

AFR
Reserved

Court No. - 4

Case :- WRIT - A No. - 15008 of 2020

Petitioner :- Farukh @ Faruk Khan

Respondent :- Appellate Authority /Additional District Judge
And 2 Others

Counsel for Petitioner :- Dushyant Singh, M.C. Singh

Counsel for Respondent :- C.S.C., Mohd. Saleem
Khan, Swetashwa Agarwal

Hon'ble Vivek Kumar Birla, J.

1. Heard Sri M.C. Singh, learned counsel along with Sri Dushyant Singh, learned counsel for the petitioner-tenant and Sri P. K. Jain, learned Senior Counsel assisted by Mohd. Saleem Khan, learned counsel for the respondents-landlord.

2. Learned counsel for the respondents-landlord submits that he does not want to file any counter affidavit, therefore, with the consent of parties the matter was finally heard and the judgement was reserved.

3. The Present petition has been filed challenging the impugned order dated 9.11.2020 passed by the respondent no. 1 and the impugned order dated 1.4.2019 passed by the respondent no. 2.

4. The landlord filed a release application for releasing the shop in question on the ground that the shop is needed for his doctor sons for clinic and for using the same as passage, which is required for connecting the landed property behind the shop on which the landlord wants to construct the hospital. It was asserted that no passage is available for connecting the vacant plot to the main road and therefore, present shop, being the longest one, is required for personal need. The same was contested by the petitioner-tenant herein on the ground that names of the doctor sons have not been disclosed in the plaint

and in fact, the landlord is already having nursing home/hospital and therefore, the shop in question is not required. It was further asserted that the present shop whereon the tenant is carrying on barber shop, is the only source of his income.

5. After considering the issue of bona fide need, it was found by the trial Court that the shop is required as a passage for opening of the proposed hospital/nursing home to be constructed by the landlord on the main road and therefore, the need is bona fide. As per the map filed before the Court below, the approach road to the proposed hospital is on the side and is narrow and is not suitable and does not fulfil the requirement of law for sanction of the map and that the plaintiff has sufficient means to construct the hospital. It was further found that during the pendency of release application since 2017, no attempt was made by the tenant to search out any alternative accommodation. Accordingly, the release application was allowed in favour of the landlord and the release of the shop in question was ordered.

6. Appeal was filed by the petitioner-tenant. On the basis of argument and the grounds taken in appeal, 17 points of determination were framed by the lower appellate court and after considering the evidence on record and dealing with the arguments made by the tenant, lower appellate court found that the need of the landlord of the shop in question for having passage from the plot on which hospital is to be constructed connecting it to the main road, for which map has already been submitted before the development authority, was genuine and bona fide. The issues raised by the tenant were specifically dealt with and rejected. Various documents including map submitted before the development authority were considered and it was found that no evidence in rebuttal was given by the tenant. It was found that the passage which was claimed to be available to the landlord to the vacant land was in fact not the

passage connecting the plot directly to the main road. It was also found that the landlord has filed an affidavit of one Irshad Mohd Khan who offered his shop to the tenant, to which no rebuttal was filed by the tenant, however, this offer was not accepted by the petitioner-tenant herein. Therefore, the comparative hardship was found in favour of the landlord as the tenant has not made any effort to search out any alternative accommodation and on the contrary he refused to accept the shop, which was offered to him in alternative. The appeal was also dismissed by the lower appellate court.

7. Challenging the impugned orders, submission of learned counsel for the tenant-petitioner is that the landlord already has 2-3 hospitals and clinics and therefore, the need of his doctor sons without even disclosing their names, was not bona fide. It is submitted that the comparative hardship of the tenant has been brushed aside without any cogent reasons. It is submitted that the findings recorded by the courts below on the issue of bona fide and comparative hardship are absolutely perverse in nature. By drawing attention to paragraph 5 of the release application, it is submitted that the son wants to run a clinic on the shop in question and on the adjoining vacant plot proposed hospital is to be constructed for which no passage is available from the main road, therefore, simultaneous need, for establishing the clinic and passage required for the proposed hospital, is not bona fide and genuine. Drawing attention to the map, which was submitted by the landlord showing that on the one side of the property owned by the landlord a passage having width of 9½ feet is available to the landlord, which connects the open piece of land on which hospital/nursing home is proposed to be constructed, therefore, need for connecting the proposed hospital to the main road is not at all genuine and bona fide. He submits that the width of shop is, in fact, 8½ feet which is even less than to the passage available to the landlord and thus, if the width of the shop in question cannot be

