

Tanauwwar Nabi Khan

Vs

Rashik Ahmed and Others

Civil Appeal No. 2647 of 1998

(S. C. Agarwal, S. Saghir Ahmed, A. P. Misra JJ)

08.05.1998

JUDGMENT

A. P. MISRA, J. –

1. Leave granted.

2. The appellant-tenant is aggrieved by the order passed by the High Court in writ jurisdiction, setting aside the order dated 5-12-1996 passed by the Additional District Judge and upholding the order of the Rent Control and Eviction Officer (hereinafter referred to as "RCO") in a proceeding under the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as "the Act"). Consequently the order made in his favour was set aside, directing the RCO to dispose of the landlord's application under Section 18(3) of the Act to put the parties back in the position which they occupied before the allotment order.

3. The disputed premises belong to one Rashiq Ahmed, a resident in England, who executed power of attorney on his behalf to Atique Ahmad a sometime in the year 1992 who in due course of management let out the house in dispute to one Mr. Anzar Hussain on a monthly rent of Rs. 700. On 1-8-1995, he intimated through notice to the RCO that since his business of brass utensils was not doing well he has decided to vacate the premises by the end of the month. The appellant's case is that Atique Ahmad was duly informed accordingly. On coming to know this the appellant made an application for allotment of the said premises to the RCO. On the 4-8-1995 the said officer declared through notification that the said house in dispute was about to fall vacant, hence 16-8-1995 is fixed for deciding the question of allotment/release. A copy of this order was directed to be put up on the Notice Board of his office and also to be served on the landlord through his mukhtiar-e-am Atique Ahmad. In the margin of this order Atique Ahmad signed in token of his presence and service of the order. It is the case of the appellant that on 14-8-1995 he approached the said Atique Ahmad and also the outgoing tenant, namely, Anzar Hussain. The latter sold his entire machinery installed in the house in dispute to the appellant for Rs. 55,000 which was duly paid to him on the same date. This written transaction was with the consent of the said Atique Ahmad, representative of the landlord. At the same time an agreement was also executed between the said Atique Ahmad and the appellant. By that the rent of the premises in question was increased from Rs. 700 to Rs. 800 with an advance of Rs. 30,000 to be adjusted in rent in future. This agreement was filed before the RCO. On 16-8-1995, the RCO allotted the said premises in favour of the appellant by recording that no objection is filed against the declaration of vacancy. The order recorded that only one application of the appellant has been received with the consent and agreement of the owner of the premises in his favour. Further case of the appellant is later, on account of dishonesty, the said Atique Ahmad in connivance with his brother Mohd. Athar, on 21-8-1995, acting on behalf of the landlord (Rashiq

Ahmed) made an application under Section 16(5) of the Rent Control Act for review of the allotment order. The case set up was that power of attorney in favour of Atique Ahmad was cancelled by Dr. Rashid Ahmed on 17-11-1994 and fresh power of attorney was executed in favour of Mohd. Athar on 31-1-1995. It is not in dispute that both Atique Ahmad and Mohd. Athar are brothers.

4. The case set up on behalf of the landlord is that no notice of the declaration of vacancy or allotment proceeding was ever given to the landlord before allotting the same. It is also alleged that the signatures of Atique Ahmad on the declaration vacancy dated 4-8-1995 as well as on the agreement dated 16-8-1995 were forged since he has not signed these documents. But the appellant denied all this. In order to prove the signatures of Mr. Atique Ahmad, the appellant produced one Shri Mahesh Sareena, a handwriting expert. According to his report, the disputed signatures were in fact those of Atique Ahmad. Mahesh Sareena - the expert was not called for cross-examination. To rebut the cancellation of power of attorney the contention is that, in spite of the alleged cancellation of power of attorney in his favour Atique Ahmad continued to receive the rent from the then tenant Anzar Hussain. On or about 20-10-1995 an application was filed on behalf a of the landlord under Section 22(f) of the Act for permission to take photograph of the alleged forged signatures of Atique Ahmad for examination by the expert. But soon thereafter on 21-12-1995 Mohd. Athar, Advocate who was one of the applicants in the said application, made an endorsement that this application was not pressed. Thereafter, on 19-1-1996 RCO reviewed his earlier allotment order by cancelling the earlier allotment order. He concluded :

