ALLAHABAD HIGH COURT

Ramesh Chand Bose

Vs.

Gopeshwar Pd. Sharma

Second Appeals Nos. 64 and 106 of 1966

(Hari Swarup and T.S. Misra, JJ.)

11.03.1976

JUDGMENT

Hari Swarup, J.

1. These two appeals have been referred to us as they raised certain questions of law on which there is a difference of opinion in different judgments of this court as well as of other High Courts. The relevant facts giving rise to these appeals in the two cases are the following :-

> The appellant in either case was defendant in the suit. The suit was filed for his ejectment and for arrears of rent and damages for use and occupation. The plaintiff claimed that the defendant was the tenant and his tenancy had been terminated by a notice to quit given under Section 106 of the Transfer of Property Act and there was a valid permission from the District Magistrate to institute the suit under Section 3 of the U.P. (Temporary) Control of Rent and Eviction Act, 1947. The defendant in either case denied the validity of the notice terminating the tenancy end also the permission granted under Section 3 of the Act. According to the defendant the tenancy had come down from the ancestors. In the case giving rise to Second Appeal No. 64 of 1966 the tenancy was created at the time of the defendant's grandfather while in the case of Second Appeal No. 106 of 1966 it was created at the time of his father. After the death of the original tenant the tenancy rights it was urged were inherited by their heirs including the defendant in either case. It was further urged that the notice terminating the tenancy alleging it to be the tenancy of the defendant alone and asking him alone to vacate, was not sufficient to terminate the tenancy because notice should have been given to all the

persons who were tenants-in-common with the defendant. An regards the permission under Section 3 of the Act the case of the defendant was that it was invalid because it had been granted in review order by the District Magistrate and that the District Magistrate had no power to review his order refusing permission.

2. The trial court held that the tenancy had been validly terminated as the defendant alone was the tenant and that the permission was also validly granted and that it could not be challenged in the present suit. The first appellate court confirmed the findings of the trial court.

3. The learned counsel for the appellant has first challenged the finding of fact recorded by the Court below that the defendant alone was the tenant. Ordinarily, a finding of fact has to be accepted as final in second appeal, but in the present case we find that the finding has not been recorded by the first appellate court on a consideration of evidence but on the basis of a view of law which, in our opinion, is not correct. The learned District Judge held that on the death of a tenant all the heirs do not become automatically the tenants but the tenancy has to be accepted by them to acquire right. He found that as no evidence was given on behalf of the defendant to show that all the heirs had chosen to become tenants of the accommodation in place of the deceased tenant they could not be deemed to be tenants. Such a view is not warranted by law. Tenancy rights being property rights are heritable and the question of choice does not arise. The nature of tenancy can of course be changed by a fresh lease. Unless the original tenancy is terminated the question again of a fresh lease does not arise. As the evidence was not considered in the first appellate Court's judgment we ourselves looked into the evidence and we find that there is no evidence led by the plaintiff to the effect that the original tenancy had at any stage been terminated or that there was any agreement between the plaintiff and the defendant in regard to the tenancy in dispute. The evidence, on the other hand, of the defendant is that the tenancy had continued and all the heirs were tenants. There is not even a pleading that a fresh tenancy had been created between the plaintiff and the defendant. The plaintiff had purchased the property and stepped into the shoes of the lessor. The earlier lease trust, therefore, be deemed to have continued. The plaintiff accordingly must be deemed to have failed to establish that the defendant alone was the tenant and the other heirs of the

original tenant were nut tenants along with the defendant.

