

(2016) 01 AHC CK 0291
ALLAHABAD HIGH COURT
Case No: Writ A. No. 45922 of 2015.

Rajendra Prasad Gupta and
another - Petitioners @HASH
District Judge And 7 Others

APPELLANT

Vs

RESPONDENT

Date of Decision: Jan. 12, 2016

Acts Referred:

- Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 - Section 21(1)(a)

Citation: (2016) 3 ARC 599

Hon'ble Judges: Mrs. Sunita Agarwal, J.

Bench: Single Bench

Advocate: Arvind Srivastava and Rishabh Kumar, Advocates, for the Petitioner; A.K. Rai and V.K. Singh, Advocates, for the Respondent

Final Decision: Allowed

Judgement

Mrs. Sunita Agarwal, J. - Heard Sri Arvind Srivastava, learned counsel for the petitioners and Sri V.K. Singh, learned counsel for the respondents.

2. The present writ petition is directed against the orders of two courts below in a proceeding of release of the shop in question on personal ground under Section 21 (1) (a) of U.P. Act No. 13 of 1972.

3. The release application has been filed for the need of the shop in question that it was required for establishing two sons of the landlady in business who were unemployed. It is stated in paragraph "1" of the release application that the premises in question was purchased by her on 9.7.1997 and the opposite parties nos. 1 and 2 were inducted by the erstwhile owner namely Smt. Pushpa Agarwal. The release application was objected by filing a written statement on 1.7.2005 on the ground that the need set up by the landlady was neither genuine nor bona fide.

No notice was given before filing of the release application on 1.7.2005 as required under first proviso to sub-section (1) of Section 21 of the Act.

4. A proceeding under Section 30 of U.P. Act No. 13 of 1972 was initiated by the opposite parties-tenant in the year 2003 in which Smt. Geeta Devi, the current landlady had appeared and contested the application on the ground that the building in question is in dilapidated condition. Pursuant to the order of Court below, rent is being deposited in the said proceeding.

5. The Prescribed Authority has allowed the release with the finding that the landlady required the shop in question for the need of her sons who were not engaged anywhere.

6. On the question of notice considering the judgment of Apex Court in *Anwar Hasan Khan v. Mohammad Shafi and Others*, it was held that since the premises was purchased on 9.7.1997 and the release application had been filed after a period of 8 years from the date of purchase, there was no requirement of giving six months notice.

7. The Appellate Court also came to the conclusion that no notice was required in view of the judgment of Apex Court in **Anwar Hasan Khan v. Mohd. Shafi and others (2001) 8 SCC 540.**

8. The main thrust of argument of the learned counsel for the petitioners is that the release was not entertain able as the landlady did not fulfil the requirement of six months notice as required under first proviso to sub-section (1) of Section 21 before filing the release. The notice is mandatory as has been held by the Apex Court in **Martin and Harris Ltd. v. VIth Additional Distt. Judge and Others (1998) 1 SCC 732.**

9. The Courts below have erred in placing reliance upon the judgment of Apex court in *Anwar Hasan Khan (supra)* in coming to the conclusion that no notice was required. While placing reliance upon this judgment, a later judgment in **Nirbhai Kumar v. Maya Devi and others (2009) 5 SCC 399** wherein the ratio in *Martin and Harris Ltd. (supra)* has been approved while disapproving the view taken by the Apex Court in *Anwar Hasan Khan (supra)* has not been taken note of.

10. It has been held in paragraph "5" of *Nirbhai Kumar* that the decision in *Martin and Harris Ltd.* express the correct view that in the case of subsequent purchase of an accommodation with the sitting tenant, even if the release application is filed after three years of purchase, six months prior notice as required in the first proviso to sub-section (1) of Section 21 is mandatory. The release application could not be maintained in absence of such notice. In paragraph "5", the Apex Court has found that in deciding the *Anwar Hasan Khan's* case, the decision in *Martin and Harries Ltd.*, was not placed before the Bench concerned and has not been considered.

