

**(2014) 07 AHC CK 0159**

**Allahabad High Court**

**Case No:** C.M.W.P. No. 3819 of 2008

Hitendra Jain

APPELLANT

Vs

Vimal Kumar Tripathi

RESPONDENT

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**Date of Decision:** July 30, 2014

**Citation:** (2014) 106 ALR 632 : (2014) 5 AWC 5333

**Hon'ble Judges:** Pankaj Mithal, J

**Bench:** Single Bench

**Advocate:** Yogendra Kumar Srivastava, Ashish Agrawal and Anuj Agrawal, Advocate for the Appellant; Prateek Sinha, Pankaj Agrawal and V.K. Tripathi, Advocate for the Respondent

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### **Judgement**

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Pankaj Mithal, J.

Heard Sri Ashish Agrawal, learned Counsel for the petitioner and Sri Pankaj Agrawal, learned Counsel for the respondent. The dispute in the writ petition is about a shop. It was under the tenancy of the respondent for a long time. Petitioner purchased it from previous owner vide sale-deed dated 22.10.1999. He applied on 24.1.2000 for release of the above shop under section 21(1)(b) of the U.P. Act No. 13 of 1972, after service of notice dated 11.10.1999 upon the respondent/tenant. The release application was got amended vide application dated 19.1.2004 which was allowed on 2.4.2004 and the release application was converted into one under section 21(1)(a) of the Act.

2. In short, the release application was initially filed on the ground of dilapidated condition but on amendment it was converted into that of bona fide need.

3. The release application has been rejected by the Courts below holding that the same was not maintainable as it was filed before the expiry of statutory period of

three years from the date of purchase of the property and that six month's notice was not given.

4. The first proviso to section 21(1) of the Act provides that where the building was in the occupation of a tenant since before its purchase by the landlord, no application shall be "entertained" on the grounds mentioned in Clause (a) of sub-section (1) of section 21 unless a period of three years has elapsed from the date of its purchase and the landlord has given a notice in that behalf to the tenant not less than six months before such application.

5. The aforesaid proviso lays down two conditions for maintaining the release application on bona fide need against a tenant who is in occupation as tenant before the purchase of the building by the present owner/landlord. First, a period of three years must expire before the application is "entertained" and second six months notice must be given to the tenant before such application.

6. In the case in hand, the release application was initially filed under section 21(1)(b) of the Act in which case the aforesaid proviso was not applicable. Therefore, neither of the above two conditions were to be followed before filing or entertaining the application. The application was got amended into one under section 21(1)(a) of the Act vide order dated 2.4.2004. Therefore, the date of amendment would be treated as the date for entertaining the application under section 21(1)(a) of the Act. The said date happens to be a date after three years of the purchase of the property by the petitioner. In view of the above, the application was neither premature or not maintainable.

7. The rider imposed under the first proviso to section 21(1) is in respect of entertaining of the application and not on its institution. This has been clarified by the Supreme Court in the case of [Martin and Harris Ltd. Vs. Vith Additional District Judge and Others](#). In the said case the Apex Court made a distinction between the words "entertain" and "institution" and concluded that both are distinct and cannot be equated. It was observed therein that the word "entertained" used in first proviso to section 21(1) of the Act in connection with the ground mentioned in Clause (a) would necessarily mean entertain the ground for consideration for the purpose of adjudication on merits. Thus, it is the date of amendment of the application and allowing it to be converted into one under section 21(1)(a) of the Act which is relevant to recognise the date of entertaining the application on above ground.

8. Sri Pankaj Agrawal, learned Counsel for the petitioner has submitted that in case any amendment is allowed it generally relates back to the date of institution of the suit/petition and in support has relied upon [Sampath Kumar Vs. Ayyakannu and Another](#).