4. The next question, which is the basic question in the case is whether the notice given by the plaintiff to the defendant was sufficient to terminate the tenancy. The notice exhibit 1 goes to show that the plaintiff had treated the defendant alone as the tenant and had sought to terminate the relationship of landlord and tenant alleged to be existing between him end the defendant. There was no attempt made in the notice to terminate the tenancy of all the persons who were tenants-in-common in respect of the property. It is urged by the learned counsel for the plaintiff that it was not necessary to give notice to all the co-tenants or to indicate even in the notice that the tenancy of each one of them was being terminated. According to the learned counsel notice to one of the co-tenants is notice to all and is sufficient to terminate the tenancy. In support of his contention learned counsel places reliance on the decision of the Supreme Court in *Kanji Manji v. The Trustees of the Port of Bombay* [1] and also on some decisions of our High court. The facts in the case of Kanji Manji (supra) were that a joint lease was executed by assignment in favor of two persons. Notice was given to terminate the tenancy to both of them. Suit was filed against both the tenants. It was found that one of them had died much earlier. His name was accordingly deleted from the plaint in the suit. The Supreme Court on these facts held that the notice to terminate the tenancy as well as the frame of the suit was good. The relevant passage is 'once it is held that the tenancy was joint, a notice to one of the joint tenants was sufficient, and the suit for the same reason was also good.' This was a case of joint tenancy and not a case of termination of tenancy of tenants-in-common. There can be no dispute that the tenants in the present case are not joint tenants but tenants-in-common as the tenancy devolved by inheritance. In the case of *Gulam Ghouse Mohiuddin v. Ahmad Mohiuddin Kamisul Qadri* [2] it was held that the estate of a deceased Mohammedan devolves on the heirs at the moment of his death. The heirs succeed to the estate as tenants-in-common in specific shares. The right of tenancy is a property right and on inheritance it passes on according to the share of each heir, but it goes by survivorship in case of joint tenants. In the present case it is nobody's case that the rule of survivorship was applicable. The property, therefore, passed on according to the share of each heir and thus all of them became tenants-in-common. Ruling of the Supreme Court in Kanji Manji's

case (supra) has, accordingly, no applicability.

5. Learned counsel, however, contended that the ruling in Kanji Manji's case is applicable in every case where there are more than one tenant. The contention, in short, is that whatever may be the rights of the tenants *inter se* so far as their relationship with the landlord is concerned there is no distinction between the case of joint tenants and tenants-in-common. According to the learned counsel so far as the relationship of a landlord and a tenant is concerned they are always joint tenants quo the landlord and notice to one will be notice to all. In this connection learned counsel has relied on the decision of the Patna High Court in the *Tata Iron and Steel Co. Ltd. v. Abdul Ahad* [3] We have carefully gone through the judgment but are unable to agree with the decision. It was held in that case "If by renovation of the contract or the transaction of lease, the lessor agrees to recognise the heirs who inherit the leasehold property as tenants-in-common not as joint tenants but separate from one another, that is to say, if the lessor agrees to make their liability several and does not keep it as joint, they may become separate or several tenants. But until that is done, the tenancy which was single, indivisible or joint at its inception, cannot become a several tenancy because the heirs who inherit the leasehold interest do so as tenants-in- common." To us it appears that the change in the status of tenancy can occur not only by an agreement or contract but also by operation of law. When a person gives the property to another on lease that lease remains subject to the law of inheritance. If the lessee dies then the law takes its course and the property (leasehold rights) devolves on the heirs in accordance with law of inheritance. If under the law a unitary tenancy ceases to exist and severalty takes place then the lease also takes the same colour and becomes subject to the same limitations. It does not become a joint tenancy of the heirs because joint tenancy contemplates unity of interest. If there is no unity of interest then several persons holding tenancy rights can have different interests. It would then be a case of tenancy-in-common as against that of joint tenancy. In the text book of Woodfall's Law of Landlord and Tenant, Twenty fourth Edition the rights and ingredients of joint tenancy are given in the following terms :-

> "Joint tenants have unity of title, unity of commencement of title, unity of interest, so as in law to have equal shares in the joint estate, unity of possession, as well of every part as of the whole, and right of

survivorship."

Tenancy-in-common has a different concept. There is unity of possession but no unity of title, i.e., the interests are differently held which mean that none of the co-tenure-holders has title over the entire estate. The title varies. This is also borne out from the observation in the same Book at page 61. There it is stated that

> "tenants-in-common need have only unity of possession; they may have unequal shares, and there is no right of survivorship. Each tenant-in-common could at common law make a lease in respect of his own share alone, the interest of each being separate and distinct, and if tenants-in-common all joined in one lease it operated as a lease by each of his respective share and a confirmation by each as to the shares of the others."

The principle will apply with equal force to tenancy rights held in common. In the case of inheritance the shares of heirs are different and the ownership of the lease-hold rights would be confined to the respective shares of each heir and none will have title to the entire leasehold property.

