

(1996) 05 AHC CK 0170

Allahabad High Court

Case No: C.M.W.P. No. 7241 of 1996

Narain Das

APPELLANT

Vs

Addl. District Judge/Special Judge
and Others

RESPONDENT

Date of Decision: May 9, 1996

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 19 Rule 2
- Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 - Section 11, 12, 13, 30

Citation: (1998) RD 651

Hon'ble Judges: Sudhir Narain, J

Bench: Single Bench

Advocate: V.K. Barman, for the Appellant; S.C. and Ashok Srivastava, for the Respondent

Final Decision: Dismissed

Judgement

Sudhir Narain, J.

The Petitioner seeks writ of certiorari for quashing the judgment and decree dated 13.4.1994 passed by the Judge Small Causes Court decreeing the suit for recovery of arrears of rent, ejectment and damages against the Petitioner and the order dated 15.2.1996 dismissing the revision against the aforesaid judgment.

2. The facts, in brief, are that Respondent No. 3 filed S.C.C. Suit No. 69 of 1989 for recovery of arrears of rent, ejectment and damages against the Petitioner on the allegation that he was a tenant of the accommodation at premises No. 24, Pratappura, Nagra, Jhansi at a monthly rent of Rs. 40. He was in arrears of rent since 1.3.1984. The Plaintiff sent a notice dated 1.3.1989 to the Petitioner which was served on him by refusal on 20.3.1989. He failed to pay arrears of rent and thereby committed default and was liable for eviction.

3. The Petitioner contested the suit and denied that there was any relationship of landlord and tenant between him and the Plaintiff. It was stated that his wife was tenant of the premises in question and Bihari Lal was its landlord. His wife, Smt. Kamla Devi, had paid rent to Bihari Lal for the period upto October 1989. He asked Smt. Kamla Devi to enhance the rent but as she did not accept, Bihari Lal got the present suit filed through his nephew, Brij Gopal, the Plaintiff.

Smt. Kamla Devi had sent rent by money order to Bihari Lal for the period 1988 to February 1989 but he refused to accept the same. She deposited the amount u/s 30 of U.P. Act No. XIII of 1972 on 15.12.90. The trial court dismissed the suit on 21.5.1992 on the ground that Plaintiff failed to prove that there was any relationship of landlord and tenant between him and the Petitioner. Respondent No. 3 filed revision against the said judgment. The revisional court allowed the revision on 1.11.1993 and remanded the case to the Judge Small Causes Court. After remand, on behalf of the Petitioner his wife Smt. Kamla Devi was examined and on behalf of Respondent No. 3 Bihari Lal was examined. The Judge Small Causes Court decreed the suit on 13.4.1994 on the finding that there was relationship of landlord and tenant between Petitioner and Respondent No. 3, the Petitioner was served with a notice and he failed to pay the rent. The rate of rent was Rs. 40 per month. The Petitioner filed revision against the said judgment and the revision has been dismissed on 15.2.1996. The Petitioner has challenged these orders in the present writ petition.

4. I have heard Sri V.K. Barman, learned Counsel for the Petitioner and Sri Ashok Kumar Srivastava, learned Counsel for Respondent No. 3.

5. Learned Counsel for the Petitioner vehemently urged that the District Judge remanded the case for fresh decision in the light of the evidence already adduced and after remand the Judge Small Causes Court had no jurisdiction to examine Bihari Lal, his uncle, in the case and Smt. Kamla Devi, wife of the Petitioner and this has vitiated the order passed by the Judge Small Causes Court. The controversy in the suit was whether the wife of the Petitioner, Smt. Kamla Devi, was the tenant of the premises in question and its landlord was Bihari Lal or the Petitioner was a tenant and Respondent No. 3 is landlord of the disputed premises. There was no documentary evidence to prove relationship of landlord and tenant. Before the Judge Small Causes Court, Respondent No. 3 had appeared as P.W. 1 and the Petitioner as D.W. 1.

6. The Judge Small Causes Court in his order dated 21.5.1992 had relied on the factor that Smt. Kamla Devi, wife of the Petitioner, had made deposit of the rent u/s 30 of U.P. Act No. XIII of 1972 in favour of Bihari Lal on 15.12.1990 during the pendency of the suit which indicates that Bihari Lal was landlord and Smt. Kamla Devi was tenant. Respondent No. 3 had filed affidavit of Bihari Lal (Paper No. 30C) on 9.4.1992 before the Judge Small Causes Court. In the said affidavit, Bihari Lal had stated that Smt. Kamla Devi, wife of the Petitioner, was not his tenant. He had no

concern with the property and Respondent No. 3 is its owner.