increased, which is even lesser than the passage available to the landlord, clearly the findings recorded by the courts below are perverse in nature. It was further submitted that enough establishment in occupation is already available with the landlord and his sons are sitting in a different clinic and that the landlord is having one ayurvedic hospital where the his sons are doing their practice and therefore, the need as shown clinic either is not bona fide. During course of argument, attention was drawn to paragraph 5 of the release application, paragraph 32 of the written statement filed by the tenant, various documents placed on record before this Court by means of supplementary affidavit filed today in Court. He further pointed out that the trial court has decided the case in a cursory manner and the lower appellate court has also decided the case in a predetermined mind. By drawing attention to paragraph 33 of the judgement of lower appellate court, it was submitted that the observations of the lower appellate court that no evidence was submitted by the tenant to contradict the documents annexed as 27A/2 and 27A/3 is incorrect. Attention was also drawn to the reply submitted by the tenant to the affidavit submitted by the landlord annexed with the supplementary affidavit filed today, to submit that the reply was submitted by the tenant. It was also submitted that the vacant plot was not a freehold plot and therefore, the release application filed on the ground that the passage is required for the proposed hospital to be constructed on the aforesaid vacant piece of land was illegally entertained.

8. Per contra, Sri P. K. Jain, learned Senior Counsel contends that concurrent findings have been recorded by the courts below after appreciation of evidence on record. He submits that admittedly, now the plot is a freehold plot and there is no impediment in raising the construction. He pointed out that the tenant-petitioner was offered another shop whose owner is willing to let out his shop but that offer was not accepted by the

tenant-petitioner and therefore, it cannot be said that he had any comparative hardship. Insofar as bona fide need is concerned, it is submitted that the running of the clinic on the said plot by the doctor sons was only during the construction of the proposed hospital and thereafter the shop is to be used as a passage to the hospital. It is submitted that insofar as the passage, which is being said to be sufficient to cater the need of the hospital is concerned, as per the laws of the development authority, 12 meter wide road is required for opening of any such hospital, otherwise the map cannot be sanctioned by the development authority. It is submitted that this is the requirement of law, therefore, direct approach to the main road is necessary before the map could be sanctioned by the development authority. He further submits that admittedly, the map of the proposed hospital is pending consideration before the development authority and nothing could be indicated by the tenant that direct approach to at least 12 meter wide road is not required for the construction of proposed hospital/nursing home. He, therefore, submits that it is very much clear that need of the landlord is bona fide in nature. He pointed out that the landlord himself is ayurvedic doctor and his sons and one daughter-in-law are allopathic/surgeon MBBS doctors and they cannot be made to sit at ayurvedic hospital of the landlord. He, therefore, submits that the side passage, which may be 9½ feet wide, is not sufficient to meet out the statutory requirement of the development authority and direct passage is required for the proposed hospital. He, however, submits that the tenant cannot dictate the terms in what manner the landlord has to run his business. In support of his arguments, he has placed reliance on a judgement of this Court in Surendra Singh vs. Additional District Judge Court No. 11, Muzaffarnagar and 4 others, 2019 (3) ARC 112 (Para 21). Attention was also drawn to the various documents annexed with the supplementary affidavit filed today by the tenant. He, thus, submits that the judgement and orders impugned herein do not require any

interference by this Court under Article 226 of the Constitution of India.

9. I have considered the rival submissions and perused the record.

10. On perusal of the record, I find that in paragraph 6 of the plaint it has been mentioned that the shop, which is in the tenancy of the present tenant-petitioner is the deepest one and this shop is required for clinic and subsequently for passage to the proposed hospital. It was the specific case of the landlord that direct passage is required for the hospital from the main road as per the law. The specific case of the tenant was that the passage of 9½ feet wide is available to the landlord was explained in paragraph 45 of the written statement wherein it was submitted that the said passage goes to the vacant plot of the landlord and to tyre factory of one Tirth Singh Mahtab Singh. This ground was specifically taken in appeal also. The concurrent findings have been recorded by the trial court on the basis of the evidence available on record. However, I find that lower appellate court had considered everything in great detail by making reference to the documentary evidence on record as and when required. The lower appellate court had also framed as many as 17 points of determination, which were discussed in detail. Dealing with issue no.2 apart from other issues, the issue of bona fide need was also considered. The issue of relevance of depth and width of the shop in question was also considered. The trial Court after discussing the evidence on record in detail found that the need of the landlord for release of the shop for making the passage to the main road from the hospital is bona fide and genuine. It was found that dimensions of the shop are not relevant for this purpose and the need was found to be bona fide and genuine. I find that while discussing the issue of comparative hardship, which was decided along with few other issues, it was found that documentary evidence was available on record in the shape of map filed before the development

