

Mohammed Haroon and ors. Vs. Central Bank of India and ors.

Mohammed Haroon and ors. Vs. Central Bank of India and ors.

SooperKanoon Citation : sooperkanoon.com/497572

Court : Madhya Pradesh

Decided On : Jun-07-1993

Reported in : AIR1994MP24; 1994(0)MPLJ101

Judge : A.G. Qureshi, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 100 - Order 22, Rule 4(4);
[Transfer of Property Act, 1882](#) - Sections 109

Appeal No. : Second Appeal No. 44 of 1987

Appellant : Mohammed Haroon and ors.

Respondent : Central Bank of India and ors.

Advocate for Def. : Samvatar and ;P.K. Saxena, Advs.

Advocate for Pet/Ap. : Sanghi, Adv.

Disposition : Appeal allowed

Judgement :

A.G. Qureshi, J.

1. This is a second appeal filed by the landlord aggrieved by the judgment and decree passed by the District Judge, Indore, in Civil Regular Appeal No. 151 of 1986 dated 6-12-1986, whereby the learned Judge has allowed the appeal of

respondent No. 1 -- Central Bank of India and reversed the judgment and decree of eviction passed against respondent No. 1 by the 5th Civil Judge Class I, Indore in Civil Suit No. 19-A of 1981 dated 15-3-1986.

2. The facts leading to this appeal, in short, are that the present appellant-plaintiffs, who are the heirs of one Mohd. Ishaque filed a suit before the court of the Civil Judge Class I, Indore against respondent No. 1 --Central Bank of India for obtaining a decree of eviction and arrears of rent in respect of the premises situate on route No. 2 at Jawahar Marg. Indore constructed on plot Nos. 24 and 26. It is not in dispute that initially the building constructed on plot Nos. 24 and 26 was taken on rent by respondent No. 1, the Central Bank of India and the lessors were Mohd. Ishaque, his brother Sheikh Hasham and Haji Ismail (defendant No. 9), Mohd. Ishaque and Sheikh Hasham expired and Mohd. Ismail only survives.

3. The case of the plaintiffs before the trial Court in short was that a building onroute No. 2 Jawaher Marg was constructed on plot Nos. 24 and 26 and it is of ownership of the plaintiffs and defendants Nos. 2 to 9. The house numbers are 23, 23(1) and 23(2) according to municipal corporation record. The ground floor of the building including the basement and the mezzanine floor along with a hall on the eastern side of the first floor was given on rent by Mohd. Ishaque, Sheikh Hasham and Mohd. Ismail for non-residential purposes to respondent No. 1 Central Bank of India on a rent of Rs. 1450/- per month. The Bank had option to renew the aforesaid lease up to 1-12-1978. The lessors were not willing to extend the lease period any further. They, therefore, informed the Bank that they are not willing to extend the lease any further. It was further averred that as the plaintiff Nos. 5 and 6 wanted to start their own business of hardware and steel furniture, they bona fide required the suit accommodation for their own use as they had no alternative accommodation in the city of Indore for that purpose. Therefore, the defendant No. 1 was informed in writing that they should hand over the suit premises to the plaintiffs but when they refused to do so, the suit was filed.

4. As the defendants Nos. 2 to 9 did not join the plaintiffs in filing the suit they were made proforma defendants but the relief was sought only against respondent No. 1. During the pendency of the trial, the defendant Nos. 6 and 7 Jaitunbai and

Rukaiya remained absent and the suit proceeded ex parte against them. Defendant No. 8 did not oppose the suit. Defendant No. 9 although remained present in the Court but he did not participate in the proceedings by filing a written statement or leading any evidence. However, defendant Nos. 2 to 5 averred that the building constructed on plot No. 26 is of their ownership and that of defendant Nos. 6, 7 and 8. Ismail has no right, title or interest in the suit house. His name was mentioned as a lessor in the . lease deed only because the plaintiffs and defendants had to pay money to him. They also denied the bona fide need of the plaintiffs relating to the building. According to them, the plaintiffs went to get the suit premises vacated for getting more rent. A plea was also raised that the tenancy being joint, the suit for eviction does not lie without the partition. It was also pleaded that Suit pertaining to ownership of the house is pending in another Court registered as Civil Suit No. 36 of 1976. Therefore, till that suit is decided, the present cannot proceed.

