

# ALLAHABAD HIGH COURT

Budh Sen

Vs.

Sheel Chandra

Second Appeal No. 1661 of 1970

(Yashoda Nandan and S. Malik, JJ.)

09.08.1977

## JUDGEMENT

### **Yashoda Nandan, J.**

1. These are two connected second appeals arising out of the same suit which can be conveniently disposed of by a common judgment. Second Appeal No. 1661 of 1970 has been preferred by the plaintiff in the suit while the connected Second Appeal No. 1676 of 1970 is at the instance of Sheel Chandra Agrawal who figured as defendant No. 1 therein.

2. The suit giving rise to these appeals was for ejection of Sheel Chandra Agrawal (impleaded as defendant No. 1), from certain premises and for recovery of arrears of rent and damages for use and occupation pendent lite and future. The suit was brought on the allegations that the plaintiff was a tenant of an accommodation consisting of a quarter No. 1/3 and three shops in a building situate at Rampur. According to him, he had sub-let two of the shops in his tenancy to late Sri Chandra Bhan, father of four of the defendants and husband of the fifth defendant in 1945. Subsequently a dispute arose between the plaintiff and Sri Chandra Bhan with regard to the rent, with the result that he was compelled to file Suit No. 457 of 1959 for ejection of Sri Chandra Bhan and for arrears of rent in respect of both the shops in his sub-tenancy. The suit for ejection was dismissed but claim for arrears of rent was decreed at the rate of Rs. 45 per month which decree was confirmed in appeal on the 14th December, 1961. Subsequently on the 20th Jan. 1962, Sri Chandra Bhan admittedly died and according to the plaintiff his son Sheel Chandra Agrawal who alone initially was impleaded as defendant took up the business of his father and continued to remain in possession of both the shops as heir of his

deceased father on the same terms and conditions as his late father. It was alleged that Sheel Chandra Agrawal also continued to pay rent at the rate of Rs. 45 per month thereby acknowledging him as his landlord. The rent continued to be paid by Sheel Chandra Agrawal till Dec., 1962 where after he ceased to pay any rent. The plaintiff claimed that he served defendant No. 1 with a registered notice dated 7th June, 1963 demanding rent with effect from 1st Jan., 1963 but under the letter dated 20th June, 1963 he declined to pay any rent and disclosed that he was making payment of rent to the owner of the building and thus denied his title as his landlord. According to the plaint case, Sheel Chandra Agrawal thus forfeited his right to remain in possession as the plaintiff's sub-tenant. The plaint case was that consequently the plaintiff again served Sheel Chandra Agrawal with a notice dated 27th March, 1964 demanding arrears of rent with effect from 1st January, 1963 and terminating his tenancy. It was alleged that in spite of receipt of that notice on the 31st March, 1961 Sheel Chandra Agrawal neither paid the arrears of rent nor vacated the shops and instead by his letter dated 27th April, 1964 renounced his character as a sub-tenant and thus forfeited his right to remain in possession. The plaintiff claimed that Sheel Chandra Agrawal thus became liable to ejection and to pay arrears of rent and damages from the 1st January, 1963. According to the plaintiff, defendants Nos. 2 to 4, who had been impleaded under orders of the court and were the sons, a daughter, and widow of late Sri Chandra Bhan did not continue in business after the death of their father and so they had no concern with the shops or with the present dispute inasmuch as they did not inherit any interest as heirs of Sri Chandra Bhan. The plaintiff asserted that, however, since they had been directed to be arrayed as defendants by the court, they were impleaded as pro forma defendants. It may be mentioned here that even after amendment of the plaint, the plaintiff prayed for no reliefs against defendants Nos. 2 to 5 by amending the relief clause.

