Achal Misra vs Rama Shanker Singh & Ors on 11 April, 2005

Author: P.K. Balasubramanyan

Bench: R.C. Lahoti, D.M. Dharmadhikari, P.K. Balasubramanyan

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           CASE NO.:
Appeal (civil)  3322 of 1998

PETITIONER:
Achal Misra

RESPONDENT:
Rama Shanker Singh & Ors.

DATE OF JUDGMENT: 11/04/2005

BENCH:
CJI R.C. LAHOTI,D.M. DHARMADHIKARI & P.K. BALASUBRAMANYAN

JUDGMENT:
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J U D G M E N T P.K. BALASUBRAMANYAN, J.

1. Dr. C.P. Tandon, had a house in Lucknow. It was two storeyed. It had a plinth area of 3500 square feet. It was situate on a plot of land admeasuring 8892 square feet. Dr. C.P. Tandon died on 24.08.1977. The house devolved on his son K.K. Tandon. K.K. Tandon died in London on 10.06.1978 while having treatment for his illness. The building was inherited by his wife, Asha Tandon. Asha Tandon thus became the owner of the building.

2. On 28.08.1978, respondent No.1 before us, made an application for declaration of vacancy and allotment of the suit building to him as a tenant under Section 12, read with Section 16 of the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter called 'the Act'). The Inspector, an officer under the Act submitted a report on 11.09.1978 to the effect that the first floor of the building may be considered to be vacant under Section 12 of the Act, though a person claiming to be a caretaker was found therein. It is seen that the Inspector, while making the report, did not comply with the requirements of Rule 8(2) of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Rules, 1972 (hereinafter called 'the Rules'). On 15.9.1978, the Additional District Magistrate, the Authority under the Act, on the basis of the report issued a notice inviting objections for allotment of the first floor. On 09.10.1978, the father of Asha Tandon, the inheritor of the house, filed objections. He contended that no part of the building was vacant and the owner, Asha Tandon, was entitled to notice in terms of the Act and the Rules and no notice had been issued to her. On 23.10.1978, the Additional District Magistrate, declared vacancy not only in respect of the first floor but also in respect of the ground floor in terms of Section 12 of the Act. This order under Section 12 of the Act was not challenged then and there by Asha Tandon, the owner. The father of Asha Tandon filed an application seeking time to file objections against the proposed

allotment of the building on the ground that at the relevant time, the landlord, Asha Tandon, was in London and there was no notice to her as mandated by the Act and the Rules. On 08.11.1978, the Additional District Magistrate rejected the application for time filed by the father of Asha Tandon. He also proceeded to pass another order allotting the ground floor to respondent No.1, but without fixing the presumptive rent as required by the Act. Two days later, he passed another order allotting the first floor in favour of respondent No.2, who had come to the town as a Munsif Magistrate, in view of that officer's urgent need as a Government official for accommodation, but again, without fixing the presumptive rent as required by Section 16(9) of the Act. These orders of allotment were challenged by Asha Tandon and her father in revisions filed under Section 18 of the Act. On 23.03.1979, the Additional District Judge allowed the revisions holding that the order of the Additional District Magistrate declaring vacancy was patently erroneous since as per the report of the Inspector, the ground floor of the building was not vacant. That, even as regards the first floor, it could not be deemed that there was a vacancy in the face of the report and hence no question of allotment arose. The Additional District Judge also found that there was no compliance of Rule 8(2) and Rule 9(3) of the Rules and that the orders of allotment were liable to be set aside. He thus set aside those orders. Respondent Nos. 1 and 2 herein, the allottees, filed a Writ Petition in the High Court of Allahabad challenging the order of the Additional District Judge. On 16.05.1991, while the Writ Petition was pending, Asha Tandon sold the building to the present appellant. The appellant moved for vacating the interim stay granted by the Allahabad High Court on the ground that respondent No.2, the Magistrate, who was the allottee of the first floor, had been transferred from Lucknow to Deoria and was no more entitled to continue as an allottee. A further ground was that respondent Nos.1 and 2 had not paid any rent and were defaulters and not having paid a single pie to the landlord all these years, were not entitled to have the benefit of a stay of eviction from the High Court. Meanwhile, on 04.05.1994, the Additional District Magistrate taking note of the fact that respondent No.2, the Magistrate, to whom the allotment was made in his capacity as an official, was transferred to Deoria and had been staying in Deoria in a Government allotted quarters, cancelled the allotment of the first floor to him. Thus, though the vacancy of the first floor was declared no further step was taken regarding that floor. The appellant, therefore, approached the High Court seeking a clarification that the interim order would not stand in the way of considering the claim for release of the first floor by the appellant. By order dated 20.07.1995, the High Court clarified that its interim order dated 10.04.1979 would not stand in the way of considering the release of the first floor to the appellant. According to the appellant, in spite of this clarification, no steps were taken regarding the first floor allegedly because of the improper influence exercised by respondents.