5. Defendant No. 1, Bank, against whom the relief was sought by the plaintiffs denied the averments of plaintiffs that they are the heirs of Mohd. Ishaque and that defendant Nos. 2 to 7 are the heirs of Sheikh Hasham for want of knowledge. It was also denied that the plaintiffs bona fide required the suit accommodation for starting the business for plaintiff Nos. 5 and 6. The non-availability of any alternative accommodation in the city of Indore was also disputed. The plea against the maintainability of the suit was also taken on the ground that the tenancy being joint, the suit is not maintainable because there cannot be a split of tenancy. Therefore, unless the defendant Nos. 2 to 7 agree to the eviction of defendant No. 1, the suit cannot proceed. It was also averred that there was an understanding for renewal of the lease from the time to time between the parties but for getting enhanced rent the plaintiffs have resiled from their promise. They also claimed to be monthly tenant by holding over,

6. On the above pleadings of the parties, four preliminary issues were framed by the Court and they were decided by the Court order dated 27-4-1983, whereby it was held that the suit is tenable and it should not be stayed because of the pendency of another suit. For deciding the case on merits, six issues were framed by the learned trial Court. After recording the evidence, the trial Court found that

the plaintiff Nos. 5 and 6 bona fide required the suit accommodation for starting their own business on plot No. 24. The tenancy of defendant No. 1 came to an end on 1-12-1978 and the plaintiffs have no alternative accommodation for starting the business for plaintiff Nos. 5 and 6 in the city of Indore. Plaintiffs I to 15 are the heirs of Mohd. Ishaque. It is not proved that there is a split of tenancy of Sheikh Hasham and Mohd. Ishaque but it does not adversely affect the right of the plaintiffs to get the decree of eviction. Accordingly a decree was passed in favour of the plaintiffs against respondent No. 1.

7. It is pertinent to note that after the written statement was filed by respondent Nos. 2 to 5 challenging the tenability of the suit, the plaintiffs amended their plaint on 30-4-1984. According to the amended plaint (para 5A of the plaint) it was averred that in view of the averments of respondent Nos. 2 to 5 that they do not want eviction of defendant No. 2, from the suit premises, the plaintiffs may be given a decree for eviction of the house owned by the plaintiffs which is constructed on plot No. 24 and about which the defendant Nos. 2 to 5 do not dispute the ownership of the plaintiffs. Therefore, an eviction decree in respect of plot No. 24 which is exclusively owned by the plaintiffs was sought against respondent No. 1, After the amendment, defendant Nos. 2 to 5 did not file any reply to the amendment. So, the suit for eviction continued for the house constructed on plot No. 24, exclusively owned by plaintiffs.

8. Aggrieved by the judgment and decree passed by the trial Court, respondent No. 1 Bank filed regular civil appeal No. 151 of 1986 before the District Judge, Indore mainly on the following grounds :--

(i) Bona fides of the requirement not proved.

(ii) Splitting up of the tenancy at the instance of one set of the co-lessor was illegal.

(iii) The co-lessors having accepted the rent, even after the expiry of the lease period will be deemed to have treated the tenant as holding over and, therefore, entitled to all the protection under the Accommodation Control Act, notwithstanding any provision in the Transfer of Property Act.

(iv) Decision in the tenancy's suit without waiting for the decision in the Civil Suit pending in the court of the A.D.J. was not justified.

