
Rakshma Tiwari Vs Upper Zila Magistrate (Nagar) and Others

Writ-A. No. 38181 of 2015

Court: ALLAHABAD HIGH COURT

Date of Decision: Jan. 12, 2016

Acts Referred:

Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 - Section 12, Section 16(4)

Citation: (2016) 115 ALR 664 : (2016) 3 ARC 817 : (2016) 1 RCRRent 481

Hon'ble Judges: Sunita Agarwal, J.

Bench: Single Bench

Advocate: A.R. Dube, for the Appellant; Ashutosh Sharma, G.S.D. Mishra and Virender Singh, for the Respondent

Final Decision: Disposed off

Judgement

@JUDGMENTTAG-ORDER

Sunita Agarwal, J.

1. Perused the records of the Writ Petition No. 8988 of 2015 (Bharat Bhandari v. Rent Control Officer/City

Magistrate, Kanpur Nagar and others) decided on 16.2.2015, sent by the Office.

2. Heard Sri Shobhit Dube holding brief of Sri A.R. Dube, learned counsel for the petitioner and Sri Jafar Nayar, learned Senior Advocate

assisted by Sri Ashish Gupta, learned counsel for the respondent No. 2.

3. By means of the present writ petition, the petitioner is challenging the order dated 20.6.2015 passed by the Additional District Magistrate (City)

Kanpur Nagar in staying further proceeding in the release matter in view of the interim order dated 30.5.2015 passed in Rent Revision No. 7 of

2015 and the order dated 11.5.2015 passed in Contempt Application (Civil) No. 2799 of 2015 (Bharat Bhandari v. Shri Ashutosh Mohan

Agnihotri, R.C.E.O./City Magistrate & 2 Others) pending before this Court.

4. The brief facts of the case relevant to decide the controversy in hand are that an application under Section 16(4) of U.P. Act No. 13 of 1972

was filed by the petitioner Smt. Rakshma Tiwari on 13.4.2015. The assertion therein was that the tenement comprises of four rooms, latrine,

bathroom and a small Varandah in house No. 59/41, Birahana Road, Kanpur Nagar was in the tenancy of late Ishwardas Bhandari. After death of

Ishwardas Bhandari, his heirs had acquired separate residential houses and they are residing therein. There is one house namely house No. 327-D

Block, Shyam Nagar in which the heirs of late Ishwardas Bhandari are residing with their family.

5. The vacancy was declared on 26.12.2014 and thereafter the release was allowed on 8.4.2015. Against the order of vacancy dated

26.12.2014, the respondent No. 2 namely Bharat Bhandari had filed a Writ Petition No. 8988 of 2015 which was dismissed on 16.2.2015. A

correction application was filed in the said writ petition which was decided on 23.2.2015. Even after the release of the tenement i.e. the

accommodation as described above, the possession has not been delivered to the petitioner and hence the application was filed for execution of

the order of vacancy which is registered as Case No. 11 of 2015. Notice was issued to the respondent No. 2 who had appeared on 11.5.2015

and filed his objection therein. In his objection, the respondent No. 2 has stated that a Revision No. 7 of 2015 has been filed by him challenging

the release order in which an interim order dated 30.5.2015 has been passed. As the eviction of the objector has been stayed by the revisional

court, the matter cannot proceed.

6. The petitioner landlady on the other hand submitted that the respondent No. 2 had succeeded in getting an interim direction that he should not

be evicted from the third floor of the building in question by placing incorrect facts before the Revisional Court below as also before this Court. In

fact, the accommodation at the second floor of the building in question was in occupancy of late Ishwardas Bhandari and has been declared vacant

by order dated 26.12.2014. There is no interim order with regard to the second floor of the building in question and hence the execution matter

can proceed.

7. An affidavit of Bharat Bhandari filed in Original Suit No. 2566 of 2012 was brought on record to submit that he had admitted his possession of

four rooms at the second floor of the building in question.

8. It was recorded by the respondent No. 1, the Additional District Magistrate that in Contempt Application (Civil) No. 2799 of 2015, he has

been impleaded as opposite party and on 11.5.2015, this Court has directed to call for his report. Further in Rent Revision No. 7 of 2015, an

interim order dated 30.5.2015 has been passed staying the effect and operation of the order dated 8.4.2015 with regard to the third floor of the

disputed house only and therefore he had stayed the execution proceeding. Hence this petition.

9. Challenging this order, learned counsel for the petitioner had submitted that the respondent No. 2 got the orders in the writ petition filed by him

against the order of vacancy by placing incorrect facts before this Court that too by filing a correction application in the said writ petition. While

disposing of the correction application only this much has been observed by this Court that the rejection of the writ petition will have no effect on

the accommodation at the third floor. This order was passed ex-parte and hence the petitioner could not get any opportunity to place the correct

facts. In the contempt application, notice was accordingly issued.