3. Ultimately, the High Court allowed the Writ Petition and set aside the order of the Additional District Judge on the sole ground that the order declaring vacancy dated 23.10.1978 not having been challenged by the Asha Tandon, the owner of the building, then and there, that order had attained finality and that order could not be challenged in the subsequent revision against the order of allotment. Even if this were the position, the High Court failed to see that at least as regards respondent No.2 herein, the effect of the subsequent cancellation of the allotment ought to be considered, in the context of the claim of the owner of the building for release of the building. Thus, clearly the judgment of the High Court suffers from non application of mind.

4. Aggrieved by the setting aside of the order of the Additional District Judge cancelling the allotment in favour of respondents 1 and 2 herein, the appellant, the assignee landlord, has filed this appeal. In view of Section 109 of the Transfer of Property Act, there cannot be any doubt that the landlord being an assignee of the owner, was entitled to enforce his rights in respect of the property even if it were to be taken that respondent Nos.1 and 2 were to be treated as tenants of the building under him. This Court granted special leave. By order dated 17.08.2000, a Bench of two learned Judges after noticing the decision in Ganpat Roy and others v. Additional District Magistrate and Others (1985) 2 SCC 307 and doubting the correctness of the approach made therein, ordered that this appeal be heard by a larger Bench. That is how, this appeal has come up before this Bench of three Judges.

5. In this appeal, I.A. 4 of 2004 was filed by the appellant seeking directions to the respondents to pay the rent in arrears at the rate of Rs.10,000/- per month for the ground floor and Rs. 8,000/- per month for the first floor from the dates of the respective allotments till date. Certain amounts, which according to the appellant were paltry, were deposited by the respondents and the said application was also directed to be heard along with the appeal. I.A. No.5 of 2004 was filed complaining that Respondent No.2 had not vacated in spite of declaration of vacancy of the premises originally allotted to him. This was also directed to be listed with the appeal.

6. The Act, by Section 11, prohibits the letting of a building without an order of allotment in terms of the Act. A building from which a landlord or a tenant had substantially removed his effects, or had allowed it to be occupied by a person who is not a member of his family, or in the case of a residential building, where the landlord and the members of his family have taken up residence elsewhere, the residence being not temporary, it was to be deemed under Section 12 of the Act, that a vacancy had arisen in respect of that building. Sub-Section (3-A) of Section 12, which has obvious application in the case of respondent No.2 herein, provides that if the tenant of a residential building holding a transferable post under the Government has been transferred to some other city, then, such tenant shall be deemed to have ceased to occupy such building with effect from the thirtieth day of June following the date of such transfer or from the date of allotment to him of any residential accommodation in the city to which he has been so transferred. Under Rule 8 of the Rules, for ascertaining the vacancy, the District Magistrate had to get the building inspected as far as possible in the presence of the landlord and the tenant or any other occupant and after eliciting from at least two respectable persons in the locality, information regarding the vacancy and thereafter put up on the notice board, for information of the general public, the information regarding vacancy. An objection filed within three days from the date of putting up of such a notice, had to be considered and decided after considering the evidence adduced by the objector and an allotment had to be made only in the event of the objection to declaring the vacancy, being rejected. Rule 10 provides the procedure for allotment. An allottee in terms of Section 16 of the Act was deemed to be the tenant of the building under the landlord from the date of the allotment. Under Section 16(9), the District Magistrate had to make an order requiring the allottee to pay to the landlord one half of the yearly presumptive rent, or one month's presumptive rent, the presumptive rent being an amount of rent which the District Magistrate, prima facie, considers reasonable having regard to Section 9 of the Act.