9. The appellate court first considered the question of bona fide need and held that the bona fide need is not proved. On point No. 2, the Court agreed with the finding of the trial Court and held that the co-respondents are owners of plot No. 26 and the plaintiffs are owners of plot No. 24 and, therefore, the plaintiffs could get the relief which they sought despite the plea raised by defendant Nos. 2 to 5. Aggrieved by the decision on point No. 2, a cross-objection was filed which shall also be decided by this judgment. The objection about the notice also did not find favour with the appellate Court. Point No. 4 was also decided against the appellants. As such, the only point which has been decided against the present appellant-plaintiffs was that the plaintiffs have failed to prove the bona fide need and, therefore, the appeal was allowed and the decree of eviction passed by the lower court was set aside. Hence this appeal by the plaintiffs and cross-objection by defendant No. 1 against the decision on point No. 2.

10. The learned counsel for the appellants, Shri S. D. Sanghi, has assailed the finding of the learned appellate Court on the ground that the finding about the bona fide need given by the learned appellate Court is based on conjectures, surmises, wrong assumptions and the evidence has been considered with a prejudiced mind. Shri Sanghi has taken me through the evidence, the discussion by the trial Court and the discussion by the appellate Court to demonstrate that the finding is perverse and is contrary to the evidence on record. According to Shri Sanghi, demand of enhanced rent was never made by any of the plaintiffs. On the contrary when the alleged demand was said to have been made, the plaintiff Nos. 5 and 6 were minors. On this ground itself, it cannot be said that the need arose in 1975 when the plaintiff Nos. 5 and 6 were actually taking training and were not ready to start business. The record shows that the plaintiffs 5 and 6 were taking training but this fact has not been viewed in the right perspective. The statement of Mohd. Salim (P.W. 4) in para 1 is unchallenged. The appellate Court has not considered the evidence on record and the finding of the trial Court. When the appellate court wanted to reverse the finding of the trial Court it should have given some cogent reasons for disagreeing with the findings of the trial Court, but the

lower appellate court has not done so.

On the other hand, Shri Chafekar, learned counsel for defendant No. 1 has argued that the finding recorded by the first appellate Court is a finding of fact and no interference is called for in the aforesaid finding based on the appreciation of evidence by the learned District Judge.

11. During the pendency of this appeal, it was brought to my notice during the course of argument that Zetunbai has died, whereupon the learned counsel for the appellants made an application under Order 22 Rule 4(4) of the Civil Procedure Code. Arguments were addressed by the learned counsel on this point also.

12. First of all I shall deal with the question of abatement raised by defendants during the course of the argument due to the death of Zetunbai and consider the application filed by the appellants. The application of the appellants is under Order 22 Rule 4(4) Civil Procedure Code which provides as under:--

'4(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing and judgment may, in such case, be pronounced against the defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.'

In the instant case, it is undisputed that the proceedings before the trial court and the appellate Court proceeded ex parte against Zetunbai. She never appeared in the court or contested the suit and she did not even file the written statement. Therefore, there can be no hesitation in allowing the prayer of the appellants even at the appellate stage when the prayer was made before it. An argument has been advanced by the learned counsel for respondent No. 1 that the suit has abated because of the death of Zentunbai. This argument is without any force in view of the settled position of law by the Supreme Court. In the case of Kanhaiyalal v. Rameshwar, AIR 1983 SC 503 the Supreme Court has held that when the pro forma respondent dies and no relief is claimed against him, in the absence of whom the appeal proceeds, then the appeal shall not abate due to failure to bring

the legal representatives of such party on record in time. The same view has been taken in *Mangalsingh v. Smt. Rattno* by her legal representatives AIR 1967 SC 1786 wherein it has been held that death of unnecessary party, who is a respondent during the pendency of an appeal, would not result in the abatement of the appeal because the death of such a defendant does not affect the right of the party claiming relief without effecting any contradictory decree. As regards exercise of powers by the second appellate Court, a Division Bench of this Court in the case of *Kanhaiyalal v. Abdul Hussain Mulla*, 1984 J LJ 455: (AIR 1985 MP 24) has held that the provisions of Order 22, Rule 4(4), Civil Procedure Code are applicable to appeals also for claiming exemption under Order 22, Rule 4(4), Civil Procedure Code and even a written application is not needed for making such a prayer and the exemption order may be passed at any stage. It has further been held that such a power can be exercised by the Court at any time before the delivery of judgment and even after the abatement has taken place.