11. He further submits that the Nirbhai Kumar's case has been decided by a larger Bench of three judges on a reference made by the Chief Justice and being a later judgment is holding the field and is binding upon this Court.
12. Learned counsel for the respondent on the other hand submits that the premises in question was purchased in the year 1997 and this fact was brought to the notice of the tenant soon thereafter. He was tendering rent to the landlady who had stepped into the shoes of the erstwhile owner and had continued to pay rent till May, 2003. Thereafter for the reasons best known to him, he started depositing the rent under Section 30 of the Act on the allegation that the landlady had refused to receive the same. Even in the application under Section 30 of the Act, he had stated that the owners and landlord of the shop in question is Smt. Geeta Devi, the purchaser and rent was paid to her after change of guards. Thus the relationship of landlord and tenant is undisputed.
13. The release application has been filed in the year 2005 when three sons of the landlady have grown up and were between the age group of 24 years to 14 years. On the date of filing of the release, eldest son was about 24 years of age whereas at the time of purchase, he was only 16 years. As such it cannot be said to be a case where the premises was purchased in order to evict the sitting tenant. Further the release application was contested on merits and it was found by the courts below that for about a period of nine years the tenant did not make any effort to get an alternative accommodation. The purpose of notice is to give six months breathing time to the tenant to put his house in order or to get the matter settled amicably or to get an alternative accommodation. No such effort has been made and after a period of nine years, there is no justification to reject the release on the ground that the notice was not given in the year 2005 before filing the release. After three years of purchase the protection against eviction is not available to the tenant. The requirement of notice in the year 2005 has been waived by the conduct of the tenant. In case, the release is rejected on this ground, the landlord would be seriously prejudice as on the question of bona fide need the Courts below have found that she needed the shop in question to settle her sons who are unemployed.
14. Having heard learned counsel for the parties and perused the record.
15. Before dealing with the submissions of learned counsel for the parties on the facts of the present case, it would be appropriate to go through the law relating to requirement of six month's notice provided under first proviso to sub-section (1) of Section 21 which is the main thrust of argument of the parties.
16. There are three judgments of the Apex Court wherein the issue of applicability of first proviso to sub-section (1) of Section 21 of U.P. Act No. 13 of 1972 has been discussed. They are *Martin and Harris Ltd. v. Vith Additional Distt. Judge and Others* (supra), *Anwar Hasan Khan v. Mohd. Safi and others* (supra) and *Nirbhai Kumar v. Maya Devi and others* (supra).

17. Section 21(1)(a) and the first proviso to sub-section (1) of Section 21 relevant are reproduced as under:-

"Section 21. Proceedings for release of building under occupation of tenant.- (1) The prescribed authority may, on an application of the landlord in that behalf, order the eviction of a tenant from the building under tenancy or any specified part thereof if it is satisfied that any of the following grounds exists, namely-

(a) that the building is bona fide required either in its existing form or after demolition and new construction by the landlord for occupation by himself or any member of his family, or any person for whose benefit it is held by him, either for residential purposes or for purposes of any profession, trade or calling, or where the landlord is the trustee of a public charitable trust, for the objects of the trust;

(b) xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

Provided that where the building was in the occupation of a tenant since before its purchase by the landlord, such purchase being made after the commencement of this Act, no application shall be entertained on the grounds mentioned in Clause (a) unless a period of three years has elapsed since the date of such purchase and the landlord has given a notice in that behalf to the tenant not less than six months before such application and such notice may be given even before the expiration of the aforesaid period of three years:"

18. A careful perusal of Clause (a) to sub-section (1) indicates that a landlord of a building can file an application for eviction of a tenant from the building under tenancy on the ground of bona fide requirement for occupation by himself or any member of his family or a person for whose benefit it is held by him. The requirement may be either for residential purposes or for the purpose of any profession, trade etc.

19. The first proviso to sub-section (1) of Section 21 creates a special class of landlord and remove this special class from the general class provided under sub-section (1) of Section 21. This special class of the landlords are the persons who purchase a building having a sitting tenant at the time of the purchase. The purpose of this enactment is clear for providing protection to the sitting tenants from unscrupulous landlords who purchase the building with the sole objective to evict them. That is why embargo of three years has been imposed and a release even on personal need before expiry of the period of three years cannot be entertained.

20. The word "entertain" has been interpreted in Martin and Harris Ltd's case and it was held that the word "entertain" cannot be construed as being synonymous with the word "institute". It was held that the term "entertain" would only show that by the time the application for possession on the grounds mentioned in clause (a) of Section 21 (1) is taken up by the Prescribed Authority for consideration on merits, at least minimum three years" period should have elapsed since the date of purchase

of the premises by the landlord. Thus the question raised before the Apex Court that the respondent-landlord's application under Section 21(1)(a) of the Act was not maintainable in view of the proviso to the Section as it was filed before expiry of three years" period from the date of purchase of the suit premises by the respondent was decided in negative and it was held that the application was perfectly entertain able and as it was decided after three years there was no error in the decision of the Prescribed Authority.

