

(2012) 09 AHC CK 0213

Allahabad High Court

Case No: Civil Miscellaneous Writ Petition No. 8189 of 1997

Smt. Kunti Devi and
Others

APPELLANT

Vs

IIIrd Additional
District Judge,
Moradabad and
Another

RESPONDENT

Date of Decision: Sept. 14, 2012

Acts Referred:

- Hindu Marriage Act, 1955 - Section 11, 12, 16, 16(3), 4
- Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 - Section 20, 20(2)(a), 20(2)(f), 21

Citation: (2012) 11 ADJ 273 : (2013) 1 ALJ 158 : (2013) 2 AWC 1359

Hon'ble Judges: Sudhir Agarwal, J

Bench: Single Bench

Advocate: C.P. Upadhyaya, L.C. Pandey, B.J. Agarwal, K.S. Khare, Krishna Ji Khare and S.K. Rai, for the Appellant; A.P. Mishra, Vishnu Sahai, B. Dayal and C.S.C., for the Respondent

Final Decision: Allowed

Judgement

Hon'ble Sudhir Agarwal, J.

Heard Sri Salil Kumar Rai, Advocate, for petitioners and Sri B. Dayal, learned counsel appearing for respondent No. 2. The dispute relates to a shop situated in Mohalla Kanjari Sarai, Moradabad City. Petitioners claim to be landlord of the aforesaid shop. Respondent No. 2, Raj Kumar, son of Doongar Singh is the tenant.

2. It is said that initially, the shop was owned by Ram Singh, husband of petitioner No. 1 and after his death on 24.12.1977, petitioners have succeeded the shop in question. Petitioner-landlords filed SCC Suit No. 50 of 1989 for eviction of respondent No. 2 and recovery of arrears of rent and damages on the ground that

tenant had committed default in payment of rent since 1.12.1977 and therefore is liable for ejectment on the ground u/s 20 (2) (a) of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as "Act, 1972").

3. The suit was decreed by Trial Court i.e. Judge, Small Causes Court, Moradabad vide judgment and order dated 24.10.1991 on the ground that though the entire rent etc. was deposited by tenant on the first date of hearing and hence was entitled for benefit of sub-section (4) of Section 20 of Act, 1972, but, since he has denied and disputed title of landlord, therefore is liable for ejectment on the ground u/s 20 (2) (f) of Act, 1972.

4. Respondent No. 2 i.e. the tenant, preferred SCC Revision No. 66 of 1991 which has been allowed by Revisional Court, i.e. 3rd Additional District Judge, Moradabad vide impugned revisional judgment and order dated 23.11.1996, whereby Revisional Court has set aside Trial Court's judgment dated 24.10.1991; and, petitioners' SCC Suit No. 50 of 1989 has been dismissed. The Revisional Court has said that disputing heirship does not amount to disputing or denying title of landlord, and, therefore Section 20 (2) (f) of Act, 1972 would not be attracted in this case.

5. The only question up for consideration is whether there is a denial or dispute of title of landlord by tenant attracting Section 20 (2) (f) of Act, 1972.

6. Section 20 (2) (f) of Act, 1972 provides a ground for eviction of tenants and reads as under:

20(2) (f) that the tenant has renounced his character as such or denied the title of the landlord, and that latter has not waived his right of reentry or condoned the conduct of the tenant;

7. Counsel for parties have not disputed if such denial has taken place in the written statement during pendency of a suit for ejectment u/s 20 (2) (a) of Act, 1972, the landlord need not initiate any fresh proceedings but in the same suit, if the ground u/s 20 (2) (f) of Act, 1972 is found proved, a decree of ejectment against tenant can be passed in view of Apex Court's decision in [Majati Subbarao Vs. P.V.K. Krishna Rao \(Deceased\) by Lrs.,](#) .

8. The decision in Majati Subbarao (supra) has been followed and applied under Act, 1972 by this Court in Shyam Sunder v. IXth Additional District Judge, Aligarh and others, 2000 (1) ARC 165, where, in para 6, the Court has said:

The tenant says that he has not denied the title of the landlord and even if he has denied the title the advantage cannot be taken in the same suit. The plaintiffs have to file another suit because the cause of action must arise before the suit is filed. The cause of action to evict the tenant in the present case, if any, on the ground of denial of title has arisen after filing of the written statement. It is subsequent to the institution of the suit. The tenant cannot be evicted in the same suit. He also cited a Privy Council decision reported in (1919) L.R. 46 I.A. 109 (Privy Council) . It is true that

this Privy Council decision supports the petitioner. But in the present case the landlord-respondents after the death of Smt. Shanti Devi have filed an application for amendment. They got their plaint amended and have also sought the eviction of tenant on the ground that he has denied the title of the landlord in the written statement. The tenant has filed his objection and additional written statement. The tenant knew the case of the plaintiff. An issue was also framed on this question. Both the Courts below have decided the same. The tenant now cannot say that landlord should file another suit. Apart from it there is no justification for driving the landlord to file another suit. The eviction of the tenant can and should be considered in the same suit if the ground exists. This will avoid the multiplicity of the proceeding and unnecessary litigation. It is for this reason that this approach has been accepted by the Apex Court in [Majati Subbarao Vs. P.V.K. Krishna Rao \(Deceased\) by Lrs.,](#). The Apex Court after referring to the Privy Council decision has approved the decision of the High Court taking the similar view.