13. In view of the aforesaid decision of law, firstly it cannot be held that the appeal has abated since Zetunbai was only a pro forma defendant and no relief was sought against her and secondly the order under Order 22, Rule 4(4), C.P.C. can be passed by this Court at any stage of the proceedings before the delivery of judgment. Therefore, the prayer of the appellants is allowed and the name of Zetunbai is ordered to be deleted from the array of respondents. It is also held that the appeal has not abated due to the death of Zetunbai.

14. Before embarking on the discussion on the point of bona fide need in the light of the respective arguments advanced by the learned counsel, firstly let us look at the principles for appreciation of evidence by the appellate Court, as-enunciated by the Supreme Court, in the case of *T.D. Gopalan v. The Commissioner of Hindu Religious and Charitable Endowments Madras*, AIR 1972 SC 1716, wherein the Supreme Court has held asunder at page 1719 :

'The uniform practice in the matter of appreciation of evidence has been that if the trial Court has given cogent and detailed reasons for not accepting the testimony of a witness, the appellate court in all fairness to it ought to deal with those reasons before proceeding to form a contrary opinion about accepting the

testimony which has been rejected by the trial Court.'

The Supreme Court while considering the appellate judgment has observed that the lower appellate Court has made no attempt whatsoever to discuss the evidence which the learned District Judge had given for not accepting the evidence of the witnesses except for a general observation here and there. In view of the aforesaid, the appreciation of the evidence made by the trial court and the discussion of the evidence by the appellate Court disagreeing with the reasoning of the trial Court have to be looked into for determining whether the appellate Court has really appreciated the evidence on record to arrive at a correct conclusion or whether the finding of the appellate Court is based on merely assumption, conjectures and surmises as argued by the learned counsel for the appellants. I am not oblivious of the limited scope of this Court in the second appeal that the finding of fact if reversed by the appellate Court cannot be interfered lightly or on the ground that it is not an elaborate judgment or that some reasons given by the trial Court are not expressly reversed and that the finding of fact recorded by the Courts below are not open to challenge in the second appeal unless it is shown that the finding is perverse or based on no evidence or is such which a reasonable man would not accept as a reasonable conclusion.

15. Thus keeping in mind the settled position of law, let us see whether the judgment of the lower appellate Court on the finding of bona fide need of the appellants, is such which can be interfered in the second appeal by this Court. The learned District Judge, while reversing the finding of the lower Court on the issue of bona fide requirement has taken into consideration firstly the recital in the title of the suit of the plaintiff Nos. 5 and 6, wherein they have stated that their profession is business. The second fact which has weighed with the lower Court is that a notice (Ex. P10-C) dated 23-11-1978 is conspicuously silent as to the need of the accommodation to start separate business. The third fact which has weighed with the lower Court is the recital in the Ex. D. 5-C, wherein it has been stated that the work shop at house No. 126 Daulatganj and the shop at Hathipala shall be owned by the sons of the second wife. In view of the aforesaid circumstances the Court has held that the statements of the witnesses of plaintiffs are self-serving and they are neither here nor there. Therefore, the bald statement not supported by the

surrounding circumstances cannot be believed.

16. The learned counsel for the appellants Shri Sanghi states that all the witnesses examined by the plaintiffs have stated that the need of the plaintiff Nos. 5 and 6 to start their own business is bona fide. The court has not considered the evidence but has based its conclusion on extraneous factors which are not borne out by the record and which are rather against the record. Shri Sanghi has also criticised the judgment of the lower Court on the ground that the lower Court even after detailed inspection of Ex.D.-5-C has ignored the material portion of the document wherein the shop and the workshop are clearly shown as movable property excluding the building. The Court has also ignored the statements of the witnesses on this point. On the other hand, Shri Chafekar argues that the lower Court has not erred in taking into consideration the circumstances mentioned in the judgment.

