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Court : Allahabad

Decided On : Sep-15-2010

Judge : Rakesh Tiwari, J.

Appeal No. : Civil Misc. Writ Petition No.56628 of 2010

Appellant : Smt. Parvati Devi and Others

Respondent : Judge, Small Causes Court, Gorakhpur and ors.

Judgement :

1. Heard learned counsel for the parties and perused the record.
2. This writ petition has been preferred for quashing of the order dated 04.09.2010 passed by Judge, Small Causes Court, Gorakhpur, Respondent no. 1 in P.A. Execution Case No. 12 of 2009: Piyush Kumar vs. Parvati and others, appended as Annexure-1 to the writ petition by which Paper no. 49-Ga has been rejected as well as for issuance of a direction restraining the respondent no. 1 from enforcing the order dated 28.10.2006 releasing the accommodation in question and also to restrain it from commanding forcible eviction of the petitioner from the building in question.
3. The brief facts of the case are that the respondent no. 2, Piyush Kumar-landlord filed an application under Section 21 (1)(a) of the U.P. Urban Building (Regulation

of Letting, Rent and Eviction) Act, 1972, which was registered as P.A. Case No. 02 of 2001 for release of the shop in dispute for his son Sudesh Kumar. The petitioner is alleged to be tenant of the said shop for the last 100 years. The petitioner after receiving notice by the Prescribed Authority filed objection against the release application and denied the bona fide need and comparative hardship set up by the respondent-landlord for his son who is not unemployed. The Prescribed Authority-respondent no. 1 allowed the release application on 28.10.2006.

4. Feeling aggrieved, petitioner preferred an appeal before the District Judge, Gorakhpur. On 01.09.2009 two separate orders were passed by the Additional District Judge, Court No.1, Gorakhpur. By first order dated 1.9.2009, appeal filed by the petitioner was dismissed and by a separate order rejected the Misc. Application filed by the petitioner under Section 21 (1) (a) of the Act.

5. Against the said orders dated 01.09.2009 and 28.10.2006, petitioner has approached this Court by filing Civil Misc. Writ Petition No. 60029 of 2009, wherein on C.M. Modification Application No. 155387 of 2010 an interim order as under was granted by this Court on 24.5.2010:

"Heard learned counsel for the parties.

This application by the petitioner tenant is for granting a reasonable time to vacate the disputed premises.

The petitioner tenant had challenged concurrent orders allowing release application of the respondent landlords and after hearing the parties, the writ petition was dismissed on 13th May 2010.

It is stated that the court below has fixed 25th of May 2010 as the date for his eviction and therefore, a reasonable time be granted for which he has submitted an oral as well written undertaking.

Accordingly, the petitioner may not be evicted from the disputed premises till 16th of August 2010, provided he deposits the entire rent up till that date with the court below within three weeks from

today. He is also directed to vacate the disputed premises and hand over vacant possession to the landlord without creating any third party rights on or before the said date i.e. 16th of August 2010. In case of default in payment of rent, the petitioner would be liable for eviction forthwith.

Subject to the aforesaid, this application is finally disposed off."

6. Ultimately, the writ petition was dismissed granting time to the petitioner till 16th August 2010 for vacating the shop in question subject to certain conditions. Pursuant to the judgment of the High Court dated 13.5.2010, respondent no. 2-landlord initiated execution proceeding by means of Execution Case No. 12 of 2009, in which the petitioners filed objection which was registered as Paper No. 49-Ga. In support of the said objection, the petitioners also filed an affidavit. However, during pendency of said execution case, respondent no. 2 died and an application for substituting his heirs was moved.

7. Judge, Small Causes Court, Gorakhpur-respondent no. 1 by order dated 04.09.2010 rejected the objection (paper no. 49-Ga) filed by the petitioners and issued Parwana Dakhal fixing 18.09.2010.

8. The contention of learned counsel for the petitioners is that the petitioners would suffer irreparable loss and hardship if they are forcibly evicted from the building merely on the strength of an order which is incapable of enforcement. He further contends that the order dated 04.09.2010 suffers from error of law as the court below has failed to record any reason for rejecting the objection filed by him and in absence of recording any reason the impugned order is liable to be set aside. It has also been submitted on behalf of the petitioners that as per Section 23 of the Act, the petitioners are entitled to raise objections and the Court of Judge Small Causes was under an obligation to decide the objection raised by the petitioners; that the order under Section 23 has to be a judicial order and is not merely an administrative order, therefore, objection of the petitioners could not have been rejected without any reason; that the order passed by the Prescribed Authority does not comply with the second proviso to Section 21 (1) of the Act; that since the order passed by the Prescribed Authority releasing the accommodation is

incapable of being enforced under Section 23 of the Act, the application filed by the respondent no. 2 for enforcement of the order of the Prescribed Authority is not maintainable and the entire enforcement proceedings are liable to be set aside.

9. Learned counsel for the petitioner further argued that enforcement is impermissible as it is incapable of being enforced, hence the undertaking given before the Court cannot come in the way of the petitioners for seeking decision on merits on the objections filed by them.

10. According to the petitioners' counsel, the court below have committed material irregularity in refusing to exercise the jurisdiction vested to him, inter alia, that the undertaking given by the petitioners was not complied with.

