(1993) 04 AHC CK 0032

Allahabad High Court

Case No: Civil Misc. Writ Petition No. 3138 of 1993

Praveen Kumar and others		APPELLANT
	Vs	
VII Additional District Judge, Meerut and others		RESPONDENT

Date of Decision: April 16, 1993

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 39 Rule 1
- Constitution of India, 1950 - Article 226
- Hindu Succession Act, 1956 - Section 3(2)
- Specific Relief Act, 1963 - Section 36
- Transfer of Property Act, 1882 - Section 105, 106
- Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 - Section 3(2)

Citation: AIR 1994 All 153

Hon'ble Judges: R.R.K. Trivedi, J

Bench: Single Bench

Advocate: Vivek Chowdhary, for the Appellant; Standing Counsel, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

1. In this petition counter-affidavit has been filed on behalf of respondent No. 2 who is the main contesting party. Rejoinder affidavit has also been filed on behalf of petitioners, and both the learned counsel for parties have agreed that petition may be disposed of finally at this stage. It is relevant to mention here that respondents 3 to 25 are pro forma parties and they have not been contesting the proceedings at any stage and the petition may be disposed of finally even in their absence and from the facts it is clear that no prejudice will be caused to them.

2. Facts giving rise to this petition are that respondent No. 2 filed Original Suit No. 1022 of 1992 claiming a decree of permanent injunction restraining petitioners not to dispossess her from the shop in dispute in pursuance of the decree dated 12-5-1979, passed in Original Suit No. 287 of 1977. She has claimed herself as tenant of the shop No. 84 (old), new number 332, situate in Mohalla Sabji Mandi, Kotla, Chaupala, Ghanta Ghar, City and District Meerut, being daughter of Hussain Bux, the original tenant who died in the year 1960, leaving behind a large number of heirs. Plaintiff claimed that after death of her father. She became tenant along with other heirs and she continued throughout to share the income and the tenancy rights. It was further stated that she was not party in Suit No. 287 of 1977 nor her tenancy was terminated by notice under S. 106 of the Transfer of Property Act and her tenancy is still subsisting and she cannot be legally ejected from the shop in dispute. The decree passed in the aforesaid suit is not binding on her. This suit was filed some time in October, 1992. In this suit, respondent No. 2 also filed an application under O. 39, R. 1, C.P.C. for grant of temporary injunction and also for the relief that she may not be dispossessed from the shop in dispute during pendency of the suit. The application was contested by petitioners who are the decree-holders of Suit No. 287 of 1977, on various pleas.
3. The trial Court by order dated 24-11-1992 rejected the application of respondent No. 2. The order was challenged in Misc. Civil Appeal No. 347 of 1992. Appellate Court has allowed the appeal by judgment and order dated 11-1-1993 and petitioners have been restrained from dispossessing respondent No. 2 from the premises in dispute till the disposal of the suit. Aggrieved by the aforesaid judgment of the appellate Court petitioners have approached this Court under Art. 226 of the Constitution.

4. Learned counsel for petitioner has submitted that Suit No. 287 of 1977 was filed against respondents Nos. 3 to 25 and they contested it tooth and nail. The suit was filed on the ground of default in payment of rent which was not paid in spite of several reminders. The rent was due from 1st June, 1973. Thereafter, tenancy was terminated vide notice dated 30-12-1976 which was personally served on several defendants and on some defendants by refusal. After contest the suit was decreed on I2-5-I979. Small Causes Court Revision No. 279 of 1979 was filed against the decree of the learned Judge, Small Causes which was dismissed on 28-4-1984. Thereafter the decree of ejectment was challenged in Civil Misc. Petition No. 6286 of 1984 in this Hon''ble Court. The writ petition was dismissed on 29-8-1992. Thereafter, defendants respondents Nos. 3 to 25 filed SLP in Hon''ble Supreme Court which was also dismissed. The present suit was filed by respondent No. 2 after the contest up to Hon''ble Supreme Court remained unsuccessful. The suit amounts to abuse of the process of the Court. Respondent No. 2 never showed any interest in the shop in dispute for the long period of 15 years when the Suit No. 287 of 1977 was being contested up to Hon''ble Supreme Court. Even prior to the aforesaid suit, there was litigation but it was never alleged that respondent No. 2 or her one more

sister Nasiran who are both married daughters have any interest in the shop in dispute. The suit has been filed with the only object that petitioners may not be able to enjoy the fruits of the decree passed in their favour. Learned trial Court after considering the facts and circumstances of the case refused to grant temporary injunction in favour of respondent No. 2. However, the Appellate Court has illegally allowed the appeal and restrained petitioners from dispossessing respondent No. 2. Learned counsel has further submitted that in Original Suit No. 287 of 1977 petitioners impleaded 27 parties representing almost the whole body of the tenants. Written statement was filed and in paras 2 and 10 thereof plea was raised that the sons are the real heirs and the rest of the persons have been illegally made parties and there is misjoinder of parties and the suit is bad for the same. There was no disclosure in the written statement that respondent No. 2 or any other daughter has any interest in the shop in dispute and the suit cannot be decided in their absence.

