

**Ambrish and ors. Vs. Additional District Judge Lko. and ors.**

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**SooperKanoon Citation : [sooperkanoon.com/917693](http://sooperkanoon.com/917693)**

**Court : Allahabad**

**Decided On : Mar-16-2011**

**Judge : Anil Kumar, J.**

**Acts : Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 - Section 21(1)(a), 22, rule 16(2); [Constitution of India](#) - Article 226**

**Appeal No. : RENT CONTROL No. - 35 of 2008**

**Appellant : Ambrish and ors.**

**Respondent : Additional District Judge Lko. and ors.**

**Advocate for Def. : C.S.C.; Pratap Singh Mehra, Advs**

**Advocate for Pet/Ap. : P.K.Khare, Adv**

**Judgement :**

1. Heard Sri P.K. Khare, learned counsel for the petitioner, Sri P.S. Mehra, learned counsel for the respondent.

2. By means of the present writ petition, petitioner has challenged order dated 14.01.2008 passed by Additional District Judge, Court No. 4, Lucknow/Appellate Authority allowing appeal filed by tenant/respondent, consequently rejecting petitioner's release application under Section 21(1)(a) of Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as the the U.P. Act 13 of 1972).

3. In the instant case, controversy relates to shop measuring 10' X 20' situated at 488/66, Daliganj, Lucknow. On 23 October, 1997, petitioners/landlords moved a release application under Section 21(1)(a) of U.P. Act 13 of 1972 (Annexure-2), case as set up by the petitioners that the shop has been let out on monthly rent of Rs. 85/- as per written agreement dated 01.10.1965 by their father to Sri Chunni Lal Kapoor/tenant, after his death, opposite party Nos. 2 to 10 became tenants. Petitioner No. 1/Sri Ambrish has no other space except shop in dispute, from which he wants to do business of general merchant in order to carry out livelihood for his family consists as under:-

1.Ambrish -petitioner/applicant

2.Smt. Madhu Havelia-wife of the applicant

3.Prince Havelia -son of the applicant

4.Km. Abhilasha Havelia-daughter of the applicant

Respondents/tenants filed written statement, tenancy of shop not denied. However, it is pleaded that petitioners have six shops in ground floor of house No. 488/66, Daliganj, Lucknow, so their need is not bona fide in respect to shop in question.

4. Further pleaded in written statement that petitioner No. 1 along with other co-landlords gave a consent for allotment of one door shop situated in ground floor of house No. 488/66, Daliganj, Lucknow accordingly allotted in favour of one Sri Satish Kumar as per provisions of Section 17(1)(1) of U.P. Act 13 of 1972 read with Rule 10(7) of the Rules. So, need of the petitioner No. 1 is not genuine and bona fide in comparison to their need, release application moved only to enhance rent of the shop, liable to be dismissed. Accordingly, PA Case No. 68 of 1997 (Ambrish and others v. Bhuushan Lal Kapoor) registered before the Prescribed Authority/ACAM-III, Lucknow allowed by judgment and order dated 15.09.2006 with observation that need of applicant/petitioner No. 1 is more genuine in comparison to the tenants/respondents.

5. Aggrieved by the same, the O.P. Nos. 2 to 10 filed an appeal under Section 22 of the U.P. Act 13 of 1972 (Rent Appeal No. 17 of 2006) allowed by appellate authority/Additional District Judge, Court No. 14, Lucknow. Hence, present writ petition has been filed.

6. Sri P.K. Khare, learned counsel for the petitioner/landlord while assailing order passed by appellate authority submits that main reason given by appellate authority while allowing appeal of tenant/respondents that before moving release application on 23.10.1997, petitioner No. 1 along with other co-owners has given a consent, in respect to allotment of another shop in the same building where the shop in dispute is situated, in favour of Sri Satish Kumar, so petitioner No. 1 (Sri Ambrish) who is 50 years old person, thereafter has no need to get the shop in question released in his favour rather his need is artificial and not bona fide is totally incorrect and wrong finding, because appellate court has failed to consider that if a consent given by petitioner No. 1 along with other co-owners for allotment of another shop in favour of Sri Satish Kumar in no manner wipe out subsequent need of petitioner No. 1 to move an application for release of the shop in question, as on 22.10.1998 a mutual partition taken place between sons of deceased/Babu Lal, original landlord of the shop in question by which it came in share of petitioner No. 1 (Sri Ambrish) thereafter a release application moved by him to get the shop in question to start his independent business of General merchant to earn livelihood of his family, is bona fide and genuine need, appellate authority failed to consider the same on wrong fact, so impugned order passed is contrary to facts, liable to be set aside.