6. The next case relied upon by the learned counsel is the decision of the Bombay High Court in *Mst. Ramubai v. Jairam Sharma* [4] Although it is stated therein that on the death of a lessee the heirs inherited not as tenants-in-common but as joint tenants and, therefore, notice to one was good notice to terminate the entire tenancy, the facts of the case indicate that it was a notice given to all though it was served on one. It purported to terminate the entire tenancy of all the co-tenants. Such a notice can certainly not be held to be invalid.

7. The view expressed in *William White v. Tyndall* [5] was taken into consideration. The observations relied upon was of Lord Halsbury in the following terms :-

> "It is true that the parties to whom the demise is made are to hold it as tenants-in-common, but what they covenant to do is to pay one rent, not

two rents, and not each to pay half a rent, but one rent."

The learned Judge then relied on the case of *United Dairies Ltd. v. Public Trustees,* [6] on the remarks of Greer, J. to the effect that

> "each of the tenants have a share of every part of the estate and it would be true to say that there was a privity of estate between him and the landlord in the whole of the leased property, and therefore each was liable to perform the covenant contained in the lease in its entirety. If that be the true position with respect to totality of the rights under the leasehold and there is unity of enjoyment and possession in respect of leasehold property vis-a-vis the landlord, it is difficult to see why notice to one of these joint tenants could not be considered as a valid notice to all provided such a notice was given."

8. The inference drawn from these English cases, with great respect, does not appear to be the inference which falls from those decisions. In William White's case (supra) the covenant showed that the lease (lessees ?) will be the tenants-in-common but on interpretation of the deed their Lordships came to the conclusion that it was a case not of tenants-in-common but of joint tenants. The other Lord Justices made the matter quite clear. Lord Watson observed :-

> "Taken by themselves, they plainly import joint end not several liability. No doubt the contest might be such as to impose upon them a meaning which they do not *prima facie* bear; but there is nothing to suggest the several liability of the lessees except the fact that in order to prevent either of them taking the whole by survivorship, it is declared in the habendum that they are to hold as tenants-in-common. That is an interest which is just as consistent with a joint as with a several liability to pay one undivided rent, and to execute all necessary repairs. In these circumstances the authorities relied on by the court of appeal appear to me to have no application."

Whether in a particular lease the tenants are holding as joint tenants or tenants-in-common will thus depend on the facts of each case. In the case of United Dairies Ltd., (supra) the question was about the performance by the tenant of

obligations under the covenant and the liability to pay damages for breach thereof. The Court held the tenants-in-common were liable to pay damages as there was unity of possession. That case did not consider the right of a landlord to terminate the tenancy by serving a notice on one of the tenants in-common holding leasehold rights. It was observed in that case :

> "Tenants who take a leasehold interest by assignment are not under any contractual obligation to perform the covenants of the lease. The original lessees and their representatives continue liable under the lease, but the law imposes upon the assignees while they are assignees a liability to perform the covenants contained in the lease by reason of what is called 'privity of estate,' that is to say, inasmuch as they take under the original lease they are liable to perform the covenants for the benefit of any person who succeeds to the title of the original lessor. Where the assignee is a single person who takes the whole of the leased property no difficulty arises. Where the leased property has been physically divided amongst two or more assignees it is clear that the obligations of the lease, so far as they affect the assignees, become separate, and each of the assignees is liable, while he is assignee, to perform the covenants so far as they affect his divided part of the leased property."

The question before us is some what different, It is where the tenants-in-common maintained the continuity of possession with severalty of title. Greer, J. in United Dairies Ltd. (supra) observed

> "..... it does not seem to me quite accurate to say that a tenant-in-common is an owner with others of the whole estate....."

The law appears to be that in a case of tenancy-in-common the ownership is of all but the share of each is different. It was observed by Baylay J. in *Holloway v. Barkeley* [7]

> "where there are tenants-in-common with undivided moieties there is only one tenement in the whole of which each tenant shares. Though there may in a sense be two estates, it is obvious that each tenant in common has an estate in the whole of the single tenement, and that as

> regards this estate there is privity between him and the landlord."

(quoted by Greer, J. in United Dairies Ltd. (supra)).