9. The above authorities have been followed in Writ-A No. 37816 of 2004 (Dr. Vijay Singh v. Smt. Ramrati Bai (since deceased) and others, decided on 13.9.2012.

10. In the case in hand, copy of written statement filed by respondent No. 2 is on record as Annexure 3 to writ petition. In para 1 respondent No. 2 admitted title of Late Ram Singh with regard to the shop in dispute. However, in reply to para 9 of plaint, he has said that plaintiffs are not heirs of Late Ram Singh and in para 7 of his additional pleas, he said that there is no legal heir or representative of late Ram Singh; Plaintiff, Smt. Kunti Devi, is not the wife of Late Ram Singh, and plaintiffs 2 to 7 are not sons and daughters of Late Ram Singh. The same assertion was repeated in para 9 of additional pleas and then in para 17 he has said that there is no relationship of landlord and tenant between the plaintiffs and defendant. The heirship of plaintiffs has further been denied in para 20 of additional pleas. The relevant averments are reproduced as under:

It is admitted in para-9 of the plaint that plaintiffs are not heirs of late Ram Singh.

(7) That the owner of the disputed shop was Ram Singh, who passed away and who was not survived by any heir as well.

(8) That the plaintiff is not wedded wife of Shri Ram Singh at all; nor are the plaintiffs 2 to 7 sons and daughters of Ram Singh

(9) That the plaintiffs are not heirs of Ram Singh at all, and for this very reason they do not have knowledge of the exact amount of monthly rental for the disputed shop.

(17) That the plaintiffs and the answering defendant have no relation with the owner of the house or with its tenant.

(20) That in the objections raised by the answering defendant in Application u/s 21, he had correctly and clearly contended that the plaintiffs are not the heirs of late

Ram Singh at all; nor is Smt Kunti Devi wedded wife of late Ram Singh.

(emphasis supplied)

(English Translation by the Court)

11. It is not the case of respondent No. 2 that plaintiff-petitioners at any point of time have waived right of re-entry or condoned his (tenant's) conduct regarding denial of title of plaintiff-petitioners on the shop in question. Once it is admitted that shop in question was owned by Late Ram Singh, his title is undisputed. Plaintiff-petitioner No. 1 is the widow of Late Ram Singh and plaintiffs 2 to 8 are the sons and daughters of Late Ram Singh. Issue No. 1, whether plaintiffs are owner and landlord of shop in question has been decided by Trial Court, after assessing evidence adduced before it.

12. The Revisional Court has not found the said findings about marriage and off springs thereafter incorrect but has further held that Smt. Kunti Devi, married to Ram Singh, when his first wife was alive, therefore under the Hindu Marriage Act, 1955 (hereinafter referred to as "Act, 1955"), second marriage of Ram Singh with Smt. Kunti Devi was void ab-initio and would not devolve any right upon the plaintiffs, i.e. Smt. Kunti Devi as well as children even after the death of Sri Ram Singh.

13. I have no hesitation in holding that Revisional Court has completely misdirected itself by failing to look into the evidence on record that marriage of Smt. Kunti Devi was solemnized on Basant Panchami in 1955 i.e. in February or March, 1955 though Act, 1955 came into force on 18.5.1955. Prior thereto, no statutory bar existed preventing a Hindu from solemnizing marriage(s) to have more than one wives. Besides, first wife of Late Ram Singh died in 1958. Thereafter defendant Nos. 2 to 8 were born out of the wedlock of plaintiff-petitioner No. 1 and (Late) Ram Singh. The judgment of Revisional Court is completely silent on this aspect and in a casual fashion it has simply made reference to Act, 1955 to hold that marriage was void ab-initio, conferring no right either on second wife and also the offshoots out of alleged unlawful marriage.

14. Moreover, with respect to children, the Revisional Court has committed another serious error of law. Though Section 11 of Act, 1955 declares a marriage solemnized after the commencement of Act, 1955 null and void, if it contravenes any of the conditions specified in Clauses (i), (iv), and (v) of Section 5. The interpretation of Section 11 of Act, 1955 came to be considered before the Apex Court in [Yamunabai Anantrao Adhav Vs. Anantrao Shivram Adhav and Another](#), . In para 3 of the judgment, the Court said that Act has been given overriding, effect vide Section 4 and no aid can be taken of earlier Hindu Law or any custom or usage so as to confer legality on a second marriage during the lifetime of first wife. The Court says that marriages covered by Section 11 are void ipso-jure, i.e. void from the very inception and have to be ignored as not existing in law at all. However, the Court also refers to

Section 16 of Act, 1955 and says that while the legislature has considered it advisable to uphold the legitimacy of paternity of a child born out of a void marriage, though it has not extended a similar protection in respect to a mother of the child. In order to appreciate the above observation, it may be appropriate to reproduce Section 11 of Act, 1955 and Section 16 thereof also as under:

11. Void marriages.--Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of Section 5.

16. Legitimacy of children of void and voidable marriages,--(1) Notwithstanding that a marriage is null and void u/s 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976, (68 of 1976) and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.