21. The second question whether the application under Section 21(1)(a) of the Act was not maintainable if it was filed prior to the expiry of the six months from the date of the notice which was given by the respondent-landlord as provided under proviso to the said section was answered in affirmative on the facts of that case. It was held in paragraph "11" that the notice as required in the proviso has to be treated to be mandatory before filing of the release application.

22. However, in paragraphs "12" and "13", it was further held that the requirement of notice under proviso is beneficial provision enacted by the legislature for the protection of the tenant and it could be waived by the tenant. On the facts of the case in Martin and Harris Ltd., it was held that the requirement of the notice was waived by the tenant. It was found that though an objection was taken in the written statement filed before the Prescribed Authority but it was not pressed for consideration later on. As a result of it, the respondent-landlord by the said conduct of the appellant-tenant irretrievably changed his position. The contention raised before the High Court at a late stage, would seriously prejudice the respondent-landlord. More so after both the courts had concurrently held on the facts that the respondent-landlord had proved his case on merits.

23. In paragraph "13", it has been held that the proceedings under Section 21(1)(a) of the Act are between the landlord on the one hand and the tenant on the other. These proceedings are not of any public nature. Nor any public interest is involved therein. Only personal interest of the landlord on the one hand and the tenant on the other hand get clashed and call for adjudication by the Prescribed Authority. The ground raised by the landlord under Section 21(1)(a) would be personal to him and similarly defence taken by the tenant would also be personal to him. Six months" breathing time is given to the tenant after service of notice to enable him to put his house in order and to get the matter settled amicably or to get alternative accommodation if the tenant realises that the landlord has a good case. This type of protection to the tenant would naturally be personal to him and could be waived.

24. After considering the law on waiver, it was held that the provisions for six months" notice before initiation of proceeding under Section 21(1) of the Act though is mandatory and confers protection on the tenant concerned, it can be waived by him.

25. In the case of Anwar Hasan Khan, the facts were that the shops were purchased on 2.8.1979. The father of the original tenant died somewhere in 1989. As the appellant tenant had not paid the rent, the respondent-landlord issued a notice to him on 6.2.1995 calling upon for payment of arrears of rent. Thereafter, he filed an application for release under Section 21(1)(a) of the Act which was resisted on the grounds of maintainability in the absence of six months notice required as per first proviso of Section 21 of the Act. The release application was allowed and the order was affirmed in appeal and the writ petition. The matter has travelled to the Apex Court and considering the language in the first proviso and the main section, it was held that the object of the service of notice is to furnish information to the tenant about the requirement of the landlord in order to enable him to search for an alternative accommodation or to find out as to whether the sale made by his erstwhile owner was genuine and bona fide or not.

26. The process and the notice as contemplated under it was never intended to be a permanent clog on the right of the purchaser. The period as contemplated under proviso to sub-section (1) of Section 21 is intended to be for a period of three years and in no case for more than three years and six months. Any proceeding initiated for release of building under occupation of the tenant on the aforesaid ground after the period contemplated under the aforesaid proviso does not require the service of aforesaid notice of six months. After laying down this preposition, it was held that the appellants were paying rent to the landlord after death of their father in the year 1989 and the landlord had purchased the shop in the year 1979 and therefore, they became the tenant of respondent-landlord and were entitled to the protections guaranteed to the statutory tenant under the Act. The respondent-landlord had successfully proved the existence of the ground of release under Section 21(1)(a) which was upheld by the Appellate Court. The order of eviction passed against the appellant was upheld while dismissing the appeal.

27. Noticing this conflict between the above decisions in Martin and Harris Ltd. and Anwar Hasan Khan, reference was made to larger Bench which was considered in Nirbhai Kumar (supra).

28. After considering the paragraph "13" of Martin and Harris Ltd.s case and paragraph "10" of the Anwar Hasan Khan's case and proviso to sub-section (1) of Section 21, it has been held in Nirbhai Kumar that a three years" period becomes relevant when there is a change of ownership. This three years" period is a sort of moratorium intended for the tenant's protection. Considering the expression in the proviso "any such notice may be given even before the expiration of the aforesaid period", it was held that the notice can be given either before or after the three years" period. After expiry of the three years" period the protection given to the tenant from being evicted has no further relevance. Thereafter it is only the question of notice.

29. After having said so it is observed in paragraph "5" of the said report:-

"5. Above being the position the decision in Martin and Harris Ltd. case express the correct view. Unfortunately, the said decision does not appear to have been placed before the Bench which heard Anwar Hasan Khan case."