"... Tanauwwar Nabi Khan and Anzar Hussain has jointly taken the possession whereas after vacating the said premises, power-of-attorney holder (mukhtiar-e-am) should have been informed, so that he could give application for release or could give his consent in regard to allotment in favour of any side but nothing of that kind happened as it is clear from the application dated 15-8-1995 of the allottee. After seeing the said conditions and after perusing the document, it is clear that the allotment of premises in question has not been done in accordance with law"

5. According to the said order the allotment order was cancelled on two grounds :

(1) that mukhtiar-e-am should have been informed too so that he could, if desired, have moved an application for release or given consent for the allotment,

(2) that allotment order is also bad as the appellant has obtained possession of the premises in dispute prior to the allotment order.

6. Aggrieved by the said order, the appellant filed revision before Additional District Judge on 5-12-1996. The appellate court recorded the following findings :

"So far as the first ground is concerned, it appears from the impugned order dated 19-1-1996 that the learned RC and EO has not discussed nor come to the conclusion that the finding of the previous RC and EO Pannalal, who passed the allotment order dated 16-8-1995 to the effect that Shri Atique Ahmad was the mukhtiar-e-am of Dr. Rashid Ahmed who had executed rent deed in favour of Sri T. N. Khan, revisionist was not based on material on record and it was obtained by the allottee by practising fraud or misrepresentation upon the RC and EO. Therefore, this opinion of the Ld. RC and EO that mukhtiar-e-am should have been in favour has no legs to stand. I do

not understand as to how the finding was recorded that mukhtiar-e-am should have been informed when there was description in the order dated 16-8-1995 itself that Shri Atique Ahmad was mukhtiar-e-am of Dr. Rashid Ahmed who and the revisionist had entered into an agreement of tenancy. Therefore, in my opinion, there was no justifiable reason with the Ld. RC and EO to say in the impugned order dated 19-1-1996 that mukhtiar-e-am was not informed and he should have been informed"

7. So far as the question of release in favour of the landlord which in effect might prejudice him for want of notice is concerned, it is recorded that throughout in the proceedings, even before the RCO, the landlord has not shown or expressed any desire to have the release of the premises in his favour. So far as the second ground is concerned, it was rejected with the following findings :

"In this respect the allotment order dated 16-8-1995 shows that the possession of revisionist was with the consent of mukhtiar-e-am of Rashid Ahmed and this finding is still intact. Therefore in view of the finding dated 16-8-1995 there could not have been any occasion for the RC and EO to say that the allotment order dated 16-8-1995 was liable to be set aside as the revisionist had obtained possession prior to the allotment order."

8. Respondent-landlord thereafter filed a writ petition in the High Court challenging this revisional order which was allowed as aforesaid. Aggrieved by this order the present appeal is filed by the appellant-tenant. The High Court mainly relying on the proviso to Section 16(1) of the aforesaid Act held that it is incumbent on the tenant to intimate the landlord in terms of the proviso and the District Magistrate should have given an opportunity to the landlord before making allotment order under Section 16(1)(a). It was held that as proviso to Rule 9(3) which requires that on receipt of the intimation of vacancy the same must be notified for information of the general public by pasting a copy of the list of vacant building on the Notice Board specifying the date on which the question of allotment is to be considered is mandatory and the District Magistrate is obliged to issue notice to the landlord. This is to give an opportunity to the landlord, if he so needs and desires. The appellant contends the High Court erred in holding : "In the present case undisputed no notice under Rule 9(3) was issued nor the procedure laid down in Rule 8(2) was followed." Consequently further finding that the landlord was not awarded with any opportunity is also not sustainable. The bone of contention for the appellant is that all the procedure as contemplated under the Act and Rules were followed. The vacancy was declared after following all what was required under the law, which is also evident from the said notification dated 4-8-1995 revealing that intimation was sent to the landlord Dr. Rashid Ahmed through his power-of-attorney holder, Shri Atique Ahmad and the same was also pasted on the Notice Board. This apart, the consent is also on record given by the said Atique Ahmad. He, in fact, participated initially in the proceedings before the Rent Control and Eviction Officer even prior to the review application. This is revealed by his signatures which he put on the court's record. Further if power of attorney was given in place of Atique Ahmad to Mohd. Athar in January 1995, the respondent would have shown by any document or evidence, any demand of rent by the said Mohd. Athar from the erstwhile tenant of the appellant after January 1995. On the contrary, Atique Ahmad continued to collect the rent and conducted himself on behalf of the landlord as late as 16-8-1995 which is on the record of this case. Further even if that be so, some intimation should have been given to either erstwhile tenant or a the present appellant-tenant or the RCO regarding this change of authorisation. Hence the High Court was not right to uphold the order in review passed by the RCO.