3. All the defendants resisted the plaintiff's claim. Defendant No. 1 Sheel Chandra Agrawal put up the defence that after the death of Sri Chandra Bhan sub-tenancy rights could not devolve on him under the law and the same could not be created by agreement since by the time Sri Chandra Bhan died U. P. Act No. III of 1947 had come into force. That being so, defendant No. 1 applied to the Rent Control and Eviction Officer, Rampur, for allotment of the two shops in his favor on the 25th June, 1962. The proceedings were contested by the

plaintiff who prayed that both the shops be allotted to him instead. The Rent Control and Eviction Officer, however, allotted the two shops in favor of defendant No. 1 with effect from 20th Jan., 1962 under his order dated 28th Jan., 1963. In view of the order of allotment in his favor, defendant No. 1 started paying rent directly to the owner Sri Ram Prakash since Feb., 1963. Defendant No. 1 pleaded that mere payment of rent for sometime to the plaintiff neither created fresh contract of tenancy nor estopped him from controverting the title and status of the plaintiff. According to defendant No. 1, what ever amount was paid to the plaintiff was mere compensation, license fee or license money for use and occupation of the premises in suit and no jural relationship was created between them. It was further pleaded that in any case if there was any sub-lease, it was renounced, undone, abandoned and extinguished on the 26th June, 1962 when he applied for allotment of the premises and the matter was contested by the plaintiff. The order of allotment had subsequently been set aside by the State Government under Section 7-F of U. P. Act No. III of 1947 but the defendant pleaded that the order of the State Government dated 28th Jan., 1963 was without jurisdiction, null and void and not binding on him. Notice of demand and ejection was also said to be defective and invalid. The earlier notice dated 7th June, 1963 was said to have been waived by the subsequent notice. According to the stand taken by defendant No. 1, the plaintiff, therefore, had no cause of action and the suit was liable to be dismissed with special costs.

4. The remaining defendants by a separate written statement pleaded that after the death of Sri Chandra Bhan all his heirs became tenants and since the tenancy of other tenants was not terminated, the suit was not maintainable. Defendants Nos. 2 to 5 further pleaded that in any event defendant No. 1 became the tenant of the premises under the order of allotment issued by the Rent Control and Eviction Officer and the suit for ejection was, therefore, not maintainable.

5. Replication was filed by the plaintiff reiterating that after the death of Sri Chandra Bhan defendant No. 1 became sub-tenant by operation of law. There was no occasion for allotment of the premises inasmuch as the same had not fallen vacant. Moreover, the allotment order was subsequently cancelled by the State Government and so defendant No. 1 could not take advantage of the

allotment in his favor. The plaintiff reasserted his right as tenant-in-chief and to institute the suit for ejection and arrears of rent and damages.

6. On the pleadings of the parties, the learned Munsif framed a number of issues and held that in view of the statement of the plaintiff before him, Sri Chandra Bhan was a tenant-at-will and as such his sub-tenancy rights, could not devolve on the heirs of Sri Chandra Bhan after his death. He further held that Sri Chandra Bhan having died in January 1962 when U. P. Act No. III of 1947 was in force, a fresh contract of sub-tenancy could not be created without the permission of the landlord and the District Magistrate, with the result that defendant No. 1 could not be deemed to be a sub-tenant. Principle of holding over was also not applicable to the case according to the finding of the trial court as the tenancy of Sri Chandra Bhan extinguished on his death. It was further held that since defendant No. 1 was not a tenant of the plaintiff, the latter could not claim ejection and arrears of rent even though the order of the State Government cancelling allotment in his favor might be held to be valid and binding on him. In view of the findings recorded, the trial court dismissed the suit with costs to defendant No. 1.

7. The plaintiff appealed against the decree of the trial court. The lower appellate court held that Sri Chandra Bhan was the sub-tenant of the plaintiff till his death as claimed by the plaintiff but it did not agree with the finding recorded by the trial court that he was or could be a tenant-at-will of the plaintiff either in fact or in law. It was held that Sri Chandra Bhan did not become statutory tenant as claimed in defence and continued to be a sub-tenant of the plaintiff. The court below held that since Sri Chandra Bhan died as a sub-tenant of the plaintiff, his tenancy rights being heritable all the defendants, and not defendant No. 1 alone, became sub-tenants of the plaintiff with effect from 20th January, 1962.