10. So far as the interim order passed in the revision is concerned, the submission is that the effect of the order of the release has been stayed only

with regard to the third floor of the building in question. In any case, the vacancy order pertains to the accommodation at the second floor of the

building which is in illegal occupation of the respondent No. 2.

11. It was specifically stated by the learned counsel for the petitioner that there does not exist four rooms, one latrine and bathroom and open

Varandah"" at the third floor of the house in question and as such the claim of the respondent No. 2 that under the garb of second floor, he is being

evicted from the third floor of the building in question is incorrect.

12. Initially this Court passed an order dated 14.7.2015 directing the Rent Control and Eviction Officer to proceed with the matter and further to

file his explanation in the pending contempt petition. However, on the appearance put by the respondent No. 2, it was directed on 5.10.2015 that

Form C"" issued by the Rent Control and Eviction Officer shall not be given effect to.

13. However, on the contentions of Sri Jaffar Nayyar, learned Senior Advocate for respondent No. 2 and Sri Sobhit Dube, learned counsel for

the petitioner, an Advocate Commissioner was appointed to inspect the building in question so as to get a report regarding the existing

accommodation at the second and third floor of the house in question namely house No. 59/41, Birahana Road, Kanpur Nagar.

14. Sri Raj Kumar Tripathi, Advocate Commissioner has submitted a detailed report dated 15.10.2015 in the Court. Alongwith the inspection

report, another report dated 10.10.2015 has been filed to show that both the parties namely the respondent No. 2 and petitioner's father Sri O.P.

Bajpai were present at the time of inspection. In the report, position of the entire accommodation with detailed description of ground floor, first

floor, second and third floor with the photographs of the front portion of the main road at the west side and another gate on the east side of the

building including the photographs of each floor have been appended. This inspection report has been supplied to the learned counsel for the

respondent No. 2.

15. The respondent No. 2 has filed his objection to the report on 6.11.2015 through a supplementary affidavit. Along with the said supplementary

affidavit respondent No. 2 had also appended certain photographs to indicate the front and back portion of the building, photographs of each floor

inspected by the Advocate Commissioner to assert that the Advocate Commissioner has wrongly mentioned one floor between first floor and

ground floor as a mezzanine floor. In fact the building in question is ""Ground plus four floors"" which cannot be described as G1, G2, first floor,

second floor and third floor. One floor which has been described as ""Loft"" by the Advocate Commissioner contains two rooms, a Kitchen and a

separate bathroom and latrine besides an ""Angan"" and ""Balkani"" where the windows of two rooms open. This entire floor which is an independent

floor cannot be described as a ""Loft"" or ""Duchhatti"" and as such the contention of the respondent that he is tenant of four rooms accommodation at

the third floor is correct.

16. The vacancy order dated 26.12.2014 was obtained with regard to second floor of the premises in question by placing incorrect facts before

the RC & EO and hence the order of release cannot be executed. In support of his submission, the learned Senior Counsel for the respondent No.

2 submits that the ""Loft"" as has been described in the "Oxford Dictionary" is a room or space directly under the roof and inside a roof. He further

submits that the Rent Revision No. 7 of 2015 has been filed wherein the eviction of respondent No. 2/revisionist has been stayed with regard to

the third floor of the disputed house and therefore the execution matter cannot proceed.

17. Having considered the submissions of learned counsel for the parties and perused the record. It appears that in the present writ petition filed by

the landlord and the earlier writ petition filed by the respondent No. 2 against the order of vacancy, the main contention of the respondent No. 2,

Bharat Bhandari is that he is in occupation of third floor of the house in question i.e. house No. 59/41 Birahana Road, Kanpur Nagar. As he is still

occupying the third floor, the vacancy order wherein the accommodation of Bharat Bhandari the respondent No. 2 has wrongly been described at

the second floor has been obtained by the landlady by placing incorrect facts and wrong report of the Rent Control Inspector.

18. In view of this submission, the reasons for declaration of vacancy by the order dated 26.12.2014 becomes all the more relevant.

19. A careful perusal of the vacancy order indicates that the vacancy has been declared with regard to four rooms, latrine and bathroom and a

small ""Varandah"" (the accommodation in occupation of late Ishwardas Bhandari), at the second floor. It is specified in the operative portion of the

order that the above mentioned accommodation which was in occupation of late Ishwardas Bhandari has been declared vacant in view of Section

12 of U.P. Act No. 13 of 1972. The original tenant namely late Ishwardas Bhandari was allotted the accommodation in question at house No.

59/41. After his death the tenancy had devolved upon his only son Krishna Gopal Bhandari. With the death of Krishna Gopal Bhandari, his wife

Pushpa Bhandari and three sons namely Bharat Bhandari, Divya Roop Bhandari and Sanjay Bhandary became joint tenant of the accommodation

in question.