7. The reference of this appeal to a larger Bench was necessitated by the following sequence of events.

In M/s Tirlok Singh and Co. v. District Magistrate, Lucknow and others, (1976) 3 SCC 726, two learned Judges of this Court held that under the scheme of the Act, an order notifying a vacancy by itself does no injury and causes no prejudice to the interests of any party. A notification of the vacancy under Section 12 of the Act, was only a step-in-aid of an order of allotment or release and only when such orders are passed, the landlord or the tenant, as the case may be, can have a grievance. Orders of allotment and release are, in the first instance, reviewable by the District Magistrate himself and an order passed by the District Magistrate under Section 16 of the Act, was appealable under Section 18 of the Act. So, a person aggrieved by an order of allotment or release has at least a twofold opportunity to challenge an order affecting his interest. Therefore, a Writ Petition filed against an order declaring a vacancy only, was premature, as the order did not affect the rights of the person who challenges that order. Of course, this decision was based on the provisions of the Act and the Rules then existing.

8. The decision in M/s Tirlok Singh and Co. (supra) came to be considered by a Bench of three learned Judges in Ganpat Roy and others v. Additional District Magistrate and Others (supra). That consideration was during the pendency of the Writ Petition filed by the tenants before the High Court in the present case. In Ganpat Roy' s case, the Bench disagreed with the position adopted in M/s Tirlok Singh and Co. , that rights of the landlord or the tenant are not affected merely by the notification of a vacancy. Of course, by the time, Ganpat Roy' s case came to be decided, the Act had undergone an amendment and an appeal against the final order of allotment had been replaced by a revision under more restricted conditions. The Bench in Ganpat Roy' s case observed that the observations in M/s Tirlok Singh and Co. that it was unnecessary for the District Magistrate to hear the parties before notifying the vacancy did not appear to be correct. It also did not appear to be correct to hold that an order notifying the vacancy did no injury and caused no prejudice to the interests of any party because an order notifying the vacancy could be objected to and if any objections were filed, they would have to be decided after considering the evidence that the objector or any other person concerned might adduce. The further remedies provided to an aggrieved person after an allotment was made, also supported this position. The learned Judges thus held that the correctness of the decision in M/s Tirlok Singh and Co.'s was open to doubt. Their Lordships ended up by saying that the scheme of the Act would show that a tenant of a premises in whose case it was found that there was a deemed vacancy had no efficacious or adequate remedy under the Act to challenge that finding. A petition under Article 226 or 227 of the Constitution of India filed by such a tenant in order to challenge that finding could not, therefore, be said to be premature. In that view, the Bench set aside the decision of the Allahabad High Court and remanded the Writ Petition involved therein to be heard by the High Court on merits. Thus, the subsequent decision of three learned Judges of this Court indicated that an order notifying the vacancy in terms of the Act was capable of affecting the rights of the landlord or the tenant and hence the challenge offered to it then and there, could not be said to be either not maintainable or premature.