It was held that though the defendants, other than defendant No. 1, did not participate in the business carried on by defendant No. 1 in the shops in question and defendant No. 1 was alone in occupation thereof, the rights which the other defendants inherited from their father could not extinguish on that account in the absence of any evidence to indicate that defendants Nos. 2 to 5 have surrendered or renounced their rights of tenancy. (In the view of the learned Civil and Sessions Judge, all the defendants inherited the tenancy of the

deceased Sri Chandra Bhan and thus became sub-tenants of the plaintiffs). The order of allotment passed under U. P. Act No. III of 1947 by the Rent Control and Eviction Officer having been set aside by the State Government under Section 7-F thereof, it was held that it conferred no rights on defendant No. 1 and consequently all the defendants continued to be the sub-tenants of the plaintiff by inheritance. (The court below concluded that the plaintiff could not sue for ejectment or arrears of rent). Notice for ejectment having been served on defendant No. 1 alone, it was held that since all the defendants were joint tenants it was ineffective and did not result in termination of the tenancy rights of defendants Nos. 2 to 5. The court below noticed that there was a cleavage of opinion on that score in two single Judge decisions of this Court reported in *Smt. Shafiq v. Maqsood Ahmad Khan*<sup>1</sup> and *Smt. Vishnawati v. Bhagwat Vithu Chowdhry*<sup>2</sup> and considered that he was bound to follow the decision later in point of time. The learned Judge consequently chose to rely on the (learned single Judge) decision of this Court in *Smt. Shafiq v. Maqsood Ahmad Khan* (supra) and held that the notice under Section 106 of the Transfer of Property Act was invalid having been served only on one of the joint tenants. In the result, the claim for ejectment of the defendants was dismissed. In the view of the court below since the tenancy subsisted the plaintiff was entitled to arrears of rent with effect from 1st January, 1963. A decree for recovery of arrears of rent against the defendants to the extent of Rs. 3,870 was rendered up to February 1970.

8. The defendant has filed Second Appeal No. 1676 of 1970 not against the decree but against the finding recorded by the lower appellate court that Sheel Chandra Agrawal was a sub-tenant of Budh Sen. The plaintiff has filed Second Appeal No. 1661 of 1970 against the decree of the lower appellate court in as far as his claim for ejectment of defendant No. 1 had been dismissed. When the second appeals came up for hearing before a learned single Judge of this Court, he noticed that there was a conflict of opinions by single Judges of this Court in *Smt. Shafiq v. Maqsood Ahmad Khan*<sup>3</sup> and *Smt. Vishnawati v. Bhagwat Vithu Chowdhry* (AIR 1970 Allahabad 389) (supra) on the interpretation of the Supreme Court decision in *Kanji Manji v. Trustees of the Port of Bombay* (AIR 1963 Supreme Court 468). He consequently referred the appeals to a larger Bench. This is how these second appeals happen to be before us.

9. As far as Second Appeal No. 1676 of 1970 preferred by defendant Sheel Chandra Agrawal is concerned, a preliminary objection was raised that the appeal was not maintainable because it had been preferred not against the decree of the court below but only against the finding recorded by it that Sheel Chandra Agrawal was sub-tenant of the plaintiff Budh Sen. The preliminary objection has force and must be accepted. The Civil P. C. does not contemplate an appeal against a mere finding in the absence of any challenge to the decree itself. Second Appeal No. 1676 of 1970 must consequently fail.

10. In Second Appeal No. 1661 of 1970, it was urged by counsel for the plaintiff-appellant that on the death of Sri Chandra Bhan only such of his heirs as accepted the plaintiff as their landlord and continued to pay rent and occupy the premises in dispute became sub-tenants and the remaining heirs who neither paid rent nor remained in occupation of the premises nor accepted the plaintiff as their landlord did not become sub-tenants. It was thus urged that termination of tenancy of defendant No. 1 alone who had been found to be the sole occupant of the premises in dispute was valid and entitled the plaintiff to sue for his ejectment. The contention is unsound and must be rejected. No authority was cited by the counsel for the plaintiff in support of his contention. It is well-settled that tenancy rights are heritable and devolve upon all the heirs of the deceased irrespective of the question as to whether some of them are in occupation of the demised premises or not. The mere fact that some of the heirs are not in actual occupation of the leased premises cannot operate to put an end to tenancy rights to which they have succeeded as a result of the demise of their predecessor-in-interest. In the instant case, there is a clear finding recorded by the court below that there was nothing on record to indicate that defendants Nos. 2 to 5 had at any stage surrendered their tenancy rights. Thus the mere fact that defendants Nos. 2 to 5 had no interest or took no part in the business of their father carried on by Sheel Chandra Agrawal, defendant No. 1, (the suit premises) could not operate to put an end to the tenancy rights succeeded to by defendants Nos. 2 to 5 as the heirs of the erstwhile sub-tenant who had died.