authority and that a passage directly connecting the hospital to the main road of 12 meter or more is required and no document to dislodge this evidence was filed by the tenant. I find that the said requirement is a statutory requirement as per the building regulations and cannot be waived and, therefore, prima facie, need is genuine and bona fide in nature, therefore, simply because of availability of the side passage, such need, by itself, cannot be said to be mala fide need of the landlord. Insofar as the assertion of the learned counsel for the tenant that in fact, he has denied the allegations made in the affidavit as mentioned in paragraph 33 of the judgement of lower appellate court, suffice to note that the documents annexed with the supplementary affidavit indicates that although the tenant-petitioner has, in fact, filed reply to the affidavit filed by the landlord, however, in rebuttal no documentary evidence was filed to indicate that the map has not been filed before the development authority in the year 2014 itself and the same is pending consideration or that the requirement of building laws are not mandatory in nature. During course of argument, reference was made to the requirement of Khurja Master Plan that for passing map for such hospital it should be directly connected with a 12 meter wide road. The same could not be denied by the learned counsel for the tenant-petitioner. It could also not be denied that the landlord himself is a ayurvedic doctor and his two sons are allopathic doctors and his daughter-in-law is also allopathic doctor and that they are sitting in ayurvedic clinic of the landlord, also could not be dislodged by the tenant. Thus, their bona fide need is established.

11. In such view of the matter, I find that concurrent findings of fact have been recorded by the courts below, which are based on cogent evidence available before the courts below and such findings are not perverse in nature, even if, for the sake of argument, it is accepted that two views are possible.

12. A reference may be made to paragraph 28 of Surendra

Singh (supra), which is quoted as under:

"28- The legal position and conclusions as stated above are briefly summarized as under:

(i) Section 21(1)(a) of U.P. Act 13 of 1972 is very widely worded. Demolition and reconstruction for occupation by landlord himself either for residential purpose or for purposes of any profession, trade or calling is permissible. The words 'profession, trade or calling' are very wide and include all activities wherein a person may usefully and/ or gainfully engage himself.

(ii) If the disputed property has acquired commercial value and, therefore, the the landlord wished to demolish the old single storey structure and to construct a multi-storeyed building which may fetch him higher rent and has applied to the competent authorities and got the plans approved, then the landlord's bonafide need is true.

(iii) It is well settled the landlord's requirement need not be a dire necessity. The Court cannot direct the landlord to do a particular business or imagine that he could profitably do a particular business rather than the business he proposes to start. It is for the landlord to decide which business he wants to do. The Court cannot advise him.

(iv) Landlord is the best judge of his need and this Court can not interfere in concurrent findings of fact regarding bonafide need establish before the Prescribed Authority and the appellate authority. This Court can interfere only when there is perversity in the findings recorded or when the courts below have acted without jurisdiction or far in excess of jurisdiction. A landlord has got a right to expand his business and in case, he requires additional space for it, the need cannot be said to be malafide. The tenant cannot dictate terms to the landlord as to how he should satisfy his need. Landlord is sole person who can take a decision as to which shop fulfils his need and the needs of his family. The tenant or for that matter even the Court can not guide the landlord as to which accommodation he should view to fulfil his need and which accommodation he shall not use.

(v) To be amenable to correction in certiorari jurisdiction, the error committed by the Court or Authority on whose judgment this Court is exercising jurisdiction, should be an error which is self-evident. An error which needs to be established by lengthy and complicated arguments or by

indulging into a long- drawn process of reasoning, cannot possibly be an error available for correction by writ of certiorari. If it is reasonably possible to form two opinions on the same material, the finding arrived at one way or the other, cannot be called a patent error. As to the exercise of supervisory jurisdiction of the High Court under Article 227 of the Constitution also, it has been held in Surya Dev Rai (Supra) that the jurisdiction was not available to be exercised for indulging into re- appreciation or evaluation of evidence or correcting the errors in drawing inferences like a court of appeal.

(vi) The tenant-petitioner has not disputed the fact even before this Court that the landlord-respondents have offered him a shop on the ground-floor for vacating the disputed shop and that the commercial complex as per sanctioned map has already been constructed by the landlord-respondents over the land in question and the only shop is of the petitioner which obstructed the front portion of the newly constructed commercial complex. Under the circumstances, the bonafide need of the landlord-respondents stands proved under Section 21(1)(a) of U.P. Act 13 of 1972. Under the circumstances, the conduct of the tenant-petitioner in not vacating the shop, cannot be appreciated, inasmuch as he is the only tenant, who is obstructing better beneficial use of the commercial complex by the landlord-respondents.