5. Learned counsel for petitioners has placed reliance in cases: (1987) 1 All Rent Cas 406: (1987 All LJ 870): (1986) 2 All Rent Cas 469 : (1987 All LJ 137): (1986) 1 All Rent Cas 79 and (1985) 2 All Rent Cas 393.

6. Learned counsel for respondent No. 2 on the other hand, has submitted that after death of Husain Bux all the heirs of Husain Bux according to the personal law applicable became the tenants of the shop in dispute and such heirs are tenants in common, as the accommodation in dispute was let out for commercial purposes. Learned counsel further submitted that such heirs were never joint tenants but in law their status was of tenants in common and as such all the co-tenants ought to have been impleaded in the suit and their tenancy should have been terminated by separate notice under Sec. 106 of the Transfer of Property Act. If the respondent No. 2 was not made party in the suit it was not her fault and her tenancy rights remained unaffected and she cannot be ejected from the accommodation in dispute. Learned counsel for respondents has placed reliance in a case : Ganpat Roy v. Addl. District Magistrate, Allahabad reported in (1992) 2 All Rent Cas 494, in support of her aforesaid submission. Learned counsel for respondents has further submitted that learned Appellate Court has considered the question involved in detail and has found prima facie case in favour of respondent No. 2 and has rightly granted injunction in her favour. The order does not suffer from any error of law.

7. I have seriously considered the submissions made by the learned counsel for parties and perused the judgments passed by the two courts below and the other material on record. From a perusal of the orders of the two courts below it is clear that both the courts have recorded a concurrent finding that prima facie it is established that respondent No. 2 is married daughter of late Husain Bux who was initially tenant and died in 1960. This finding is based on the affidavit filed by respondent No. 2 and also on a gift deed executed in 1968. It appears that in this gift deed respondent No. 2 and Smt. Nasiran, the two married daughters have been described as daughters of Husain Bux. This finding has not been disputed before

this Court. Since respondent No. 2 is daughter of Husain Bux she was one of the heirs of Husain Bux and thus she inherited tenancy rights on death of her father Husain Bux. The learned Munsif on the basis of certain judgment cited before him held that the heirs of Husain Bux were joint tenants in the shop in dispute and thus the decree passed in Suit No. 287 of 1977 may be executed as there was unity of title and one tenant could represent the entire body of the tenants. The Appellate Court, on the other hand, after considering the various authorities, has concluded that after death of the tenant his heirs will not be joint tenants but they shall be tenants in common as there cannot be unity of title. In my opinion, the view taken by the learned appellate court appears to be correct in this regard. The heirs of a tenant after his death cannot be joint tenants. They can be only tenants in common but it does not appear necessary to enter into a long discussion of the various authorities referred to and discussed in the judgments of the two courts below.

8. In my opinion, in cases of the facts of the present nature, the real question is to strike a balance between the equity and technicality of law. Respondent No. 2 cannot be allowed to defeat the decree passed by the Court below which has been upheld up to the Apex Court on a bald allegation that she was tenant after death of her father and was sharing in the business according to the tenancy rights. From the facts of the case it is clear that Husain Bux died in the year 1960. Respondent No. 2 has filed suit in October, 1992, i.e. after 32 years. This suit is the only positive act on the part of respondent No. 2 asserting her tenancy rights in the shop in dispute. In the plaint, she has not mentioned any specific instance on which basis it could be held that she actually continued to assert her tenancy rights and her rights in the business run in the shop in dispute. Had it been so, there could not be dearth of evidence or in any case some evidence could be filed before the courts to establish the prima facie case of exercising tenancy rights and actual participation in the business but after perusing the plaint of respondent No. 2, her application and affidavit under O. 39, R. 1, C.P.C. and the judgment of the learned lower Appellate Court, there is total absence of any such fact on which basis it could be said that respondent No. 2 was asserting her tenancy rights. The question may be considered from another angle too. Suit No. 287 of 1977 remained pending for over 15 years. The eviction from accommodation in dispute was on ground of default in payment of rent from 1-6-1973. If respondent No. 2 was actually continuing as tenant, and was sharing in the business, it is difficult to believe that she remained unaware of the pendency of the litigation for such a longtime. On basis of the normal human conduct the inference would be that the expenses incurred in the litigation up to Hon''ble Supreme Court must have been shared by all the tenants or in any case if the expenses were not shared at least worries may have been shared in view of the imminent threat of eviction after the decree was passed by the trial Court which has been upheld by the higher courts. However, respondent No. 2 remained totally unaffected in respect of both. She is a married daughter. She must have been residing with her husband, as prevalent in our society irrespective of the caste,

creed and religion. After marriage invariably daughters look after their own family and the affairs of the family and it is only in exceptional cases that they keep any interest in the business left by father. For rebutting these normal inferences, the respondent No. 2 ought to have come to Court with substantial piece of evidence and not merely bald allegations made in the affidavit. Hon''ble Supreme Court was faced with the identical problem in a case Smt. Rani Devi v. Bhola Nath reported in 1992 All WC 250, where this Court set aside the order of release on the ground of non-impleadment of married daughters. The Hon''ble Supreme Court disagreed with the view taken by this Court and observed as under:

"Indisputably, S. 3(a)(2) postulates that in this Act, unless the context otherwise requires (a) tenant in relation to a building means a person by whom its rent is payable, and on the tenant''s death (2) in the case of a non-residential building, his heirs. Therefore, as defined under S. 3(a)(2) all heirs of tenants are the tenants who succeeded intestate as per the Hindu Succession Act, 1956. Certainly, therefore, they are tenants within the meaning of S. 3(a)(2). They are entitled to succeed to the tenant''s lease-hold rights under the Act, including not merely to the liabilities to pay rent as contended by the appellant but also to continue the business until duly ejected as per the provisions of the Act. Whether non-impleadment of the married daughters would vitiate maintainability of the proceedings for ejectment. The finding recorded by the Rent Appellate Tribunal that by necessary implication the married daughters surrendered their tenancy rights inherited under the Act. After the demise of Lalu, the daughters evinced no interest to assert their rights, is well justified. Once that is found to be so, their non-impleadment as respondents does not vitiate the action for non-joinder of them as necessary parties nor maintainability of the proceedings for ejectment itself. The High Court committed grave errors of law in allowing the writ petition and dismissing the application for ejectment..."

9. In my opinion, the ratio of the aforesaid judgment is fully applicable to the facts of the present case. The lower Appellate Court after coming to the conclusion that respondent No. 2 was one of the tenants and her tenancy rights having not been terminated by a notice or by decree of the Court, she cannot be ejected from the shop in dispute, but it is not so. If there is no positive evidence of her participation in the business run in that shop, payment of rent or some other action on her part from which the Court could be satisfied to have a prima facie view that she continued to assert tenancy right, the decree passed in the earlier suit could not be rendered ineffective merely on her coming and filing a suit after 32 years after death of her father and 15 years during which the decree was passed and upheld, to say that she is tenant and cannot be ejected. The lower Appellate Court has failed to consider this vital aspect of the case. At this stage it would be appropriate to observe about one more sister of respondent No. 2 i.e. another married daughter of tenant late Husain Bux who is also probably waiting for her turn to file another suit. If the courts continued to exercise their equitable discretion to help such

unscrupulous litigants there will be no end of the litigation. This tendency is threatening the entire judicial system and has to be and should be curbed with firm hand otherwise no person after obtaining decree from the Court will be certain to get the fruits of the same.

10. Learned counsel for respondents submitted that the findings recorded by the lower Appellate Court are in favour of respondent No. 2 and as the lower Appellate Court felt satisfied with the three ingredients which are essentially the questions of fact, the order should be maintained. However, the submissions of the learned counsel cannot be accepted in view of the fact that respondent No. 2 failed to substantiate her allegations by any evidence worth the name. In the facts and circumstances of the case. Filing of affidavit alone and making bald allegations could not be sufficient and should not have been held sufficient. The lower Appellate Court illegally lost sight of the fact that the decree passed in favour of the petitioners has been upheld up to the Apex Court and such a decree should not be put at naught on the basis of the allegations wholly uncorroborated by any other evidence. This Court in number of decisions relied on by the learned counsel for petitioners has held that such attempts amount to abuse of the process of the Court as the tenants who lost the case after a long battle set up some body for challenging the decree passed against them. A Division Bench of this Court in a recent case Smt. Anjoo Sharma v. Suresh Chandra Jain reported in (1993) 1 All Rent Cas 291, held that after such a prolonged litigation if respondent No. 1 is not able to get the decree executed and permit fresh litigation in the suit, it would amount to abuse of the process of the Court. This situation obviously will cause irreparable loss to respondent No. 1. The appellant is not going to suffer anything. She is already residing with her husband. The balance of convenience, therefore, does not tilt in favour of the appellant. In the case before the Division Bench a married daughter was claiming to be tenant of the accommodation in dispute and she had filed suit challenging the decree passed in a suit for ejectment in which she was not a party. The observations of the Division Bench are squarely applicable in the present case. The grant of injunction is governed by provisions of the Specific Relief Act, and equitable considerations should invariably be the guiding factor, while recording findings on the question of prima facie case, irreparable loss and balance of convenience.

11. In my opinion in the present case there was nothing on which basis conclusion could be drawn in favour of respondent No. 2. The satisfaction should not be a mere satisfaction but should be a logical satisfaction. Considered in the light of the observations made above, the judgment of the lower Appellate Court suffers from manifest errors I of law and cannot be sustained.

12. For the reasons recorded above, the writ petition is allowed. The judgment and order dated 11-1-1993 passed by the learned 7th Additional District Judge, Meerut in Misc. Civil Appeal No. 347 of 1992 Smt. Chammo v. Praveen Kumar and others is

hereby quashed. There wilt be no order as to costs.

13. Petition allowed.