17. After considering the respective arguments and going through the record. I find that the argument of Shri Sanghi has great force. I agree with Shri Sanghi when he argues that the finding of the lower court is based on merely on conjectures, surmises and assumptions. Let us first look at the reasonings of the lower Court based on Ex.D.5-C. The court after reading the document has held that the trial Court has wrongly interpreted the recitals in Ex.D.5-C because it specifically says that the workshop and the shop shall be of the ownership of the plaintiffs including plaintiff Nos. 5 and 6. As such, the recital indicate the existence of a shop and workshop which were initially managed by Mohd. Ishaque and after his death became the property of the plaintiffs, In para 21 of the judgment, the lower court has said that then the work shop and the shop has been shown as the property of Mohd, Ishaque in Ex.D.5-C, then it cannot be said that the building is not of the ownership of the plaintiffs. It was for the plaintiffs to prove that the building is not of the ownership of the plaintiffs which they have failed to show. In my opinion, this whole discussion by the lower Court is misconceived. The learned Judge has not tried to read the will as a whole and was persuaded only by one portion of the recital of the document. A bare look at Ex.D5-C shows that the work shop and shop is not included in the immovable property but only the goods in the shop and the work shop have been so included., Ex. D-5-C is the photostat copy of the will

executed by the predecessor-in-title of the plaintiffs. Mohd. Ishaque. In para 2 of the will he has specified the immovable property which belongs to him and the second paragraph clearly gives the heading of immovable property i.e Shthawar Jayadad LFkkoj tk;nkn and para 3 says about the Jangam Jayadad taxe tk;nkn i.e., the movable property and under the heading of 'Jangam Jayadad' the work shop at 126 Daulatgang and shop in house No. 49 Hathi-pala road has been shown. As such, it is manifest by the bare reading of the first portion of the document that the work shop and shop are rented premises and only the movable property has been bequeathed and not the house or structure or the land of the workshop and the shop and the document no-where says that the land and the construction of the shop and the work shop also belongs to the author of the document. Then immediately after the heading under 'Jangam Jayadad' it has been written that he is in possession of the movable and immovable property as above. As such, the learned District Judge has only read the recital which makes the will pertaining to immovable and movable property jointly without first reading the description of the property which was to be bequeathed by the instrument. As such, it is manifest that the finding of the learned District Judge disagreeing with the trial Court is erroneous and against the record of the court and based on misreading of the document. Similarly the finding of the learned Judge based on the assumption that because the plaintiffs ignored to mention the existence of bona fide need in the notice (Ex. P.10-C) a presumption should be drawn against the plaintiffs is also erroneous. A bare look at Ex. P.10-C shows that Haji Ismail and Mohd. Ishaque by Ex.P. 10-C had informed the Bank that since the date of their last option to renew the lease expires on 1/12/1978, they do not want to renew the lease and, therefore, they would cease to be their tenant after 1-12-1978, therefore, they should vacate the house. As such, the notice is not a quit notice on the basis of the genuine need of the plaintiffs. Actually in 1978, as is manifest from the evidence on record, the two plaintiffs were minors and at that time the notice was not for seeking eviction on any of the grounds but merely an intimation to the Bank that the owners do not want to renew the lease after the expiry of the lease period. As such, there was neither any need to mention the fact of bona fide need of the plaintiff Nos. 5 and 6 nor a need was in existence when this notice (Ex.P.10-C) was sent by Mohd. Ishaque and Haji Ismil to the Bank, So