11. Next submission made by learned counsel for the petitioners is that admittedly the building in question is a non-residential building and as such the court while dealing with the release application under Section 21 (1) was bound to record findings only in accordance with second proviso to Section 21 (1) of the Act and in absence of any finding or conclusion recorded with respect to Section 21 (1) the order so passed by the Prescribed Authority becomes incapable of enforcement particularly, when proviso is mandatory in character. As this issue has neither been decided by the Prescribed Authority nor by the appellate authority nor by this Court, therefore, the said question has rightly been agitated by the petitioners in proceedings under Section 23 of the Act and this plea is not barred by Section 11 C.P.C.

12. With regard to undertaking given by the petitioners, learned counsel for the petitioners has relied upon a judgment rendered in the case of P.R. Deshpande vs. Maruti Balaram Haibatti reported in (1998) 6 SCC 507 wherein it has been held that "appeal filed by tenant against order of eviction would be maintainable notwithstanding any undertaking given by him before High Court that he would vacate the premises within a specified time".

13. He has also relied upon the judgment rendered in the case of Southern Railway Officers Association & another v. Union of India & others reported in (2009) 9 SCC 24. According to learned counsel for the petitioners paragraphs 40

and 41 wherein the Apex Court considered the judgment rendered in Thacker Hariram Motiram v. Balkrishan Chatrabhu Thacker reported in 1989 (2) SCC 655 observed thus:

"Regarding submission of the learned Senior Counsel for the respondents that the Union of India had waived its right to maintain the special leave petition by undertaking to comply with the order of the High Court, reliance has been placed on Thacker Hariram Motiram v. Balkrishan Chatrabhu Thacker. That case related to a rent control matter. It refused to exercise its discretionary jurisdiction under Article 136 of the Constitution of India stating: (SCC pp. 655-56, para 1)."

"1.....It appears that the undertaking was affirmed on 9.11.1984 wherein it was stated that the appellant would vacate and give vacant possession of the suit premises by 31.12.1985 i.e. to say after one year if 'by that time no stay order from the Supreme Court is received as I intend to file an appeal in the Supreme Court'. This undertaking filed by the appellant in our opinion is in clear variation with the oral undertaking given to the learned Judge which induced him to give one year's time. We do not wish to encourage this kind of practice for obtaining time from the court on one plea of filing the undertaking and taking the different stand, in applications under Article 136 of the Constitution. In that view of the matter the interim order is vacated and we direct that the appellant should hand over possession to the respondents forthwith".

14. Learned counsel for the petitioners has also placed reliance upon a judgment rendered in Civil Appeal No. 1521 of 1981: Sagir Ahmad v. IV Addl. District Judge, Agra and others decided on 24.4.1981 and in the case of Abdul Salam and others v. II Addl. District Judge, Varanasi and others reported in 1984 (1) ARC 360. Paragraph 2 of Abdul Salam v. IInd Addl. District Judge (supra) is relevant which is quoted as under:

"The consideration of the proviso was mandatory because the High Court was making an order for ejectment of the tenant on an application made by the landlord under Section 21 (1) (a) of the Act. It is not necessary for the Court to send the case back to the High Court for this purpose as learned counsel for the parties are agreed before us that in accordance with the proviso the appellant should be entitled to compensation in an amount equivalent to two years' rent. The appellant shall not be evicted from the premises for a period of six months from today provided the appellant furnishes an undertaking to the Registrar of this Court within two weeks from today that he will hand over vacant and peaceful possession to the respondent-landlord on the expiry of the said period and will not induct any other person or otherwise part with possession of the premises. If the undertaking is not furnished within two weeks from today or any of the above conditions is violated, this order granting time to vacate the premises shall stand vacated."

15. He has also relied upon a judgment rendered in Civil Misc. Writ Petition No. 5658 of 1982: Kishan Swarup v. The 1st Additional District Judge decided on 21.5.1982, wherein it has been held that compliance of second proviso to Section 21 (1) of the Act is mandatory and if the courts below failed to comply it, High Court will direct the landlord to pay the necessary compensation to the tenant and will not remand the case for this purpose.

16. I have considered the arguments of the learned counsel for the petitioners and perused the judgments cited by the petitioners.

17. According to paragraph 5 of the agreement appended as Annexure-10 to this writ petition, the petitioners could continue to occupy the shop till he pays the rent. A condition in any agreement is subject to law and if it is breached, the aggrieved party has remedy and therefore if condition no. 5 was breached, the petitioners had a remedy for breach of contract, but they could not have opposed the release application on the ground that the contract has been breached. Same is the position with regard to paragraphs 5, 7 and 10 of the objection filed by the

petitioners under section 23 of the Act, appended as Annexure-9 to the writ petition. If the court below had not passed any order under second proviso to Section 21 (1) (a) the same can be rectified by this Court which is apparent from the judgment rendered in the case of Sagir Ahmad V. IV Addl. District Judge (supra), pages 5 and 6.

18. Since the petition is being decided by the Court on merits, the question of effect of consideration of undertaking becomes immaterial.

19. The petitioners have lost their case from both the courts below. Concurrent findings are against them.

20. In my considered opinion since the petitioners had acquired their own shop, they are not entitled for compensation under the proviso to Section 21 (1) (a) of the Act No. 13 of 1972 from the landlord in this regard. As regards, impugned order is concerned, the petitioners have not complied with the order of this Court and the Authority concerned had rightly directed for issuance of Parwana in pursuance of the order passed on 24.5.2010 in Writ Petition No. 60029 of 2009, aforesaid.

21. For all the reasons stated above, I am of the view that this writ petition is not maintainable. It is, accordingly, dismissed.

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