20. The documents on record indicate that names of Bharat Bhandari and Divya Roop Bhandari have been recorded in the Municipal record as

owner of house No. 327 D-Block, Shyam Nagar, Kanpur Nagar. Whereas Sanjay Bhandari was living separately at Kakadev, Kanpur as per

own contention of Bharat Bhandari i.e. the respondent No. 2. This apart there are papers of registration of Maruti Car, address given in the bank

statement by the wife of Bharat Bhandari namely Kamini Bhandari, Voter List 2014, Gas connection etc which indicate that Bharat Bhandari and

his wife had mentioned their residence as 327 D-Block, Shyam Nagar, Kanpur Nagar. This apart the electricity connection in the name of Bharat

Bhandari of the accommodation in question namely house No. 59/41 has been disconnected on 31.3.2012 for non-payment of electricity dues.

The reading of Telephone bill of the accommodation in question in the name of Bharat Bhandari is "Zero". On the other hand Bharat Bhandari did

not produce any document to establish that he is still occupying the accommodation in the house in question. It was held by the Rent Control and

Eviction Officer that as the tenant had acquired a residential house in the same municipality, he shall be deemed to have ceased to occupy the

accommodation under his tenancy under Section 12 of the Act.

21. It is noteworthy that in the present petition, the respondent No. 2 is only contesting the execution proceeding on the ground that there is an

interim order of the revisional court and also a direction of this Court in the earlier writ petition not to evict the respondent No. 2 from the third

floor of the building in question. On the other hand the petitioner is seeking eviction of the respondent No. 2 who has been declared unauthorised

occupant by order dated 26.12.2014. The respondent No. 2 had also contested the proceeding for declaration of vacancy in the earlier writ

petition on the ground that he is tenant of the third floor and has wrongly been mentioned as tenant of the second floor. The Rent Control Inspector

had given a wrong report after inspection of the second floor and therefore, the report could not be looked into.

22. So far as this contention of the respondent No. 2 is concerned, a careful perusal of the vacancy order clearly indicates that the vacancy has not

been declared solely on the report of the Rent Control Inspector. The Rent Control and Eviction Officer had declared vacancy on two grounds

namely that the tenant had acquired a residential house in the same municipality which is house No. 327 Sujatganj, Shyam Nagar, Kanpur and

further he had removed all his belongings from the accommodation in question as the electricity connection in his name had been disconnected

much earlier i.e. on 31.3.2012 and there is "zero" reading in the telephone bill. Other documents pertaining to the house existing in the name of the

tenant Bharat Bhandari were also considered to reach to a conclusion that he had acquired a residential house in which he had already shifted.

23. This finding cannot be challenged merely on the ground that the report of the Rent Control Inspector is incorrect or the respondent No. 2 is

occupying the third floor and not the second floor and therefore, the vacancy order is bad.

24. It appears that the respondent No. 2 has got stay of the eviction order only by hammering on one fact that he is in occupation of the third floor

and not the second floor. In the present petition also the same dispute has been raised by the respondent No. 2 and in order to resolve this dispute,

the report of Advocate Commissioner has been called for. Now the respondent No. 4 is challenging the Commissioner's report on the ground that

one floor of the house in question has wrongly been described as ""Loft"" or ""Duchhatti"" and adding this floor, there would be four floors apart from

the Ground floor in the house in question. The floor which has been described as second floor having four rooms, latrine, bathroom and a small

Varandah"" is actually the third floor which was allotted in the name of late Ishwardas Bhandari, the grand father of the respondent 2.

25. Looking to this submission one thing is clear that indisputably the respondent No. 2 is claiming his occupation only on one floor of the house in

question which was allotted in the name of his Grand father late Ishwardas Bhandari. It is also not disputed that the respondent No. 2 had inherited

the tenancy from his grand father late Ishwardas Bhandari. It is also not disputed that four rooms, latrine, bathroom and a ""Varandah"" existing only

on one floor of the house No. 59/41 Birahana Road, Kanpur Nagar was allotted to late Ishwardas Bhandari and therefore, it could not be safely

concluded that the respondent No. 2 had inherited accommodation existing at one floor of the house No. 59/41 Birahana Road, Kanpur Nagar

from his father late Krishna Gopal Bhandari who in turn had inherited this tenancy from late Ishwardas Bhandari in whose name the allotment order

was passed in the year 1950.

26. Now so far as the order of vacancy is concerned whether the respondent No. 2 was tenant of second floor or third floor would be immaterial

inasmuch as the vacancy order is not solely based upon the report of the Rent Control Inspector. The finding recorded by the Rent Control and

Eviction Officer in the vacancy order dated 26.12.2014 indicates that it is based upon the perusal of the documents of ownership of one house by

the tenant Bharat Bhandari in the same municipality. Other documents on record namely electricity connection and telephone bill have been brought

on record to show that the tenant was not using the accommodation in question. Thus it becomes incumbent upon the tenant to show that he had

not acquired a house in his name or he is still using the accommodation in question. Whether the accommodation in his tenancy is at the second

floor or the third floor would be immaterial.