The privity of estate between the landlord and the tenant is thus with the leasehold estate held by each tenant and the landlord. The covenants about payment of rent or maintenance of property stand on different footing as they are matters of contract and depend upon the unity of possession over the entire leasehold property. In *Merceron v. Dowson* [8] Bayley, J. said :

> "The defendant is the assignee of the lessee; and though he has no entire interest in any part of the estate, he has a qualified interest in the whole; and as the whole estate is burthened with the liability to repair, he is liable for a portion of the repair commensurate with his interest."

The distinction was clearly drawn in United Dairies Ltd. as regards the liability under the covenant on the basis of possession from the rights and liability that may arise by title.

9. In the case of *Smt. Vishnawati v. Bhagwat Vithu Chowdhry* [9] it was observed :

> "It is an incident of 'tenancy' that it is one and even though more than one person may hold it they hold it together as one. It is well recognised that a landlord cannot terminate the tenancy piecemeal, nor can some out of the several co-tenants terminate it for themselves only. Co-tenants who come to hold a tenancy by inheritance may, for the purposes of succession, have an estate as 'tenant-in-common' and not 'joint tenants', but the special incidents attaching to a tenancy will not be changed upon the tenancy passing to more than one person by inheritance. In so far as their relationship with the landlord is concerned they hold the tenancy jointly and for the landlord they constitute one unit. So even if a notice is addressed to one or some of the co-tenants it must be effective as against all, the only limitation to this being that there is nothing to show that the tenancy is intended to be terminated piecemeal and it is clear that the intention is to terminate the tenancy as a whole."

With great respect it appears to us that the learned single Judge fell in error in equating the unity of possession with unity of title. There is no doubt that the tenancy cannot be terminated piecemeal and it is for this reason that notice has to be given to each of the tenants in common. The tenancy is created by transfer of title. If the title vests partially in one person and partially in others then the title has to be terminated by a notice to each one of the persons holding the moiety in the title. The difference between the leasehold right and the right, of other property arises because it is capable of having unity of possession without having unity of title. Joint tenancy means that each one of the tenants has unity of title in respect of the entire property and it is for this reason that notice to one joint tenant is sufficient to terminate the entire tenancy and it is also for this reason that principle of survivorship applies in case of joint tenancy and not in the case of tenancy-in-common. We are unable to accept that even though by operation of law the title in the leasehold right gets divided it remains a single unit so far as the landlord is concerned. The lease itself as we have said, is subject to law of inheritance and if the law divides the unity of title it becomes binding also on the landlord.

10. The cases which have taken a view contrary to the view taken in the case referred to above have been relied upon by the learned counsel for the appellant. In the case of *Shrimati Shafiqa v. Maqsood Ahmad Khan* [10] learned single Judge of this court took the view that co-tenants have no unity of title. Each one of the co-tenants is the owner of specific interest in the property and, therefore, notice given to one of them cannot have the effect of determining the interest of other interest-holder. In *Ajit Kumar Roy v. Smt. Satya Bala Dutt* [11] the learned Judges considered the Supreme Court's decision in Kanji Manji's case (supra) and held that it did not apply to cases where the lessees held not as joint tenants but as tenants-in-common. The learned Judges distinguished the Supreme Court case on the ground that because a joint tenancy goes by survivorship it had nothing in common with the case of lessee holding as tenant-in-common. In that case the learned Judges finally held that the notice to quit if addressed to all the tenants holding in common but served only on some of them was sufficient service and had the effect of terminating the tenancy. In the present case the notice was not addressed to all the tenants, nor it did purport to terminate the tenancy rights of each of the tenants. In the Full Bench case of this court in *Ram Awalamb v. Jata Shanker* [12] it was held that there was a distinction between a

joint tenancy and a tenancy-in-common as all the ingredients were not the same. In the case of *Valiyaveettil Konnappan v. Mangot Velia Kunniyil Manikkam* [13] the court emphasised the distinction between the rights arising from joint tenancy and tenancy in common. It was observed that where however, the joint owners are only tenants in common there is only unity of possession, not of title or interest and to determine a tenancy so held in accordance with Section 106 of the Transfer of Property Act notice must be addressed to all the tenants though proof of service on one will be *prima facie* proof of service on all..... notice must go to every party intended to be bound by it and if it is not issued to any of the joint owners of the lease there is no determination of the lease so far as he is concerned. A lease cannot be determined piecemeal and hence it follows that there is no determination even so far as the others are concerned. It appears that in case of a leasehold rights held by co-sharers as tenants-in- common there is no unity of title meaning thereby that the title gets split up and unless every bit of the title is sought to be effected by the notice to terminate the tenancy the lease as a whole cannot be determined. As there is no unity of title among the holders of the lease the termination of title of one cannot amount to termination of title of others in the leasehold rights.