(viii) Under the facts and circumstances of the case, the findings of both the courts below with regard to bonafide need of the plaintiff-landlord/respondents cannot be said to suffer from any legal infirmity. The findings recorded by the courts below are findings of fact, which are based on relevant evidences on record."

13. A reference may also be made to a judgement of this Court in Smt. Shamim Begum and 5 others vs. Dinesh Kumar and 7 others, 2019 (1) ARC 319, paragraphs 11 and 12 whereof are quoted as under:

"11. *There was some dispute regarding the exact area of the shop in possession of Hemant Kumar, as according to the assertions made in the release application, the area of the said shop was 8' x 30' but the Prescribed Authority has returned a finding that the area is 9' x 34', but nothing much turns*

upon it, keeping in mind the nature of need. The specific case of the landlords was that after putting counter on the front side, a very narrow passage is left for ingress and egress of the customers. The business being done by Hemant Kumar, consists of sale and supply of fast food, confectionery and bakery items and it cannot be disputed that for carrying on such a business, ample space is required. The specific case of the landlords was that they were compelled to purchase the adjoining shop, being most suited to their need, for a hefty sum. A landlord has got a right to expand his business and in case he requires additional space for it, the need cannot be said to be malafide. The tenant cannot dictate terms to the landlords as to how he should satisfy his need. The court cannot act as a rationing authority and force the landlord not to expand his business or carry on in the same shop. In the above context, it is worthwhile to quote the following lines from the judgement of the Supreme Court in *Sarla Ahuja Vs. United India Insurance Company Ltd*, (1998) 8 SCC 119:-

".....When a landlord asserts that he requires his building for his own occupation, the Rent Controller shall not proceed on the presumption that the requirement is not bona fide. When other conditions of the clause are satisfied and when the landlord shows a prima facie case, it is open to the Rent Controller to draw a presumption that the requirement of the landlord is bona fide. It is often said by courts that it is not for the tenant to dictate terms to the landlords as to how else he can adjust himself without getting possession of the tenanted premises. While deciding the question of bona fides of the requirement of the landlord, it is quite necessary to make an endeavour as to how else the landlord could have adjusted himself."

12. The appellate court was fully justified in holding that the need of Hemant Kumar for additional space for expansion of his existing business is genuine and bonafide and he cannot be compelled to effect expansion of his business at some other place. The view taken by the Prescribed Authority that Hemant Kumar had sufficient space available with him in shop no.14/2, was based on wholly irrelevant consideration that one of his uncles is running his business in a much smaller shop measuring 8' x 16'. It was not at all germane for evaluating the need of Hemant Kumar, having regard to the nature of business being carried on by him."

14. A reference may also be made to a judgement of this Court in *Kailash Nath Gupta vs. Smt. Asha Gupta and 3 others*, 2018 (3) ARC 451 wherein it has been held that the need of landlord or his sons for expansion of the business cannot be said to be not bona fide.

15. Therefore, it is clear that the landlord has got every right to expand his business and in case he requires additional space for it, the need cannot be said to be mala fide. In the present case, there are four doctors in the family of landlord and if the need is being shown for establishing the hospital/nursing home or for expansion of professions, the same cannot be said to be mala fide in nature. Insofar as the comparative hardship is concerned, it is not in dispute that the tenant-petitioner has never made any effort to search out any shop during the pendency of litigation and that the landlord offered him a shop which he denied to accept the same, therefore, the issue of comparative hardship has also been correctly decided in favour of the landlord. Therefore, I am not inclined to interfere in the impugned orders.

16. Present petition is devoid of merit and is accordingly dismissed.

17. However, having considered the facts and circumstances of the case, subject to filing of an undertaking by the petitioner-tenant before the Court below, it is provided that:

(1) The tenant-petitioner shall handover the peaceful possession of the shops in question to the landlord-respondent on or before 30.6.2021.

(2) The tenant-petitioner shall file the undertaking before the Court below to the said effect within four weeks from the date of receipt of self-verified copy of this order;

(3) In the undertaking the tenant-petitioner shall also state that he will not create any interest in favour of the third party in the premises in dispute;

(4) Subject to filing of the said undertaking, the

tenant-petitioner shall not be evicted from the premises in question till the aforesaid period;

(5) It is made clear that in case of default of any of the conditions mentioned herein-above, the protection granted by this Court shall stand vacated automatically.

(6) In case the shop is not vacated as per the undertaking given by the tenant, he shall also be liable for contempt.

18. There shall be no order as to costs.

Order Date : 3.3.2021

Abhishek