7. The revisional court set aside the judgment holding that the amount u/s 30 of the Act was deposited by Smt. Kamla Devi on 15.12.1990 after one and a half year of the institution of the suit. It was further observed that Bihari Lal had filed affidavit in the suit itself and in that affidavit, he had indicated that he is not owner of the premises in question. It was further observed that the Petitioner failed to prove in evidence that the accommodation was taken by Smt. Kamla Devi from Bihari Lal. The observation made by the revisional court reads as under:

In this context it is also relevant that Bihari Lal has denied on affidavit that he is the owner of the accommodation in question. This statement is against his own interest, and so it deserves consideration. The learned Judge, Small Causes Court, drew adverse inference by non-examination of Bihari Lal. His testimony was of negative character. On the other hand, the Defendant did not examine his wife Smt. Kamla Devi to prove that the accommodation was taken by her from Bihari Lal on a monthly rent of Rs. 10 only.

8. The affidavit of Bihari Lal was already on the record. The court while remanding the matter on 1.11.1993 made it clear that the statement made by Bihari Lal in his affidavit deserves consideration. Respondent No. 3 produced Bihari Lal for examination. Even if Bihari Lal had not been produced, his affidavit would have been taken as evidence by the trial court. In case Bihari Lal was produced to depose on oath, it was also for the benefit of the Petitioner as he was entitled for cross-examination. The court may permit a deponent of affidavit to appear for cross-examination under Order XIX, Rule 2, CPC. The revisional court had further made adverse comments against the Petitioner as he did not produce Smt. Kamla Devi in evidence. The Petitioner himself produced Smt. Kamla Devi in support of his version. The Petitioner did not raise any objection before the trial court as to why Bihari Lal and Smt. Kamla Devi are being examined on oath before the Court.

9. An affidavit of the Petitioner dated 12th March, 1996 has been filed. In para 3 of the affidavit, It has been stated that on the date of hearing both the parties were present before the trial court. During the arguments of the case, learned trial court asked the parties whether Bihari Lal and Smt. Kamla Devi, wife of the Petitioner are present in the Court. They were present in the Court. The trial court making undue and uncalled impression said that he will take the evidence of Bihari Lal and Kamla Devi. The counsel for the Defendant-Petitioner orally objected to it. In para 3, no date has been given. Secondly, the averment made in the affidavit had not been stated in the grounds of revision nor any averment made in the writ petition. This has been stated for the first time in the affidavit. Sri Hari Mohan Sharma, advocate, has filed an affidavit and he stated that he had argued the Revision No. 84 of 1985 but in the affidavit he nowhere stated that he had argued the case before the trial court or he was a counsel when the evidence was being taken. He had nowhere stated that the statement of Smt. Kamla Devi was taken by the Judge Small Causes

Court under his undue influence.

10. The Judge Small Causes Court by taking statement of Smt. Kamla Devi and examination of Bihari Lal in the aforesaid circumstances was not acting illegally. It was in fact for the advantage of both the parties. The affidavit of Bihari Lal was already on the record and Smt. Kamla Devi was produced by the Petitioner for his own benefit in support of his case. Now in this writ petition he cannot urge that the Judge Small Causes Court acted illegally by taking her evidence on the record. The Court remanding the matter had made adverse comment against the Petitioner for non-production of Smt. Kamla Devi in evidence before the trial court.

11. Learned Counsel for the Petitioner has placed reliance upon the decision *Abdul Wahab v. District Judge and Ors.* 1978 (UP) RCC 324, wherein it was held that the High Court remanded the case to the District Judge for decision but on remand, the District Judge acted illegally as instead of deciding the case himself remanded the case to the Prescribed Authority for decision and thereby he failed to exercise the jurisdiction vested in him. This case has no application to the facts of the present case. Learned Counsel for the Petitioner further placed reliance upon the decision *Prem Chand v. Krishna Chandra and Ors.* 1983 (1) ARC 8. In this case, the High Court had remanded the case to Judge Small Causes Court to decide the question regarding demand of rent. An application was made for taking additional evidence which was rejected by the Judge Small Causes Court. The revision against the said order was also rejected. This Court held that when the matter had been remanded, unless the High Court had permitted to lead additional evidence the trial court was justified in not taking additional evidence.