11. We shall now consider the basic question as to whether the notice under Section 106 of the Transfer of Property Act which was served on Sheel Chandra Agrawal alone and purported to terminate his tenancy could be relied upon as against the other heirs of the deceased sub-tenant. On this question, as noticed

by the learned single Judge who has referred these second appeals to a larger Bench, there does appear to be divergence of opinion between H. N. Seth, J. who decided *Smt. Shafiqa v. Maqsood Ahmad Khan* <sup>4</sup> and Gursaran Lal, J. who rendered judgment in *Smt. Vishnawati v. Bhagwat Vithu Chowdhry* (AIR 1970 Allahabad 389) (supra). Both the decisions primarily are based on conflicting interpretation of the Supreme Court decision in *Kanji Manji v. Trustees of the Port of Bombay* (AIR 1963 Supreme Court 468) (supra). In our judgment, the interpretation of the Supreme Court decision by H. N. Seth, J. is preferable to that of Gursaran Lal, J. It has not been disputed, and rightly so, that on the death of a tenant, his heirs succeed to his rights not as joint tenants but as tenants in common. Mulla in his Transfer of Property Act, Sixth Edition at page 222 clearly brings out the distinction between ' joint tenants' and ' tenants in common' in the following words:-

"A joint tenancy connotes unity of title, possession interest and commencement of title; in a tenancy in common, there may be unity of possession and commencement of title, but the other two features would be absent."

Similarly at page 639 of the Fifth Edition occurs a passage which runs as follows:-

"Leases may be granted to any person who is competent to contract at the date of execution. A lease may be granted to several persons who may take as tenants in common or as joint tenants. In the case of joint tenants the interest of each person passes upon death to the survivors. In the case of tenants in common the interest of a deceased lessee passes at his death to his representatives."

The basic distinction thus between ' joint tenant' and ' tenants in common' is that in the case of joint tenant there is unity of title and possession while in the case of tenants in common though there is unity of possession there is no unity of title. The view, therefore, appears to be reasonable that while a notice served under Section 106 of the T. P. Act only on one of the joint tenants is effective to terminate the tenancy of all the joint tenants who have unity of title, no such result follows where a notice is served only on one of the tenants in common

since there is no unity of title as between them in contra-distinction to the joint tenants. H. N. Seth, J. in *Smt. Shafiqā v. Maqsood Ahmed Khan* (supra) has, in our opinion, rightly observed that,

"It is obvious, that the principle on which, notice given to one of the joint tenants may be considered to be notice to the entire body of joint tenants, cannot apply to a case of co-tenants. 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."