9. It was in the context of this decision that the High Court allowed the Writ Petitions filed by the allottees on the ground that the landlord not having challenged the original order notifying the

vacancy then and there, was precluded from challenging the notifying of vacancy in revision against the final order or in further challenges to it in the High Court. The Court also noticed the decision in Smt. Kunj Lata v. Xth Additional District Judge, Kanpur Nagar and others , 1991 (2) RCJ 658, holding that if an order declaring a vacancy was not challenged and allowed to become final, it could not be set aside by the Revisional Court in a revision against the final order of allotment. The High Court proceeded to say that the law declared by this Court in Ganpat Roy' s case has to be taken to be the law as it always was, and even though at the time of the declaration of vacancy in this case, the landlord might have been misled by the ratio of the decision in M/s Tirlok Singh and Co.'s case in not challenging that order then and there, the challenge of the landlord in the revision to the final order of allotment had to be rejected on the ground that the order declaring a vacancy had become final. It was thus that the Writ Petitions filled by the allottees was allowed by the High Court.

10. In the order of reference to a larger Bench dated 17.8.2000, the learned Judges noticed that it could not be said that the question of vacancy if not challenged by a separate Writ Petition on its notification, could not be questioned in the revision filed under Section 18 of the Act. The question of vacancy pertained to a jurisdictional fact and can be challenged in the revision filed against the allotment order passed by the District Magistrate. In case it was found that there was no vacancy, the order of allotment had to be set aside. The Bench, therefore, felt that the decision in Ganpat Roy' s case holding that the validity of declaration of vacancy cannot be agitated in the revision under Section 18 of the Act challenging the allotment could not be accepted as correct. It was in that context that the case was referred to a larger Bench for decision, since the decision in Ganpat Roy' s case was rendered by three learned Judges of this Court.

11. On the scheme of the Act, it is clear that the preliminary step is to declare a vacancy. At this stage, an enquiry has to be made including an enquiry involving at least two respectable neighbours. It is thereafter that the vacancy has to be notified and objections invited. This is followed by either dropping of the proceedings on the objections being upheld that there was no vacancy or by allotment to a tenant on finding the vacancy or in ordering a release of the building, in case a landlord was found entitled to have such a release under the Act. Therefore, the notifying of a vacancy is only a step in the process of making an allotment of the building to a tenant. The Act contemplates that no building should be let out by a landlord except through the process of allotment by the Rent Control Authority. Since the order notifying a vacancy is only a step in passing the final order in a proceeding under the Act regarding allotment, it is clear that the same could be challenged while challenging the final order, unless there is anything in the Act precluding such a challenge or conferring a finality to the order notifying a vacancy. It was held long ago by the Privy Council in Moheshur Singh v. The Bengal Government, (1859) 7 Moo Ind App 283 (302):

> "We are not aware of any law or Regulation prevailing in India which renders it imperative upon the suitor to appeal from every interlocutory order by which he may conceive himself aggrieved, under the penalty, if he does not do so, of forfeiting forever the benefit of the consideration of the Appellate Court. No authority or precedent has been cited in support of such a proposition, and we cannot conceive that anything would be more detrimental to the expeditious administration of justice than the establishment of a rule which would impose upon the suitor the necessity of

> so appealing, whereby on the one hand he might be harassed with endless expense and delay, and on the other inflict upon his opponent similar calamities."

In Sheonath vs. Ramnath (10 MIA 413) the Privy Council reiterated that a party is not bound to appeal from every interlocutory order which is a step in the procedure that leads to a final decree. It is open on appeal from such final decree to question an interlocutory order.

12. This principle is recognized by Section 105(1) of the Code of Civil Procedure and reaffirmed by Order XLIII Rule (1A) of the code. The two exceptions to this Rule are found in Section 97 of the Code of Civil Procedure, 1908, which provides that a preliminary decree passed in a suit could not be challenged in an appeal against the final decree based on that preliminary decree and Section 105(2) of the Code of Civil Procedure, 1908 which precludes a challenge to an order of remand at a subsequent stage while filing an appeal against the decree passed subsequent to the order of remand. All these aspects came to be considered by this Court in Satyadhan Ghosal and others v. Smt. Deorajin Debi and another, (1960) 3 SCR 590 wherein, after referring to the decisions of the Privy Council, it was held that an interlocutory order which had not been appealed from either because no appeal lay or even though an appeal lay an appeal was not taken, can be challenged in an appeal from a final decree or order. It was further held that a special provision was made in Section 105(2) of the Code of Civil Procedure as regards orders of remand where the order of remand itself was made appealable. Since Section 105 (2) did not apply to the Privy Council and can have no application to appeals to the Supreme Court, the Privy Council and the Supreme Court could examine even the correctness of an original order of remand while considering the correctness of the decree passed subsequent to the order of remand. The same principle was reiterated in Amar Chand Butail v. Union of India and others., AIR 1964 SC 1658 and in other subsequent decisions.