7. Sri P.K. Khare, counsel for petitioner/landlord further submits that landlord is a best judge to choose accommodation from which he wants to do his business and in this regard neither any court nor tenant can dictate the term. Accordingly, order under challenge, cannot sustain.

8. Lastly, it has been argued on behalf of landlord by Sri P.K. Khare that on the basis of material evidence on record, it is clearly established that tenants/respondents do not made any effort to search any alternate accommodation since the date of moving of release application. Accordingly, order

passed by appellate court that need of tenant is more genuine in comparison to landlord liable to be set aside, release application rightly allowed by prescribed authority. So, present writ petition be allowed.

9. Sri P.S. Mehra, learned counsel for respondents/tenants while defending order passed by appellate court on the basis of pleadings as made in paragraph Nos. 8, 9, 10 and 12 in written statement submits that in the instant case, one shop in the same building allotted in favour of one Sri Staish Kumar in view of consent given by petitioner No. 1 along with other co-owners, so his need is not bona fide and genuine in respect to the shop in question, finding of fact recorded in this regard by appellate court cannot be interfered.

10. Sri P.S. Mehra, in addition to the abovesaid argument on the basis of supplementary affidavit filed by tenants/respondents dated 17.01.2011 has also submitted as under:-

A. That the petitioners have filed release application on 23.10.1997 under Section 21 of U.P. Act XIII of 1972 (Annexure No. 2 to the writ petition), for getting release the shop in the lawful occupation of the opposite parties since 01.10.1965.

B. That there are six shops in the building of the petitioners i.e. Shop No. 1 in the tenancy of M/s. Santosh Trading Company @ Rs. 1,300/- per month, Shop No. 2 in the tenancy of Shri Shiv Shanker gupta @ Rs. 1,500/- p.m., Shop No. 3 in the tenancy of Shri Ramesh Kumar at the rate of Rs. 60/-, Shop NO. 4 in the tenancy of Mr. Sushil Kumar Agarwal, @ Rs. 2,200/- per month, Shop No. 5 in the tenancy of opposite parties No. 2 to 4 @ Rs. 85/- per month and Shop No. 6 is in the occupation of petitioner No. 1 and petitioner No. 1 is running his business together his son namely Shri Shubham Havelia since last many years.

C. That the opposite parties have got no other shop for business in the city of Lucknow for which they have already tried since prior to 23.10.1997 to meet their requirement for doing business but could not get any other alternate accommodation to shift the business.

D. That the learned Prescribed Authority has not considered the evidence of opposite parties and recorded erroneous finding and allowed the release application that too ignoring the principle laid down under rule 16(2) of U.P. Act XIII of 1972.

E. The appellate authority while allowing the appeal of the tenant has rightly held that before moving the release application in the month of October, 1997, the petitioner along with other co-owners/landlords has given a consent for allotment of another shop on the premises in question where the shop in dispute is situated in favour of one Sri Satish Kumar, so the need of the petitioner No. 1 is neither genuine nor bona fide.

F. That the petitioners having one shop in their own premises in House No. 488/66, Daliganj, Lucknow in which the petitioner No. 1 and his son, namely, Shri Subham Havelia are doing their business of commodity business and another shop at Pragati market at Kapoorthala, Lucknow in which wife of petitioner No. 1 Smt. Ambrish Havelia is doing her business of "Pujan Samagree" since last 7/8 years.

G. Further on the basis of supplementary affidavit filed during the course of the argument it was also submitted by learned counsel or the tenant on the basis of the a certificate issued by President/Co-Treasure, Uttar Pradesh Yuva Vyapar Manda that the need of the tenant is more genuine in comparison to the landlord.

11. In view of the abovesaid facts, Sri P.S. Mehra, learned counsel for tenant/respondents submits that order passed by appellate court thereby allowing appeal of respondents/tenants is perfectly valid, needs no interference, so writ petition liable to be dismissed.