11. In the present case the lease was granted to an individual. It was inherited by the present defendants and others and accordingly all of them became tenants-in-common in the leasehold rights with independent shares in title. Though they have unity of possession, there is no unity of title. The tenancy could, therefore, have been terminated only by the termination of the entire tenancy rights held by the various persons. As the notice never purported to terminate the tenancy of all the owners of the tenancy rights it cannot be held to have validly terminated the tenancy under Section 111 read with Section 106 of the Transfer of Property Act.

12. In view of our finding that the tenancy had not been validly terminated the other questions do not arise for determination. But as the point has been raised about the validity of the permission under Section 3 of the U.P. (Temporary) Control of Rent and Eviction Act we think it would be better to express our opinion on that point also. The permission had been originally refused by the District Magistrate. On a review he granted the permission. The tenant went up in revision before the Commissioner. The Commissioner dismissed the revision

and upheld the permission. The suits were instituted thereafter. The tenants, however, filed revisions against the Commissioner's orders, but before they could be allowed the suits had been instituted. The revisions therefore, became infructuous. The matter is concluded by the Supreme Court decision in *Mohd. Ismail v. Nannhey Lal* [14] It was held therein that an order under Section 7-F passed by the State Government cancelling the permission to sue given by the Commissioner cannot affect the suit filed prior to the order of the State Government.

13. Further, it is not even open to the defendant in the present case to challenge the validity of the permission. The permission had been granted by the District Magistrate who had the initial jurisdiction to grant permission. The error, which is being pointed out, is the error of procedure, i.e., instead of passing an independent and fresh order he passed the order in the form of an order passed in review of the earlier order. The order of the District Magistrate was then subjected to the revisional jurisdiction of the Commissioner and he upheld the order. No error of jurisdiction has been pointed out in the order of the Commissioner. Sub-section (4) of Section 3 of the U.P. (Temporary) Control of Rent and Eviction Act provides

> "The order of the Commissioner under sub-section (3) shall, subject to any order passed by the State Government under Section 7-F be final."

The order of the Commissioner thus became final to remove the bar to the institution of the suit. Further as held by the Supreme Court in *Ramji Das v. Trilok Chand* [15]

> "Section 16 of the Act provides that no order made under the Act by the State Government or the District Magistrate shall be called in question in any court. It is true that the finality of the order declared by Section 3 (4) and Section 16 will not exclude the jurisdiction of the High Court in exercise of the jurisdiction under Article 226 of the Constitution to issue an appropriate writ quashing the order. But subject to interference by the High Court the decision must be deemed final and is not liable to be challenged in any collateral proceeding."

14. In the result both the appeals are allowed with costs, the decrees, passed by the courts below are set aside and the*Sri Gopeshwar Prasad Sharma v. Sri R. C. Bose* [16] and *Sri Gopeshwar Prasad Sharma v. Sri R.C. Bose*[17] are dismissed with costs.

Appeals allowed.

Cases Referred.

1. (AIR 1963 SC 468)
2. (AIR 1971 SC 2184)
3. (AIR 1970 Pat 338)
4. (AIR 1964 Bom 96)
5. ((1888)13 AC 263 at p. 270)
6. ((1923)1 KB 469)
7. ((1826)6 B and C 2)
8. ((1826)8 D. and Ry 264)
9. 1969 All LJ 1131
10. (1969 All LJ 1116)
11. (AIR 1973 Cal 339)
12. (AIR 1969 All 526) (FB)
13. (AIR 1968 Kerala 229)
14. (AIR 1970 SC 1919)
15. (AIR 1971 SC 2361)
16. Suits Nos. 608 of 1963
17. 607 of 1963