

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Review Application No. 289 of 2015

IN

Writ Petition (M/S) No. 2729 of 2014

Durga Prasad

... Petitioner

Vs

Narayan Ram Chandaani

... Respondent

Mr. Neeraj Garg, learned counsel for the petitioner/applicant.

Mr. Lokendra Dobhal, learned counsel for the respondent.

Hon'ble Sudhanshu Dhulia, J. (Oral)

1. This is a review petition filed by the petitioner/applicant seeking a review of the order dated 09.03.2015 by which the writ petition was dismissed by this Court holding that he has absolutely no lien on the property in question and that he is an unauthorized occupant and the building be declared deemed vacant.

2. Now a review petition was filed by the petitioner stating that the sole question on which the petition was dismissed by this Court was by holding that the petitioner is the brother of the deceased/tenant, namely, Smt. Lalita Devi and since brother does not come under the definition of family given in Section 3(g) of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (*from hereinafter referred to as "U.P. Act No. XIII of 1972"*), the petitioner has absolutely no right over the property. Thus holding him to be an unauthorized occupant on the property. In the review petition, petitioner submits that in the order dated 09.03.2015, there is an error apparent on the face of record inasmuch as the court did not consider Section 3(a) of U.P. Act No. XIII of 1972 as well as other provisions of law, which were crucial to resolve the issue.

3. *Prima facie* this Court found some merit in the contention of the review petition. Consequently, an interim protection was granted to the petitioner by an order of status quo. The petitioner admittedly is still occupying the premises in question. Even though strictly speaking Order 47 Rule 1 of

the C.P.C. would not be applicable in a writ petition, but the practice being that at least the principles laid down under Order 47 Rule 1 of C.P.C. should be followed and, therefore, this Court would examine the review petition on strict parameter of Order 47 Rule 1 of C.P.C. most importantly as to whether there was an error apparent on the face of record while dismissing the writ petition earlier!

4. The facts of the case are that the landlord moved an application under Section 21(1)(a) of the U.P. Act No. XIII of 1972 before the Prescribed Authority for release of his property from the tenant Ms. Lalita Devi on the ground of his *bona fide* need. This application was dismissed vide order dated 19.04.2010 by the Prescribed Authority. Aggrieved by the said order, the landlord/respondent preferred an appeal under Section 22 of the U.P. Act No. XIII of 1972 before the competent court, which was subsequently transferred to learned Additional District Judge 7th, Dehradun. During the pendency of the appeal, the tenant in question i.e. Ms. Lalita Devi passed away on 06.07.2013. Thereafter, for reasons best known to the landlord, he moved a substitution application before the appellate court with a prayer that the present petitioner, who is the real brother of the deceased, be substituted in her place. The said application was allowed and the petitioner was impleaded as a defendant/respondent in the said appeal. The appellate court allowed the said appeal vide order dated 10.10.2014 holding that during the pendency of the appeal the sole tenant passed away and Durga Prasad, who has been substituted is not a member of "family" and he has not been able to prove that he was previously residing with the tenant in the same premises. The appellate court set aside the order of the prescribed authority and allowed the appeal. Thereafter, the tenant/petitioner, preferred the present writ petition before this Court. This Court came to the conclusion that the petitioner does not come under the definition of

“family” given in the Act No. XIII of 1972 and in fact he was not even liable to be substituted in the appeal. This Court further held that vacancy was liable to be declared on the premises in question on the death of the sole tenant. It is this order, which is presently under challenge under review.

5. Heard Mr. Neeraj Garg, learned counsel for the petitioner/applicant, Mr. Lokendra Dobhal, learned counsel for the respondent on the review petition and perused the records.

6. Learned counsel for the review applicant submits that he may not be strictly a member of the “family” as defined under Section (3)(g) of the U.P. Act No. XIII of 1972, which reads as under:-

“3(g) “family”, in relation to a landlord or tenant of a building, means, his or her –

(i) spouse.

(ii) male lineal descendants.

(iii) such parents grand-parents and any unmarried or widowed or divorced or judicially separated daughter or daughter of a male lineal descendant, as may have been normally residing with him or her, and includes, in relation to a landlord, any female having a legal right of residence in that building.”

7. The review petitioner admittedly being a brother of the deceased does not fall under the above definition of a “family”.

8. The dispute of tenant in Section 3(a) of U.P. Act No. XIII of 1972, however, reads as under:-

“3. Definition – In this Act, unless the context otherwise requires –

(a) “tenant”, in relation to a building, means a person by whom its rent is payable, and on the tenant’s death or his heirs;

(1) in the case of a residential building, such only of his heirs as normally resided with him in the building at the time of his death;

(2) in a case of non-residential building, his heirs.”