12. I have heard counsel for the parties and gone through the record.

13. So far as the factual matrix of the present case is concerned, it is not disputed between the parties that the shop situated in the premises having Municipal No. 488/66, Daliganj, Lucknow originally belongs to Sri Babu Lal, father of petitioners, let out to Sri Chunni Lal Kapoor by way of an agreement in the year 1965 at a

monthly rent of Rs. 85/-, after his death, petitioners become landlords/owners moved an application under Section 21(1)(a) of U.P. Act 13 of 1972, registered as P.A. Case No. 68 of 1997 before Prescribed Authority (Rent Control)/ Civil Judge, Mohan Lal Ganj, Lucknow to get the shop vacated for need of petitioner No. 1 to start independent business, initially written statement filed by Sri Bhushan Lal Kapoor, after his death O.P. Nos. 2 to 5 were substituted as his legal heirs they had inherited tenancy rights in respect to the shop/non-residential premises in the matter in question, Prescribed Authority vide judgment and order dated 15.09.2006 allowed release application holding that the need of petitioner No. 1 is genuine and bona fide, challenged by way of appeal before appellate authority by tenants/respondents allowed by order dated 14.01.2008.

14. From perusal of impugned order passed by appellate authority dated 14.01.1980, the sole reason given by it while allowing appeal of tenants/respondents was that before moving application for release dated 23.10.1997, petitioner No. 1 along with other co-owners have given a consent in the year 1996 for allotment of the shop in favour of one Sri Satish Kumar situated in the same premises in which the shop in question is situated. So, thereafter release application moved by him inter alia stating need therein is neither bona fide nor genuine keeping in view the fact that he is a 50 years old person and his income from other sources is Rs. 1150/- per month and regarding theory of mutual partition on the basis of which shop in question come to the share of petitioner No. 1 as set up between sons of original landlord, Sri Babu Lal is not correct. In view of the fact that consent given by petitioner No. 1 along with other co-landlord for allotment of another shop in the same building in favour of one Sri Satish Kumar in the year 1996, cannot be a bar or legal implemement in moving release application under Section 21(1)(a) of U.P. Act 13 of 1972 as the principle of res judicate will not apply in said situation because the principle of res-judicata apply only to situation which is static and not to challenging situation. So, finding given by appellate court in this regard is incorrect and wrong.

15. Further, principles of res judicata will not apply in the instant case as every application has to be decided independently and without being influenced by the judgment given in the earlier. To me it appears that in a case where no new facts

have come into existence and there have been no intervening change or circumstance the second application may not be entertainable on the principles of res judicata but where the landlord established a change of circumstance since the first application, the said case would require the court trying the second application to re investigate not only the question of bona fide requirement but also of grievous hardship and to find on the basis of intervening changed circumstances as to whether the landlord is entitled to a release to be made in his favour under Section 21 of U.P. Act No. 13 of 1972.

16. The test is whether the second proceeding involves a new cause of action or whether it is merely an attempt to reiterate the same facts and to get a judgment in his favour on the same old cause of action. Whether or not matter of res judicata must depend solely upon whether the issue to be decided by the court has already been litigated and decided between the parties. If the circumstances had changed it could not be contended that the issue between the parties remains the same. It is quite clear that a court can upon fresh evidence alter, vary the judgment previously, made if the cause of action of this subsequent proceeding is different than what it was in the former, but, of course, if there is no evidence of any fresh circumstances, the second application may be barred by principles of res judicata.

17. It may worthy or being noted that the question of greater hardship which is required to be decided under the proviso is also one which can change with the lapse of time. Every sort or circumstance may rise to change relevant fact on which the issue of greater hardship falls to be decided. In deciding the question of greater hardship the court must bear in mind that the change of circumstance may occur from day to day and a court will consider changed circumstances while deciding the second application for release made by the landlord. A trivial or insignificant change will not oust the applicability of the principles of res-judicata. Each case will have to be decided on its own fact for finding out as to whether the change is of a nature has altered the position of the parties. It if the answer is in the affirmative the principles of res-judicata would not be applicable.

18. However, legislature did not want the principles of res-judicata to apply to an application under Section 21, the only restriction imposed is that within an year of

the dismissal of the previous application, the second one cannot be moved. The bona fide need of petitioners/landlords must be considered when application for release has been moved and it cannot be said once they have given a consent for allotment of another shop in favour of one Sri Satish Kumar, it cannot be assumed that their need is neither genuine nor bona fide even in future.

19. Further in the instant case, the release application was moved by the petitioners on 23.10.1997 inter alia stating the need on the ground that the shop in question has come to the share of petitioner No. 1 and from the said shop, he wants to do business and earn livelihood for his family members. The said need cannot be negated on the ground that he has given a consent along with other co-landlords in respect to allotment of a shop on 12.02.1995 in the same building in favour of Sri Satish Kumar.