13. It is thus clear that an order notifying a vacancy which leads to the final order of allotment can be challenged in a proceeding taken to challenge the final order, as being an order which is a preliminary step in the process of decision making in passing the final order. Hence, in a revision against the final order of allotment which is provided for by the Act, the order notifying the vacancy could be challenged. The decision in Ganpat Roy' s case, which has disapproved the ratio of the decision in M/s Tirlok Singh and Co., cannot be understood as laying down that the failure to challenge the order notifying the vacancy then and there, would result in the loss of right to the aggrieved person of challenging the notifying of vacancy itself, in a revision against the final order of allotment. It has only clarified that even the order notifying the vacancy could be immediately and independently challenged. The High Court, in our view, has misunderstood the effect of the decision of this Court in Ganpat Roy' s case and has not kept in mind the general principles of law governing such a question as expounded by the Privy Council and by this Court. It is nobody's case that there is anything in the Act corresponding either to Section 97 or to Section 105(2) of the Code of Civil Procedure, 1908 precluding a challenge in respect of an order which ultimately leads to the final order. We overrule the view taken by the Allahabad High Court in the present case and in Smt. Kunj Lata vs. Xth Additional District Judge, Kanpur Nagar and others (supra) that in a revision against the final order, the order notifying the vacancy could not be challenged and that the failure to independently challenge the order notifying the vacancy would preclude a successful challenge to the allotment order itself. In fact, the person aggrieved by the order notifying the vacancy can be

said to have two options available. Either to challenge the order notifying the vacancy then and there by way of a writ petition or to make the statutory challenge after a final order of allotment has been made and if he is aggrieved even thereafter, to approach the High Court. It would really be a case of election of remedies.

14. We are, therefore, satisfied that the High Court was in error in allowing the Writ Petition solely on the ground that the landlord had not challenged the original order notifying the vacancies then and there. The decision of the High Court in the Writ Petition, therefore, requires to be set aside and the Writ Petition remanded to that Court for a fresh hearing and disposal in accordance with law, including the question whether the order notifying the vacancy was proper. It would also be necessary for the High Court to consider the effect of the cancellation of the order in favour of Respondent No.2 considering the nature of the allotment made in his favour, even assuming that the High Court does not find any reason to interfere with the order notifying the vacancy or with the order making the allotment. The appeal is hence allowed. The judgment of the High Court in the Writ Petition filed by the allottees is set aside and the Writ Petition is remanded to the High Court for a fresh disposal in accordance with law and in the light of the observations contained in this judgment. The High Court, it is hoped, will expeditiously dispose of the Writ Petition afresh pursuant to this order of remand, in the circumstances of the case preferably within a period of six months of the receipt of a copy of this Judgment.

I.A. NOS. 4 AND 5 of 2004

15. It appears that the respondents who are in occupation of the two floors in the suit premises, have not paid rent since the beginning. They seem to be taking advantage of the pendency of litigation, also of the landlord being not resident in India or in the city.

16. I.A. No.4 of 2004 is filed by the landlord seeking direction to the respondent-tenants to pay the rent of the premises during the pendency of litigation. I.A. No.5 of 2004 is filed for a direction to the respondents to vacate the premises. Notice on the applications was issued to the respondents. On 5.4.2004, this Court directed respondent-tenants to pay the entire arrears of rent/damages within a period of two months from the date of the order and to continue to pay monthly rent/damages as and when it falls due. On 5.7.2004, the Court directed that any amount tendered by the respondent-tenant would be accepted by the landlord without prejudice.