9. After giving our consideration to the various submissions made by the parties we find, the RCO

while deciding the first point in review did not deal with any fact or evidence in order to dislodge the findings recorded by the RCO in its original order dated 16-8-1995 that Shri Atique Ahmad was mukhtiar-e-am of Dr. Rashid Ahmed and had executed rent deed in favour of the appellant. There is no finding that the earlier order was based on no material or was obtained by the appellant by practising fraud or misrepresentation. The High Court decided mainly on the ground of violation of proviso to Section 16(1) read with Rule 9(3) and Rule 8(2) as the landlord was not afforded any opportunity, which is mandatory, hence depriving him of the opportunity under Section 16(1)(a) to apply for release, if he so needs.

10. We find that in order to settle the matter in issue the most essential finding which is missing both by the Rent Control and Eviction Officer and also by the High Court is on the question : who was the authorised person on behalf of the landlord at the relevant time and whether any intimation was ever communicated by the landlord either to the erstwhile tenant Anzar Hussain or to the RCO about the change of authorisation for them to comply with the requirement of law ? It is not in dispute that Atique Ahmad was the mukhtiar-e-am authorised to act on behalf of the landlord and he continued to do so for a long period including admitting the erstwhile tenant - Anzar Hussain to the tenancy. It is the case for the landlord that there was a change in the authorisation. If there is any such change, how is anyone to know ? Who is to inform whom ? What facts are on record ? Before drawing any inference of violation of the aforesaid provision, it is necessary to record a clear finding on facts. Intimation of vacancy is sent to the landlord by the RCO either to his known given address or to his authorised person as intimated. Till before the said change of authorisation, it is Atique Ahmed who is known to be dealing with the property on behalf of the landlord. Therefore the question of intimation of this change of authorisation gains importance : who has to intimate which authority for complying with the procedure of Rule 8(2) and Rule 9(3) in terms of proviso to Section 16(1). In other words, before holding no opportunity to landlord or violation of the aforesaid provisions a finding has to be recorded as aforesaid whether any such notice was sent or not to the landlord, in case it was sent was it to the proper person ? In the present case, admittedly the landlord is living outside India and he gave power of attorney to Atique Ahmad which is in the knowledge of both the RCO and erstwhile tenant. So if, subsequently there is any change as alleged of the authorisation, the finding has to be recorded with regard to the person to whom the notice should have been sent by the RCO and whether on the facts of this case notice sent to Atique Ahmad was proper or bad in law. This has to be recorded before applying the law of a violation of any mandatory provision. In the present case, the notification notifying the vacancy is not under challenge but the challenge is whether before passing the allotment order an intimation to the landlord in terms of proviso to Section 16(1)(a) which is mandatory was given or not.

11. For all the aforesaid reasons we quash the impugned order dated 30-7-1997 passed by the High Court and the order dated 19-1-1996 passed in review by the RCO and remand the case back to the Rent Control and Eviction Officer to decide afresh after giving opportunity to the parties, the question of the validity of the allotment order in the light of the observation made above after the stage of notifying the vacancy, notwithstanding and without prejudice of the observations made by this Court or High Court or the Revisional Court as aforesaid. Till the matter is decided the status quo between the parties shall continue and shall be subject to the order to be passed by Rent Control and Eviction Officer. Costs on the parties.