27. It appears that the tenant instead of contesting the vacancy order on merits, has made a consistent effort to challenge the order only on the

ground that it pertains to the second floor of house No. 59/41 Birahana Road, Kanpur Nagar not to the third floor and therefore, cannot be read

for vacancy of the accommodation occupied by him as a tenant. This assertion of respondent No. 2 cannot be accepted in view of the categorical

findings recorded in the vacancy order dated 26.12.2014. It is noteworthy that the respondent No. 2 had contested the proceeding for declaration

of vacancy also on the same ground.

28. It appears that being conscious of the nature of contest, the Rent Control and Eviction Officer with all caution has clarified in his order dated

26.12.2014 that the vacancy is being declared with regard to the accommodation namely four rooms, latrine bathroom and a small Varandah

which was in occupation of late Ishwardas Bhandari.

29. Thus there is no scope of having two opinion with regard to the accommodation which has been declared vacancy in the order of vacancy and

therefore, the argument of the respondent No. 2 that the vacancy order dated 26.12.2014 does not relate to the accommodation in his occupation

which has been inherited from late Ishwardas Bhandari, is wholly misconceived.

30. Having said so it is to be seen as to what relief can be granted in the present petition. The learned counsel for the petitioner submits that the

vacancy order has become final between the parties with the dismissal of Writ Petition No. 8988 of 2015 filed by respondent No. 2 and further an

unauthorised occupant or outgoing tenant cannot contest the release matter, thus there is no hindrance in execution of the release order dated

8.4.2015.

31. This submission of the learned counsel for the petitioner is not accepted for the reason that the merits of the vacancy order has not been

touched while dismissing the writ petition by order dated 16.2.2015 by this Court.

32. The challenge in the said writ petition was only on the ground that respondent No. 2 (the petitioner therein) was in occupation of third floor of

the premises namely house No. 59/41 Birahana Road, Kanpur Nagar since the time of his father and therefore, the vacancy order dated

26.12.2014 did not relate to him having been passed with regard to the second floor.

33. The crux of submission was that the respondent No. 2 (the petitioner therein) cannot be effected by the said vacancy order as it pertains to a

different accommodation than the accommodation in tenancy of respondent No. 2. Even before the Rent Control and Eviction Officer, the

petitioner had contested the vacancy proceeding on this ground only.

34. Thus it is clear that the merits of the vacancy order has not been touched so far. It appears that the respondent No. 2 the tenant has filed a

revision namely Rent Revision No. 7 of 2015 which is pending before the District Judge, Kanpur Nagar after dismissal of the writ petition

challenging the vacancy order. As it is a case of deemed vacancy, the Revisional Court below in the pending Revision No. 7 of 2015 is under

obligation to examine the merits of the vacancy order i.e. as to whether any vacancy arises with regard to the accommodation allotted to late

Ishwardas Bhandari which has been inherited by respondent No. 2. The question as to whether the respondent No. 2 is in occupation of the

second floor or the third floor would, therefore, becomes redundant.

35. However, there is no justification to issue any direction to the Additional District Magistrate (Nagar), Kanpur Nagar to proceed with the

execution of the release order dated 8.4.2015, in view of the pending revision.

36. It is therefore, directed that the District Judge, Kanpur Nagar shall decide the revision No. 7 of 2015 considering the merits of the vacancy

order and the order of release in the light of the evidences on record and decide as to whether there is a deemed vacancy of the accommodation

which was allotted to late Ishwardas Bhandari and inherited by respondent No. 2.

37. A perusal of the order dated 26.12.2014 further indicates that the allotment application was filed in the year 2010 and for a period of four

years, the respondent No. 2 instead of challenging the matter on merits had made all effort to linger on the proceedings.

38. The finding is that about 100 dates were fixed in the matter and respondent No. 2 did not file his evidence despite due opportunity given to him

rather contested it on the ground that the report of the Rent Control Inspector is incorrect as it pertains to the second floor.

39. This Court, therefore, is constrained to direct the District Judge, Kanpur Nagar to decide the revision namely Rent Revision No. 7 of 2015

within a period of two months without granting any unnecessary adjournments to either of the parties.

40. In case of any such adjournment, heavy cost of at least Rs. 5,000/- shall be imposed for each adjournment upon the concerned party.

41. It goes without saying that the District Judge, Kanpur Nagar shall not be influenced by any observations made herein above on the merits of

the vacancy order.

42. With the above observations and directions, the writ petition is disposed of.