9. In the said case it has been held by the Apex Court that once a plaint is allowed to be amended and the amendment is incorporated it relates back to the date of institution. However, the aforesaid decision further provides that the Court can

direct in appropriate cases that the amendment should not relate back to the date of suit. In the present case, the order allowing the amendment application is silent as to whether the amendment shall take place from the date of institution of the suit or from the date it has been allowed. But looking to the fact that the ground of bona fide need was permitted to be added by the amendment and previous to it the application was only on the ground of dilapidated condition, it would be appropriate to hold the said amendment to be prospective in nature. Therefore, the application for release on the ground of bona fide need would be treated to be one which has been entertained on the date of amendment i.e., 2.4.2004. On the said date the waiting period of three years for entertaining an application under section 21(1)(a) of the Act was over.

10. The prescribed authority has recorded a finding that after purchase of the property the petitioner/landlord has given a notice dated 10.11.1999 to the respondent/tenant. The said notice (paper No. 19 Ga) on record proves that the petitioner/landlord in the said notice has clearly pleaded his bona fide need and need for getting the shop in dispute vacated on that ground.

11. The aforesaid notice is sufficient compliance of the second condition contained in the first proviso to section 21(1) of the Act. It was given six months prior to the entertainment of the application for release under section 21(1)(a) of the Act. The issuance of said notice prior to expiry of three months statutory period for entertaining the application on the ground of bona fide need is not fatal as the said proviso itself provides that six months notice may be given even before the expiry of period of three years.

12. Therefore, in view of the above notice dated 11.10.1999 and the fact that the release application on the ground of bona fide need had been entertained on 2.4.2004, it is not premature or barred by first proviso to section 21(1)(a) of the Act. The Courts below as such have manifestly erred in holding otherwise.

13. It has also been argued that the Courts below have held that the petitioner/landlord has no bona fide need of the shop in dispute. A very reading of the impugned judgment and orders reveals that the prescribed authority has recorded finding on the bona fide need of the petitioner in a very cursory and casual manner. It has non suited the petitioner/landlord on the ground of bona fide need simply for the reason that he had purchased the tenanted property with open eyes knowing very well that the respondent/tenant is sitting therein for such a long period. The reasoning so given by the prescribed authority is wholly untenable in law as when the statute itself provides for a remedy of release of the tenanted property on the ground of bona fide need even if the tenant happens to be an old one than it is incumbent upon the prescribed authority to adjudge the genuineness of the need of the owner/landlord on merits without being swayed by the aforesaid fact.

14. The Appellate Court has also brushed aside the question of bona fide need on the ground that the parents of the petitioner/landlord have other shops and he can utilize one of those shops to satisfy his need. No evidence has been discussed and no reasoning has been given in support of the above finding. The shops alleged to be available with the petitioner's parents cannot be regarded as the property of the petitioner/landlord which he can use according to his wishes. Therefore, the reasoning that the shops of the parents can satisfy his need is palpably illegal.

15. In view of the above, the finding on bona fide need as recorded by the Courts below is also not tenable.

16. Further, the prescribed authority failed to record any finding on comparative hardship of the parties which is mandatory for deciding a release application under section 21(1)(a) of the Act. The finding on the comparative hardship returned by the Appellate Court is again on the basis of the shops of the parents of the petitioner and that the petitioner is a young man who can run about to do his own business from any place whereas the respondent/tenant has earned a goodwill of doing business in the shop in question.

17. In view of the aforesaid facts and circumstances of the case, the impugned judgment and orders dated 20.12.2007 passed by the District Judge, Mainpuri and dated 31.1.2007 passed by the Prescribed Authority/Additional Civil Judge Senior Division) Court No. 1, Mainpuri are quashed and it is held that the release application filed by the petitioner under section 21(1)(a) is not hit by the first proviso to section 21(1)(a) of the Act and, therefore, requires reconsideration on merits afresh. Accordingly, the prescribed authority is directed to reconsider and decide the release application in accordance with law, as expeditiously as possible, preferably within a period of six months from the date of production of a certified copy of this order. The writ petition is allowed accordingly.