12. The facts of the case in *Kanji Manji v. Trustees of the Port of Bombay* (AIR 1963 Supreme Court 468) (supra), which was the subject-matter in both the decisions in *Smt. Shafiqā v. Maqsood Ahmad Khan*<sup>5</sup> and *Smt. Vishnawati v. Bhagwat Vithu Chowdhry*<sup>6</sup> were that Mureshwar Narain Dhobri and Dinshaw Rustami Ogra assigned their lease rights in the premises in question to Roopji Jai Raj and Kanji Manji. The deed of assignment specifically provided that the tenants took the premises as joint tenants. This deed of assignment was approved and accepted by the Trustees of the Port of Bombay. In consequence of the deed of assignment Roopji Jai Raj and Kanji Manji became joint tenants. The Trustees of the Board of Port of Bombay served a notice on Roopji Jai Raj and Kanji Manji requiring them to vacate the premises and deliver vacant and peaceful possession of the land on the 29th February, 1956. Since the notice was not complied with, a suit for ejectment was filed. Since Roopji Jai Raj died, the plaint was amended by striking out his name. Kanji Manji as the sole defendant of the suit set up the plea mainly that the notice under Section 106 of the Transfer of Property Act was invalid inasmuch as it has been served on one of the lessees and not on the heirs and legal representatives of Roopji Jai Raj. He further contended that the suit was bad for non-joinder of the heirs and legal representatives of Roopji Jai Raj who were necessary parties. Both the pleas were rejected by the Supreme Court which held that as Roopji Jai Raj and Kanji Manji were joint tenants, notice to one of the tenants was sufficient and the suit for the same reason was also good. There was no occasion for the Supreme Court to consider in the above mentioned decision as to what would have been the consequence and the effect of the notice if Roopji Jai Raj and Kanji Manji had been tenants in common instead of being joint tenants. Since Roopji Jai Raj

and Kanji Manji were joint tenants, on the death of Roopji Jai Raj his rights such as they were devolved not on the heirs and legal representatives of Roopji Jai Raj but on the surviving joint tenant Kanji Manji who undisputably had been served with a notice. It was under these circumstances that the Supreme Court repelled the plea that the suit was bad for non-joinder of the heirs and legal representatives of Roopji Jai Raj. We are unable to see how the decision of the Supreme Court in *Kanji Manji v. Trustees of the Port of Bombay* can be pressed in aid in support of the contention that a notice under Section 106 of the Transfer of Property Act served only on one of the co-tenants can operate to terminate the tenancy of other co-tenants whose status as tenants remains unaffected by the notice served only on one of the tenants. As already observed, there exists no unity of title between the co-tenants and it is thus not unreasonable to hold that the title of co-tenants other than the one served remains untouched by such a notice. The process of reasoning by which Gursaran Lal, J. stretched the decision in *Kanji Manji v. Trustees of the Port of Bombay* (supra) to apply to a case of co-tenants does not appeal to us.

13. In our judgment, the view taken by the court below is legally correct and calls for no interference.

14. It may be mentioned here that decisions dealing with the situation where a notice has been served only on one of the co-tenants though seeking ejectment of the remaining co-tenants also have no application to the facts of the instant case. In the present case as already noticed though defendants Nos. 2 to 5 were impleaded in consequence of the order of the court, the plaintiff never amended his plaint seeking their ejectment, and sought ejectment of defendant No. 1 alone.

15. Relying on the decision of the Supreme Court in *Beohar Rajendra Sinha v. State of Madhya Pradesh* <sup>7</sup> it was contended that Sheel Chandra Agrawal was the karta of the joint family of which defendant Nos. 2 to 5 were members and denial of title by him of the plaintiff operated to extinguish the tenancy rights of all the defendants and notice to defendant No. 1 sufficed. The decision relied upon has, in our opinion, no relevance to the facts of the instant case. In that decision the Supreme Court was concerned with the notice under Section 80 of the Civil P. C. and the object and scope of the notice under Section 80 and one

under Section 106 of the T. P. Act are very different. It will further be noticed that the notice under Section 80 of the Civil P. C. though served by the Karta of the family did state that the cause of action arose in favor of the joint family, on the other hand the plaintiff specifically omitted to seek any relief for ejection against defendants Nos. 2 to 5 and clearly asserted that they succeeded to no tenancy rights on the demise of Sri Chandra Bhan.

16. For the reasons given, we dismiss both the appeals. Parties shall bear their own costs in either of them. Interim orders, if any, in any of the two appeals or both of them, are hereby vacated.

Appeals dismissed.

Cases Referred.

1. (1969 All LJ 1116)
2. 1969 All LJ 1131: (AIR 1970 All 389)
3. 1969 All LJ 1116
4. (1969 All LJ 1116)
5. 1969 All LJ 1116
6. (AIR 1970 All 389)
7. (AIR 1969 SC 1256)