the Court has erred in drawing a presumption on this ground also against the appellants. The third ground on which a presumption has been drawn against the appellants is the recital in the plaint about the profession of the two plaintiffs. Firstly the evidence on record which has been subjected to cross-examination cannot be ignored only because of some recital in the heading of the plaint. Secondly even if any advantage is to be drawn by the recital, then the counsel for the defendants had every opportunity to confront the plaintiffs from the aforesaid recital, when they said that they have no business and are jobless. Without drawing the attention of the plaintiffs to the recital in the heading of the plaint and without giving them opportunity to explain the recital in the cause title of the suit, a presumption could not be drawn at the appellate state when initially such a plea was not in existence at all in the suit. A person may be in business on behalf of some one else or with joint family and he may want to start his own business, but merely because, the profession has been mentioned as business in the cause title, the adverse inference could not be drawn against the plaintiffs, who were in the witness box and not a single question was asked to them when they claimed to be without business, and as to how they have written in the cause title, that their profession is business. As such, on this point also the learned District Judge has proceeded on wrong assumptions which are contrary to the evidence on record.

18. Now the judgment of the lower appellate court shows that in the light of the aforesaid circumstances, the lower appellate court has brushed aside the evidence of the witnesses of the plaintiffs by just saying that the statements of the witnesses of the plaintiffs are just self-serving neither here nor there. The trial Court has discussed the evidence of the witnesses of the plaintiffs in detail but it appears that the learned appellate court was swayed away by the aforementioned three factors for disbelieving the statement of the plaintiffs. This approach of the lower appellate Court is manifestly erroneous leading to a finding which is contrary to record.

19. The record of the trial court shows that Mohammad Yunus (P.W. 1) one of the plaintiffs has examined himself and he has stated in para 12 of his deposition that they had filed the suit because their own brothers have no business and they want to start the shop of hardware and steel furniture and, therefore, they bona fide

need the suit accommodation for that purpose. They have also stated that they do not have any other alternative accommodation in the city of Indore for that purpose. He has further stated that since 1978 these boys were taking training in the hardware and steel business. The house on plot No. 24 is most suitable for that purpose because there are about 100 shops of steel furniture in that locality, he has also stated that they used to take training in the shop of Mohammad Salim S/o Kamruddin and now they have knowledge of the work. He has also stated that he sits on the Hathipala shop which is in the rented premises. He has also admitted to be in possession of Daulatgang shop. He further admitted that whatever is written in Ex. D.5-C is correct. The statement of this witness has not been rebutted. In the cross-examination also nothing has been elicited to show that he is telling a lie. This witness has been disbelieved by the learned appellate Judge because of the recital in Ex. D.5-C. As discussed above, the recital in Ex. D.5-C lends support to the testimony of this witness instead of discrediting him. Plaintiff No. 5 Mubarak Hussain has also examined himself as P.W. 2 and he has also stated that he has taken the training of the business for about 8 years and that he wants to start the business of steel and steel furniture in the premises constructed on Plot No. 24 which belongs to the other plaintiffs. In para 6, this witness also stated that there is no other accommodation in the city of Indore for the purpose except the suit premises. In cross-examination also he has denied the suggestion that house No, 126 at Daulatgang and shop No. 49 at Hathipala belongs to him. He has categorically denied that he is the owner of any premises at the aforesaid two places. As such, the statement of this witness is also reliable and supports the statement of Mohammad Yunus. Similar is the statement of Faizaj Hussain (P.W. 3). Mohammad Salim (P.W. 4) has also supported the testimony of the aforesaid three witnesses. The evidence of all these witnesses is consistent suffering from no infirmity at all and there is nothing in the cross-examination of these witnesses, which may lead one to disbelieve their testimony. On the other hand the evidence led by the defendant does not at all rebut the aforesaid statements made by the plaintiffs and their witnesses. As such, the learned District Judge has clearly based his finding on the assumptions which are contrary to the evidence and record of the case. Consequently, I am of the opinion that the finding of the learned trial Court based on the detailed and proper

appreciation of the evidence were wrongly reversed by the learned lower appellate Court basing his findings merely on conjectures, and surmises without going through the document and the evidence on record properly.