30. Thus it is held by the Apex Court that the release application by a purchaser landlord can only be maintained when it is preceded by a six months notice. The notice is mandatory even after three years from the date of purchase and the tenant would be entitled to contest on the maintainability of the release application on this ground. However, the ground of maintainability has to be taken at the first instance and would not be allowed at a later stage. In case such an objection is taken at a late stage it would be considered to have been waived and the matter would proceed on merits.

31. In this legal scenario, the facts of the case are to be sifted. In the present case an objection has been taken by the tenant in paragraph "8" of the reply dated 1.7.2005 filed by him against the release application.

The relevant paragraph "8" is as under:-

"g fd izkfFkZuh nLrkost dckyk fnukad 09-07-1997 bZ0 dks nqdkuk fdjk;knkjh ds ckr rgjhj djuk tkfgj dh gS vkSj mDr nqdku fdjk;knkjh ds ckor] dckyk djus ds ckn] fnukad 01-07-2005 dks izkFkZuk i= nh gS tks dckyk ysus ds dkQh fnuksa ckn nkf[ky dh gSA dckyk ysus ds ckn o mijksDr okn izLrqr djus ds igys lk;yk us dksbZ dkuwuh uksfVI] okn izLrqr djus ds ckr ;k nqdku [kkyh djus ds ckr ge foi[kh dks ugha nh gS tcfd m0iz0 "kgjh Hkou vf/kfu;e dh /kkjk 21&d esa mfYyf[kr gS fd ;fn Hkou esa fdjk;snkj gS o fdjk;knkjh izkFEHk gksus ds i"pkr mDr Hkou fdLh nqljs jkjk dz; fd;k tkrk gS rks dzsrk dk dksbZ vkosnu i= [k.M&k esa mfYyf[kr dkj.kksa ls rc rd xzg.k ugha fd;k tk;sxk] tc rd fd dz; ds fnu ls rhu o"kZ dh vof/k O;rhr u gks tk;s vkSj dzsrk edku ekfyd ,slk vkosnu i= nsus ls de ls de N% ekg iwoZ fdjk;knkj dks mFkZ uksfVI u ns nsA ,slh uksfVI 3 o"kZ dh vof/k leklr gksus ds ckn fn;k tk ldrk gS ijUrq izkfFkZuh ds jkjk mDr izdh.kZ okn izLrqr djus esa ;g dkuwuh =qfV gS vkSj dkuwuh =qfV gksus ds dkj.k izkfFkZuh dk izdh.kZ okn gj n"kk esa fujLr gksus ;ksX; gSA"

32. It appears that even after this objection, the landlady had proceeded to press the release on merits. The matter was taken up in the year 2014 by the Prescribed Authority and on the objection taken by the tenant issue no. 1 was framed regarding landlord tenant relationship. This issue has been decided in favour of the landlady as there was no objection that the petitioner was tenant. However, the issue regarding maintainability of the release application was also pressed during the course of argument before the Prescribed Authority who had rejected it on the ground that notice was not required in view of the judgment of Apex Court in Anwar Hasan.

33. This approach of the Prescribed Authority is incorrect as it had not taken note of the previous judgment which says that the notice is mandatory. On the date of consideration by it i.e. 22.12.2014, the larger Bench of the Apex Court in Nirbhai Kumar had already clarified that notice is mandatory and that Anwar Hasan did not lay down the correct law. Further in appeal also the tenant had raised objection regarding maintainability of the release application. This objection was again repelled on the ground that no notice was required after three years of purchase

and the release application was maintainable.

34. Thus it is seen that the tenant had taken objection with regard to the maintainability of the release application at the very first instance in the year 2005 and therefore it cannot be said that he has waived the requirement of six months notice before filing the release application.

35. The prescribed Authority had no jurisdiction to entertain the release application for adjudication on merits as it was not preceded by the mandatory notice required under first proviso to sub-section (1) of Section 21 of the Act. The correct course for the landlady was to take the application back and file a fresh release application after giving notice to the tenant on the same grounds. The landlady has taken a chance and now at this stage she cannot plead that she would be seriously prejudiced by rejection of the release.

36. In view of the above discussion, it is concluded that both the courts below have erred in proceeding with the release application on merits.

37. The judgments and orders dated 22.12.2014 passed by the Civil Judge (JD) West/Prescribed Authority, Ballia and dated 20.5.2015 passed by the District Judge, Ballia are hereby quashed.

38. The release application is rejected as not maintainable.

39. The writ petition is allowed. No order as to costs.