(2) Where a decree of nullity is granted in respect of a voidable marriage u/s 12, any child be gotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

(3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity u/s 12, any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.

15. It may be pointed out that Section came to be substituted vide Section 11 of Act No. 68 of 1976 with effect from 27.5.1976.

16. In [Smt. Parayankandiyal Eravath Kanapraavan Kalliani Amma and others Vs. K. Devi and others](#), it was contended that where a marriage is solemnized after enforcement of Act, 1955 but before coming of Section 16 into present form vide Act, No. 68 of 1976, the children born out of second or invalid marriages held prior to the aforesaid amendment should not be extended benefit u/s 16. The Court held that Section 16 irrespective of the fact whether the children were born earlier or later would cover all as is evident from para 18 of judgment which reads as under:

18.....though polygamy was not permitted, a second marriage was allowed in a restricted sense, and that too, under stringent circumstances, as for example, when there was a total failure of the object of marriage. Monogamy was the Rule and

Ethos of the Hindu society which derided a second marriage and rejected it altogether. The touch of religion in all marriages did not allow polygamy to become part of Hindu culture. This was the effort of community.

17. Regarding the marriages more than one made before, enactment of Act, 1955, this Court may refer to Apex Court's decision in [Bhaurao Shankar Lokhande and Another Vs. State of Maharashtra and Another](#), , observing:

Apart from these considerations, there is nothing in the Hindu Law, as applicable to marriages till the enactment of the Hindu Marriage Act, 1955, which made a second marriage of a male Hindu, during the lifetime of his previous wife, void.

18. The Apex Court in Parayankandiyal Eravath Kanapraavan Kalliani Amma (supra), following the above observations, said in para 19:

...if a second marriage did take place, children born of such marriage, provided it was not otherwise invalid, were not illegitimate and in the matter of inheritance, they had equal rights.

19. Thereafter Section 16 sub-section (3) came to be considered by Apex Court in [Jinia Keotin and Others Vs. Kumar Sitaram Manjhi and Others](#), , and therein it was clearly held that by virtue of Section 16 (3), wherever it is applicable, the children born out of a void marriage shall have right in the property of parents only and not in the ancestral property.

20. It is neither anybody's case here at nor any finding has been recorded by Courts below that property in dispute is an ancestral property. Hence the above authority would apply with full force to the present case.

21. Thus firstly this Court finds that the marriage of petitioner No. 1 having been solemnized in February or March 1955, i.e., before enforcement of Act, 1955 is not void for violating Section 5 thereof since it was not in existence on that date, and secondly, the children of petitioner No. 1 cannot be denied right of inheritance of property of their parents by virtue of Section 16 of Act, 1955. The Revisional Court has completely failed to consider relevant provisions of Act, 1955, the binding precedents of Apex Court as also the relevant facts in taking a view otherwise and reversing Trial Court's judgment. The impugned revisional judgment, therefore, cannot sustain.

22. In the result, Revisional Court's judgment dated 23.11.1996 (Annexure 5 to writ petition) is hereby quashed. The judgment of Trial Court dated 24.10.1991 is hereby restored and confirmed.

23. At this stage, learned counsel for tenant-respondent No. 2 stated that he may be given a reasonable time to vacate the shop in question since it is a non-residential accommodation and it would be appropriate to grant him some indulgence.

24. Sri Salil Kumar Rai, learned counsel for petitioners stated that in case respondent No. 2 hands over vacant possession of premises in question within such time as directed by this Court, he would have no objection to such indulgence.

25. In the above facts and circumstances, it is provided that respondent No. 2, if files an affidavit within 15 (fifteen) days from today before the Trial Court containing an undertaking that he shall vacate the premises in question and hand over its vacant possession to the landlords within three months from today, the proceedings for execution of eviction order shall not proceed.

26. However, in case of any default, the above indulgence granted by this Court shall automatically cease and it would be open to landlords to proceed for execution of eviction order immediately thereafter in accordance with law.

27. It is also provided that in case the respondent-tenant after filing affidavit, as aforesaid, and enjoying deferment of vacation of premises in question, fail to comply with any of the conditions, as aforesaid, he shall be liable to pay for such non compliance of pious undertaking given to the Court, an exemplary costs of Rs. 50,000/- which shall also be recovered from respondent-tenant alongwith execution proceedings, if such necessity arises. Subject to above directions, the writ petition is allowed.