9. The “purpose” for which Section 3(a) of the U.P. Act No. XIII of 1972 exists. The purpose of Section 3(a) of the U.P. Act No. XIII of 1972 is not to carry on a litigation in the hands of someone, who have got absolutely no justification to stay on the premises, and all that Section 3(a) of the U.P. Act No. XIII of 1972 states is that in a case of a death of a tenant, if “rent” is recoverable from him then that rent can be recovered from such heir of the tenant. It is for the benefit of a landlord, who can on the death of his tenant the dues from the heirs of the tenant.

10. The present applicant may have been “rightly” or “wrongly” substituted after the demise of his sister, but that is not the issue. The main issue is as to his status in the property. The contention of the petitioner that in any case under these circumstances the premises cannot be deemed to be vacant for a deemed vacancy, which has been specifically defined under Section 12 of the U.P. Act No. XIII of 1972. Section 12 of the U.P. Act No. XIII of 1972 reads as under:-

“12. Deemed vacancy of building in certain cases

– (1) A landlord or tenant of a building shall be deemed to have ceased to occupy the building or a part thereof if –

- (a) he has substantially removed his effects therefrom, or
- (b) he has allowed it to be occupied by any person who is not a member or his family, or
- (c) in a case of a residential building, he as well as members of his family have taken up residence, not being temporary residence, elsewhere.

(2) In the case of a non-residential building, where a tenant carrying on business in the building admits a person who is not a member of his family as a partner or a new partner, as the case may be, the tenant shall be deemed to have ceased to occupy the building.

(3) In the case of a residential building, if the tenant or any member of his family builds or otherwise acquires in a vacant state or gets vacanted a residential building in the same city, municipality, notified area or town area in which the building under tenancy is situate, he shall deemed to have ceased to occupy the building under his tenancy:

Provided that if the tenant or any member of his family had built any such residential building before the date of commencement of this Act, then such tenant shall be deemed to have ceased to occupy the building under his tenancy upon the expiration of a period of one year from the said date.”

11. Broadly speaking deemed vacancy is visualizes in three cases given in clause (1) of Section 12 of the U.P. Act No. XIII of 1972 where a tenant has substantially removed his effect therefrom or he has allowed to be occupied by any person, who is not a member or his family or in the case of a residential building as well as members of the family have taken a residence, not being temporary residence elsewhere.

12. Admittedly as per the own contention of the petitioner he was occupying the property being the brother of the tenant, even prior to her death. Since the petitioner was not a member of the family, as defined under Section 3 (2)(g) of the U.P. Act No. XIII of 1972, the building was allowed to be occupied by the person, who is not a member of the family of the deceased, and therefore, from that day itself, the building was liable to be declared as deemed vacancy under Section 12(1)(b) of the Act No. XIII of 1972. Therefore, this Court does not find any anomaly holding that in this contingency the building is liable to be declared as deemed vacancy.

13. The petitioner, however, has relied upon a decision of Hon’ble Apex Court in **Ganesh Trivedi Vs Sundar Devi & others** reported in **AIR 2002 SC 676** wherein it has been held that if a brother comes to occupy a property in a lifetime of the brother he cannot be deemed to be an unauthorized occupant and on the death of the original tenant, the brother who has come to occupy the said property on lifetime of the property cannot be described under authorized occupant over the premises be declared as deemed vacant. Paragraph Nos. 9 and 10 of the said judgment, which are relevant to the present case

and heavy reliance has been taken by the counsel for the petitioner, are reproduced as below:-

“9. The brother of a tenant is not included in the definition of ‘family’. However, the present one is not a case where the tenant Suraj Prasad had during his lifetime taken up residence elsewhere and/or allowed the suit premises to be occupied by his brother. Deo Narain, being a real brother of late Suraj Prasad, the tenant, had come to stay with his brother and was residing along with him as such, even at the time of death of Suraj Prasad. It will not, therefore, be correct to say that applicability of Cl. (b) of sub-section (1) of Section 12 of the Act was attracted to the suit premises during the lifetime of Suraj Prasad and a deemed vacancy had occurred. On the death of Suraj Prasad tenancy rights devolved on Deo Narain, he being the only heir. He too became ‘tenant’ within the meaning of Cl. (a) of Section 3. The decision of the High Court cannot, therefore, be faulted.

10. There is yet another reason why no interference with the impugned order of the High Court is called for. Shri Upadhyay, the learned counsel for the respondent Nos. 1 to 3 invited our attention to the pleadings and pointed out that admittedly the sale deed executed by Jagdamaba Prasad Awasthi in favour of Ganesh Trivedi, the appellant, contains recitals to the effect that the former landlord-owner was well aware of Deo Narain occupying the suit premises after the death of Suraj Prasad, that he was acknowledged by the landlord as tenant in the premises, and that rent was also paid by Deo Narain landlord though Deo Narain had fallen into some arrears of rent at the time of sale of the suit premises in favour of the appellant. Such admissions made by Jagdamaba Prasad Awasthi are binding on Ganesh Trivedi, the appellant, inasmuch as the same are contained in the sale deed by which title has been derived by the appellant and thereunder the appellant has stepped into shoes of the previous owner-landlord. Deo Narain’s status as tenant in occupation of the suit premises, cannot, therefore, be doubted or disputed by the appellant.”

