the building was originally let out, completed his or her technical education and is not employed in Government service, and wants to engage in self-employment, his or her need shall be given due consideration.

13. In *Sushila v. Ind Additional District Judge, Banda and Ors.* 2003 (1) ARC 256, the Supreme Court held that the rule prescribed certain factors which are required to be taken into account while considering the application for the eviction of a tenant on the ground of bona fide need. Clause (a) of Sub-rule (2) of Rule 16 of the Rules provides that greater the period of tenancy, less the justification for allowing the application whereas, according to Clause (b), in case the tenant had a suitable accommodation available to him to shift his business, greater the justification would be to allow the application. The availability of another suitable accommodation to the tenant waters down the weight attached to the longer period of tenancy as a factor to be considered as provided under Clause (a) of Sub-rule (2) of Rule 16. The Supreme Court, further held that even though the period of tenancy could be a deterrent factor but the availability of another shop where the tenant could shift his business neutralises the factor of the length of the tenancy in the accommodation and consequently tilts the balance in favour of the landlord.

14. In *Mst. Bega Begum and Ors. v. Abdul Ahad Khan (dead) by L.R's and Ors.* , the Supreme Court held:

It was then submitted by Mr. Andley, counsel for the respondents that if the respondents are evicted they will be thrown out on the road; that hotel is the only source of their sustenance and they are not likely to get any alternative accommodation on being evicted. If the defendants had proved that they will not be able to get any accommodation anywhere in the city where they could set up a hotel, this might have been a weighty consideration, but the evidence of all the witness examined by the defendants only shows that the defendants may not get alternative accommodation in that every locality where the house in dispute is situated. There is no satisfactory evidence to prove that even in other business localities there is no possibility of the defendants getting a house. To insist on getting an alternative accommodation of a similar nature in the same locality will be asking for the Impossible. The defendants are tenants and had taken the lease only for 10 years but had overstayed for 20 years and they cannot be allowed to dictate to the landlord that they cannot be evicted unless they get a similar accommodation in the very same locality.

15. In *Dr. Ranbir Singh v. Asharfi Lal* . the Supreme Court again observed:

In the present case, there is no such evidence or any material produced by the defendant to show that he will not be in a position to get alternative accommodation in the town of Dholpur of his residence.

16. In *Badrinarayan Chunilal Bhutada v. Govindram Ramgopal Mundada* 2005 (2) ARC 899, the Supreme Court observed:

A perusal of the scheme of the Act, so far as the ground of reasonable and bona fide requirement by the landlord for occupation of residential or non-residential premises is concerned, shows that Clause (g) of Sub-section (1) of Section 13 contemplates a decree for eviction being passed on proof of availability of the ground according to law. In spite of a ground for eviction under Section 13 (1) (g) having been made out, the Court may deny the relief of eviction if the issues as to comparative hardship is answered against the landlord and in favour of the tenant. Thus, in a way, Section 13 (2) acts as a proviso to Section 13 (1) (g); the former having an overriding effect on the latter. The burden of proving availability of ground for eviction under Section 13 (1) (g); lies on the landlord; the burden of

proving greater hardship so as to deprive the landlord of his established right to seek eviction lies on the tenant.

17. In view of the aforesaid judgments and in view of the concurrent findings given by the courts below that inspite of a notice being given by the respondent No. 3, the petitioner made no effort to look for an alternative accommodation, consequently, the courts below were justified in not taking into consideration, the length of tenancy of the petitioner in the premises in dispute.

18. In the opinion of the Court, the findings on comparative hardship are based on sound principles which are supported by the decisions of the Supreme Court as cited aforesaid, and consequently, requires no interference.

19. The learned Counsel for the petitioner submitted that the prescribed authority should have considered the partitioning of the shop in question. On this issue, this Court directed the parties to explore the possibility of a compromise and amicable settlement and the matter was adjourned. It has been stated at the Bar by the learned Counsel for respondent No. 3 that an offer of partitioning the shop was given to the petitioner, subject to a payment of a premium, which offer was rejected by the petitioner. The learned Counsel for the petitioner also stated that the talks of compromise failed and therefore, the Court may proceed and decide the matter finally on merit.

20. The submission of the learned Counsel for the petitioner that the tenancy was inherited by all the sons and daughters of the original tenant as tenants in common is patently erroneous. The Supreme Court in the case of Harish Tandon (supra) has categorically held that the heirs of tenant inherit the premises as joint tenants and not as tenants-in-common and therefore, the notice to one was sufficient notice to all for the purpose of the proceedings under Section 21 (1) la) of the Act. The Supreme Court held that after the death of the original tenant, his heirs became the joint tenants and not tenants-in-common. In view of the aforesaid decision, the Division Bench judgment cited by the learned Counsel for the petitioner is no longer good law and stands impliedly overruled.

21. This leads to the last question. Admittedly the petitioner is carrying on the business for the last 40 years In the heart of the old city of Allahabad.

22. The second proviso of Section 21 of the Act contemplates that where an application for bona fide need is made out in respect of a building for non-residential purpose, the Court will also consider awarding compensation not exceeding two years rent. I find that the court below has awarded 2 years' rent as compensation.

23. However, certain compensation payable to the tenant would be justified to offset goodwill which the tenant has earned from the premises in question. It has come on record that he was a tenant for 40 years and had earned a goodwill. Consequently, the compensation is justified. In my view the compensation of two years rent as given by the courts below is a paltry amount in view of the fact that the rent was only Rs. 35 per month. This Court is of the opinion that the two years of statutory rent cannot offset the goodwill by way of compensation. Admittedly, the landlord had purchased the building for Rs. 14 lacs. 10% of this price, in my estimation, would be a reasonable amount for payment of compensation. Consequently, this Court directs a sum of Rs. 1.40 lacs to be paid as compensation to the petitioner as part of the condition for allowing the release application.

24. Consequently, this Court directs the petitioner to hand over the vacant and peaceful possession to the respondent No. 3 on or before 31.12.2007, subject to an undertaking being given by him within 30 days from today, before the prescribed authority that, he would handover the vacant and peaceful possession on or before 31.12.2007. Further, he would deposit the arrears of rent as well as rent upto 31.12.2007 before the prescribed authority within the same period. On the other hand, the respondent No. 3 will also deposit a sum of Rs. 1.40 lacs within 90 days from today before the prescribed authority. This amount will only be paid and handed over to the petitioner only after the petitioner files the undertaking and deposits the rent as stated aforesaid, and hands over the peaceful and vacant possession on or before 31.12.2007. If any of the conditions as stated aforesaid is not completed within the aforesaid period, the amount of compensation as

awarded by this Court, will not be handed over by the prescribed authority to the petitioner and it would be open to respondent No. 3 to apply for the refund of this amount from the prescribed authority.

25. With the aforesaid observations this writ petition is dismissed. In the circumstances of the case there shall be no order as to cost.

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