20. The other findings recorded by the appellate Court are in favour of the plaintiff-appellants. The defendant No. 1 has filed a cross-objection challenging the finding of the court below about the maintainability of the suit and legality of the decree in view of the fact that the tenancy being one it could not be split into two separate tenancies.

In support of his cross-objection Shri Chafekar has cited the Judgment of Miss S. Sanyal v. Gain Chand, AIR 1968 SC 438, wherein the Supreme Court has held that under the Delhi and Ajmer Rent Control Act, a relief under Section 13(1), (3) cannot be granted unless the landlord holds single and indivisible contract of tenancy. The contract of tenancy cannot be divided into two contracts one of letting for residential purpose and the other for non-residential purpose and to grant relief to the landlord, limited to the portion of the demised property which is being used for residential purposes.

Shri Chafekar has also placed reliance on the judgment of the Supreme Court in Smt. Kama Goel v. B. P. Pathak, AIR 1977 SC 1599, wherein it has been held that under Section 14A of the Delhi Rent Control Act relief can be made available to the plaintiff if the premises are owned by him as propositus in whose name the property is stood. Therefore, the property must be owned by him directly which is the case where he, as heir, steps into his father's shoes who has in his own name and let it out himself. As such, the son being the representative of the former owner and lessor falls within the purview of Section 14-A.

21. A Division Bench authority of this Court has also been cited in the case of B.P. Pathak v. Dr. Riyazuddin Haji Mohammad Ali, AIR 1976 MP 55, wherein it has been held that as between the lessor and lessee there can be no splitting of tenancy and even the court or Rent Controlling Authority cannot by its decree or other split up a tenancy unless there is a specific provision in the statute for splitting tenancy, Thus, there is no absolute bar to the splitting. What is prohibited is that the lessor cannot unilaterally split up the tenancy and claim ejectment in

respect of part only of the property leased. The law recognises splitting up of tenancy either by contract or by statutory effect, But in the same judgment it has also been held that when a partition is effected then it amounts to a splitting of respective part of the property within the meaning of Section 109 of the Transfer of Property Act and the partition brings about, the splitting of tenancy and the co-owner can eject tenant from property allotted to him in partition. But if only an interest in the leased property is transferred, then the transferee becomes co-lessor, then the co-lessor cannot alone determine tenancy or sue for ejectment without joining other co-lessor unless he gets partition effected. It has also been held that Section 109 of the Transfer of Property Act creates an exception to the general rule that a tenancy cannot be split up by unilateral act of lessor. By virtue of Section 109 proprio vigore transfers of the part of the property leased itself splits up the tenancy. What is transferred is the right, title and interest of the lessor in the part transferred and Section 109 creates what may be called statutory attornment which substitutes and has the same effect as contractual attornment so that because of the transfer of the leased property or part thereof the transfer ipso facto acquires all the right of the lessor and new relationship is created between the transferee and the lessee. It is not dependent on the consent of the lessee and letter of attornment is not necessary. The title of the assignee is complete on execution of deed of assignment and is not postponed till notice of the assignment. A transferee of a part of the leased property can thus exercise all the rights of the transfer or as if the part transferred had alone been comprised in the lease and he can therefore evict the lessee from the part transferred and he is so entitled whether the lease is determined before the transfer or not. The transferee can determine the lease of the part transferred in any of the circumstances enumerated in Section 111.

22. On the strength of the afore-mentioned judgments, Shri Chafekar strenuously argues that there can be no splitting of tenancy by the court because of the other lessors have not joined the plaintiffs in the ejectment suit. In my opinion, the aforesaid argument by Shri Chafekar is without any force for the simple reason that the ratio of Miss Sanyal's case (supra) decided by the Supreme Court is not applicable to the facts and circumstances of this case at all, In that case what the court has prohibited is the splitting of a single lease given for residential and non-