14. The facts of the above case were that one Ganesh Trivedi was the landlord of the property and after the death of the original tenant, namely, Suraj Prasad, his brother who has come to occupy the property not being a member of the family as defined under Section 3(2)(g) of the U.P. Act No. XIII of 1972

can only be called as an unauthorized occupant and the building can be declared as “deemed vacant”.

15. The Hon’ble Apex Court had held to the contrary and rejected such a contention of the landlord, but after perusal of paragraph Nos. 9 and 10 of the above judgment, we find that there was a marked distinction of fact in the case before the Hon’ble Apex Court and the present case before this Court. In para-9 the finding has been arrived at by the Hon’ble Apex Court on the ground that the brother may not come under the definition of ‘family’ under Section 3(2)(g) of the U.P. Act No. XIII of 1972, but he is a legal heir perhaps the only heir of the deceased. This is not the case before us, as the petitioner, as we have already noticed above is not the heir of the deceased, for which we have already referred to the provisions of Hindu Succession Act and have come to a conclusion that considering the nature of the property the status of the original tenant, the tenancy will not pass on the brother or on heir. It will not be devolved upon the petitioner but only on the legal heir of the husband of the deceased. In para 10 another reasoning has been given by the Hon’ble Apex Court for not holding the brother Deo Narain to be an unauthorized occupant and the reasons are clear in para 10 itself, which is for a number of years after the death of his brother Suraj Prasad, he continued to pay the rent and the landlord continued to accept the rent from the tenant Deo Narain, hence some kind of landlord tenant relationship was there between the two as the landlord too acknowledged this that he was a tenant at the time of death of Suraj Prasad. The facts of the case are quite different from the facts of the case at hand.

16. Learned counsel for the petitioner also relied upon Section 34 (4) of the U.P. Act No. XIII of 1972, which is also not

helpful to the petitioner in the present case, as the above provision is only relates to “substitution” of heir in a case.

17. The purpose of Section 3(a) of the U.P. Act No. XIII of 1972 has already been referred above. It is for the benefit of the landlord, who should not be deprived of his legitimate rent in case of demise of a tenant. But even if we extend the meaning of “tenant”, for the purposes for which it is presently being entitled to by the learned counsel for the review petitioner Mr. Neeraj Garg and tenancy on the death of a tenant has to be seen as a heritable right. This Court finds that under the present circumstances, this again would not be of much help to the review petitioner. This is so as admittedly the premises in question was being used both for residential as well as non residential purposes. For both residential as well as non residential building the petitioner would have to prove that he was a legal heir of the deceased. In order to determine the status of the present petitioner, as a legal heir of the deceased, we have to examine Hindu Succession Act, as admittedly tenant as well as the present petitioner are Hindus. Section 15 of the Hindu Succession Act reads as under:-

“15. General rules of succession in the case of female Hindus (1) The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16:

- (a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband;
- (b) secondly, upon the heirs of the husband;
- (c) thirdly, upon the mother and the father;
- (d) fourthly, upon the heirs of the father; and
- (e) lastly, upon the heirs of the mother.

(2) Notwithstanding anything contained in sub-section (1)-

- (a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father; and

(b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband.”

17. It is again an admitted fact that on the premises in question which is situated at Dehradun earlier the father-in-law of Ms. Lalita Devi was the tenant and on his death the tenancy devolved on his son and on demise of his son, the tenancy devolved on her wife i.e. Ms. Lalita Devi. The devolution of this tenancy hence will be determined under Section 15(2)(b) of the Hindu Succession Act (quoted above). Admittedly, the tenant on the property was a female Hindu. The tenancy will devolve on her death, in the absence of any son or daughter of the deceased (which is a case in hand), not on any “heirs” referred to in sub section (1) but it will devolve upon heirs of the husband. Since the petitioner does not fall under the category of he “heirs of the husband”, the property will not devolve on him nor can he be called an heir as visualize under Section 3(a) of the U.P. Act No. XIII of 1972.

18. The review petition hence fails and is hereby dismissed, as this Court does not find any error apparent on the face of the records in the order dated 09.03.2015. Needless to say that the authorities under law (i.e. U.P. Act No. XIII of 1972), which now proceed in accordance with the provision of law given in U.P. Act No. XIII of 1972 as well as under the Rules framed therein. Stay order dated 01.06.2015 stands vacated.

(Sudhanshu Dhulia, J.)

31.08.2015

Aswal