12. As discussed above, the Petitioner himself had produced his wife to fill up the lacuna in the case as commented by the revisional court in the remand order and Respondent No. 3 had only produced Bihari Lal to support the version in the above stated affidavit already filed by him in the suit and the Petitioner was given opportunity to cross-examine him, the trial court in these circumstances did not commit any illegality in examining Bihari Lal and Smt. Kamla Devi.

13. The second submission of the learned Counsel for the Petitioner is that the Judge Small Causes Court and the revisional court both acted illegally in placing the burden of proof upon the Petitioner. The Judge Small Causes Court held that there was relationship of landlord and tenant between the Petitioner and the Plaintiff-Respondent No. 3. His wife was not tenant of Bihari Lal as alleged by him. The rate of rent was Rs. 40 per month. The burden of proof regarding relationship of landlord and tenant and the rate of rent is certainly upon the Plaintiff. Learned Counsel for the Petitioner placed much emphasis on Para 8 of the order of the revisional court wherein observation was made that according to the Plaintiff, the rate of rent was Rs. 40 and according to the Defendant, the rate of rent was Rs. 10 per month. Once it is held that there is relationship of landlord and tenant, the burden of proof that the rate of rent is Rs. 10 per month is upon the Petitioner. The

Petitioner denied that there was any relationship of landlord and tenant between him and the Plaintiff. He did not set up the case that he is a tenant at the rate of Rs. 10 per month and not of Rs. 40 per month. According to him, his wife is tenant at the rate of Rs. 10 per month and Bihari Lal is landlord. The trial court having found that Bihari Lal was never the landlord and the wife of the Petitioner was not the tenant of Bihari Lal, the rate of rent was accepted at Rs. 40 per month on the basis of evidence adduced by the Plaintiff. If the version of the Petitioner was that his wife was a tenant of Bihari Lal at a monthly rent of Rs. 10, the burden of proof of this allegation was certainly upon the Petitioner. The view taken by Respondent No. 1 is not erroneous in law.

14. The last submission of the learned Counsel for the Petitioner is that Respondent No. 3 appeared as P.W.I. He made statement that the premises in question was let out four or five years ago by his father. The statement was made on 6.4.1992. It is contended that according to this statement, letting was done in the year 1987 and this letting was void in violation of Sections 11 and 13 of U.P. Act No. XIII of 1972. No suit can be filed for recovery of arrears of rent, ejectment and damages on the basis of contract which is unenforceable under the law and void. The Petitioner had filed written statement and he had not taken this plea in his written statement. In absence of this plea, there was no issue framed by the court below. The Petitioner cannot be permitted to take this plea before the revisional court or in this writ petition. The parties must be aware of the points which are in issue in the suit if the suit is to be decided on that issue.

15. Learned Counsel for the Petitioner has placed reliance upon the decision in Navin Chandra Sharma v. VIth Additional District and Sessions Judge, Meerut and Ors. AIR 1983 All 116. In this case the Defendant had taken a plea in the written statement that the contract of tenancy set up by the Plaintiff was void and unenforceable in law having been entered into in breach and disregard of express statutory provision contained under U.P. Act No. XIII of 1972. In the Full Bench decision in Nutan Kumar and Ors. v. IInd Additional District Judge, Banda and Ors. 1993 ALR 437, the question of law as framed by the learned Single Judge was decided and it was held that an agreement of lease between the landlord and tenant for letting an accommodation of a building in contravention of provision of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 is void and the agreement is not enforceable in law and a decree for ejectment of a tenant cannot be passed in favour of the landlord on the basis thereof. The Full Bench was not considering a situation where the tenant had not raised this plea and has raised for the first time in revision or in the writ petition. In case, the tenant raises this question in the written statement, an issue could have been framed and the matter could have been decided. It would have been open to the Plaintiff also to file an application for declaration of vacancy u/s 12 of the Act if the tenancy is treated as void. Further, the Petitioner was denying the relationship of landlord between him and Respondent No. 3.

16. In view of the above, there is no merit in the writ petition. It is, accordingly, dismissed.