17. On 5.7.2004, respondent No.2-Raj Singh filed an affidavit-in- response stating that on 2.6.2004 he tendered a crossed cheque of Rs.1,45,860/- as rent for 26 years calculated on the basis of the annual value as stated in the assessment list of 1976, of the first floor of the premises in question which is Rs.5,100/-, water tax Rs.408/- and drainage tax Rs.102/- making a total of Rs.5,610/- per annum. However, the cheque was received back by respondent No.1 as addressee-landlord was not available at the address given by him.

18. Respondent No.1-Rama Shanker Singh has stated that he is a tenant on the ground floor assessed at Rs.6,120/- per annum whereas water tax is Rs.489.60 and drainage tax is Rs.122.40 making a total of Rs.6,732/- per annum. According to him he is a tenant since 14.11.1978 and with

his letter dated 15th May, 2004 he tendered a pay order in an amount of Rs.1,75,032/- to the landlord. The pay order sent through registered post has been received back by him as undelivered to the addressee-landlord.

19. According to the landlord, the property is a valuable property situated in a prime locality of Lucknow city. The landlord has got the property valued through Snow Fountain Consultants, Architects and Valuers. The valuation report dated 17.7.2004 has been filed in the court, according to which the total rent of the property would come to Rs.28,496/- per month.

20. This litigation is more than 25 years old. To allow the tenants to contest the case without payment of arrears and occupation charges falling due month by month would be travesty of justice. There are two proceedings pending between the parties: one is the present proceedings and the other is a suit for recovery of rent filed by the landlord against the tenants.

21. We direct as under:-

(i) Within a period of two months from today respondent No.1-

Rama Shanker Singh, in occupation of the ground floor, shall tender an amount of Rs.3,50,000/- through demand draft drawn on a scheduled bank in the name of the landlord and hand over the same to the counsel for the landlord. With effect from 1.5.2005, month by month, or on or before the 15th day of that month, Rama Shanker Singh-respondent No.1 shall pay an amount of Rs.1200/- per month plus the amount of water tax and drainage tax through bank draft drawn in the name of the landlord and tendered either to the landlord or to her counsel.

(ii) Within a period of two months from today respondent No.2- Raj Singh, in occupation of the first floor, shall tender an amount of Rs.3,00,000/- by way of demand draft drawn on a schedule bank in the name of the landlord and hand over the same to the counsel for the landlord. With effect from 1.5.2005, month by month, on or before the 15th day of that month, Raj Singh-respondent No.2 shall pay an amount of Rs.1000/- per month, plus the amount of water tax and drainage tax through bank draft drawn in the name of the landlord and tendered either to the landlord or to her counsel.

(iii) This amount shall be treated as a provisional payment but a condition precedent to their entitlement to contest the present proceedings. The amount so paid shall be liable to be adjusted consistently with the decree that may be passed by the competent Court for the recovery of the rent.

(iv) Any respondent who does not comply with the above-said order, shall not be entitled to contest in the proceedings and shall not be entitled to be heard.

22. From the material available on record it does not appear that any rate of rent was appointed at which rent would be payable by the respondents to the landlord. The respondents also do not seem to have taken any steps for fixation of rent of the premises in their occupation. They have been happy to have got the premises in a prime locality, occupying and enjoying the same for no payment. We make it clear that the respondents shall be liable to pay the rent equivalent to mesne profits with

effect from the date with which they are found to have ceased to be entitled to retain possession of the premises as tenant and for such period the landlord's entitlement cannot be held pegged to the standard rent. Reference may be had to the law laid down by this Court in Atma Ram Properties (P) Ltd. vs. Federal Motors (P) Ltd. (2005 (1) SCC 705).

23. The appeal is allowed. I.A. Nos.4 and 5 are disposed of in the terms above said. The parties through their respective counsel are directed to appear in the High Court on 2nd May, 2005. As it is long pending litigation, we request the High Court to give this matter a priority in hearing and decide the same as far as possible within a period of six months from 2.5.2005, the date on which the parties would appear in the High Court.