20. In the instant case, appellate authority on erroneous consideration and without any basis has rejected the fact that by way of mutual partition shop in question has come to the share of petitioner No. 1. Even otherwise, a landlord is a best judge to select a shop for his personal requirement and for his family member and for the said purpose he can choose from which shop he wants to do business, neither tenant nor any court can dictate a term to a landlord to do a particular business from a particular shop. Accordingly, the finding given by the appellate court while allowing the appeal of the tenant and argument made by Sri P.S. Mehra counsel for respondent on the basis of supplementary affidavit filed on 17.01.21011 are contrary to the law, cannot sustain.

21. In the case of Mohammad Sadiq v. District Judge, Pauri Garhwal and others,, 2007 (1) ARC 297, this court in paragraph No. 24 has held as under:-

"In the case of Smt. Sarla Ahuja v. United India Insurance Co. Ltd. AIR 1999 SC Page No. 103, it has been observed as under:-

"When a landlord asserts that he requires his building for his own occupation the Rent Controller shall not proceed on the presumption that the requirement is not bona fide. When other conditions of the clause are satisfied and when the landlord shows a prima facie case it is open to the Rent Controller to draw a presumption

that the requirement of the landlord is bona fide. It is often said by courts that it is not for the tenant to dictate terms to the landlord as to how else he can adjust himself without getting possession of the tenanted premises. While deciding the question of bona fides of the requirement of the landlord it is quite unnecessary to make an endeavour as to how else the landlord could have adjusted himself."

22. In the case of *Rishi Kumar Govil v. Maqsoodan and others*, 2007 (2) ARC 1, the Apex Court in paragraph No. 19 has held as under:-

"In *Ragavenra Kumar v. Firm Prem Machinery and Co.*, AIR 2000 SC 534 : 2000 SCFBRC 24, it was held that it is the choice of the landlord to choose the place for the business which is most suitable for him. He has complete freedom in the matter. In *Gaya Prasad v. Pradeep Shrivastava*, AIR 2001 SC 80. : 2001 (1) ARC 352 it was held that the need of the landlord is to be seen on the date of application for release. In *Prativa Devi (Smt.) v. T.V. Krishnan*, 1996 (5) SCC 353 it was held that the landlord is the best judge of his requirement and courts have no concern to dictate the landlord as to how and in what manner he should live.

Recently in the case of *Uday Shankar Upadhyay & Ors. v. Naveen Maheshwari*, 2010 SAR (Civil) 69, the Apex Court has held in paragraph No. 11 as under:-

"In our opinion, once it is not disputed that the landlord is in bona fide need of the premises, it is not for the Courts to say that "he" should shift to the first floor or any higher floor. It is well-known that shops and businesses are usually (though not invariably) conducted on the ground floor, because the customers can reach there easily. The Court cannot dictate to the landlord which floor he should use for his business; that is for the landlord himself to decide. Hence, the view of the Courts below that the sons of plaintiff No.1 should do business on the first floor in the hall which is being used for residential purpose was, in our opinion, wholly arbitrary, and hence cannot be sustained."

23. Lastly, from document on record, it transpired and established that tenant has not made any effort to search for an alternate accommodation since the date of moving of release application, the said fact is also not disputed by learned counsel for respondent felt comparative hardship and bona fide need against him and in

this regard appellate court has given finding, relevant portion reproduced as under:-

"The finding of the appellate court is totally incorrect and wrong finding as it is well settled proposition of law that if a tenant does not make any effort to search alternate accommodation then his need cannot be considered [See: Mst. Bega Begum and others v. Abdul Ahmad Khan (dead) by Lrs. And others, 1986 SCFBRC 346 :(1979) 1 SCC 273 and Badrinarayan Chunilal Bhutada v. Govindram Ramgopal Mundata, 2005 (2) ARC 899 and Harish Chand Bhatia v. Smt. Jora Begum 2008 (2) ARC 27]."

24. In view of the abovesaid facts, the argument advanced by learned counsel for respondent that this Court under Article 226 of [Constitution of India](#) cannot set aside the finding of fact recorded by court below is totally incorrect and misconceived finding because as per settled proposition of law if a finding of fact recorded by court below are perverse in nature and contrary to law then this Court while exercising the power of judicial review under Article 226 of [Constitution of India](#) can set aside the same. The said position exists in the present case as the finding recorded by appellate court while allowing appeal filed by tenants/respondents consequently rejecting petitioners' release application beside being contrary to facts also perverse in nature are thus, liable to be set aside.

25. For the foregoing reasons, present writ petition filed by the petitioners succeed is allowed, order dated 14.01.2008 passed by appellate authority set aside, consequently, order dated 15.09.2006 passed by prescribed authority in PA Case No. 68 of 1997, allowing the release application, is restored. Further keeping in view the facts that controversy in the present case.