residential purposes into one for residential and the other for non-residential purposes and the award of decree for a part of the portion given for residential purposes. In the instant case, it is not such a case of splitting of tenancy. Similarly the judgment in Smt. Kama God's case (supra) also is not applicable to the facts and circumstances of this case. The principle that the heir steps into the shoes of his father cannot be disputed and here it is no one's case that the plaintiffs are not the heirs of the deceased Ishaque. The case of B. P. Pathak (supra) supports the case of the appellants rather than the case of the defendants, because it has been clearly laid down in the aforesaid judgment that even a transferee of a part of the accommodation can get the relief of eviction for that portion and on the partition there is a statutory attornment having the effect of the contractual attornment after such a transfer of the property. In the instant case it is not disputed that the plaintiffs are owners of plot No. 24 exclusively and neither it is a joint property nor the defendants 2 to 5 have any interest in the building constructed on plot No. 24. Therefore, plaintiffs are fully entitled to claim eviction from the building owned by them of which they have become the lessors and the defendant No. 1 Bank the lessee in the present case. The ownership of the two buildings on plot Nos. 24 and 26 is separate and plaintiffs and defendant Nos. 2 to 5 are not co-owners of the building constructed on plot Nos. 24 and 26. The ownership of the plaintiffs on plot No. 24 is exclusive. So there is no question of partition. Therefore, the present case clearly falls within the exception prohibiting the splitting of tenancy.

23. The Supreme Court in the case of Mohar Singh v. Devi Charan, AIR 1988 SC 1365, has considered this question about the splitting of tenancy and has held that when two shops were leased by co-owners and on partition when one shop goes to the share of one of the co-owners, then action for eviction of tenant can be taken by one of the co-owners without impleading another co-owner. In that case two adjacent shops were owned by the co-owners and those two shops were obtained in lease by a tenant under a single lease. On partition, one of the shops came to the share of a co-owner. The transferee of co-owner shop claimed ownership on the shop on the ground of bona fide need. The Supreme Court in such circumstances held that on partition the co-owner transferee became the exclusive owner of one of the shops which came to his share. Therefore, there was no question of splitting of tenancy. On proof of bona fide need, the transferee-

landlord was entitled to evict the tenant and there was no necessity of joining another co-owner in the action.

24. Now in the instant case there is no question of partition because the construction is on two separate plots and it is not disputed that the owner of the building on plot No. 24 are the plaintiffs. Therefore, even if there be a joint tenancy a question of joint ownership would not arise, because every set of owners owns a particular part of the property. The property is of course leased jointly by different owners by a single contract of tenancy. As such in the light of aforementioned principles enunciated by the Supreme Court separate and exclusive owner can always seek ejectment of the tenant from the portion owned by them exclusively and such a case is clearly covered by the statutory exception under Section 109 of the Transfer of Property Act. So, when even a co-owner, on partition, can seek the eviction of the portion which falls to his share despite a single tenancy of different portions in the property, then in any case an exclusive owner who has a well defined separate portion of the property can always seek the ejectment of the tenant despite the existence of the single lease deed. The case of the plaintiffs as such is much stronger than the case of the co-owners seeking the eviction of their respective part of the property after partition and thus seeking the splitting of the tenancy. In view of the aforesaid, I am of the opinion that the learned Courts below have not erred in any way in negating the plea raised by defendant No. 1 about the lack of jurisdiction of the Court in the matter of splitting of the tenancy.

25. In the result, this appeal succeeds and the cross-objection filed by respondent No. 1 is disallowed. The judgment and decree passed by the lower appellate Court is set aside and that passed by the trial Court is upheld with the modification that defendant No. 1 is directed to vacate the suit premises constructed on plot No. 24 and hand over the vacant possession of that premises to the plaintiff within a period of two months from today. It has come in the evidence that there is no partition wall between the rented portions of building constructed on plot No. 24 and plot No. 26. Therefore, the plaintiff shall construct a partition wall between two portions constructed on plot Nos. 24 and 26 so that the property under plot No. 26 may be separated from plot No. 24. It has also come in evidence that a partition wall is already constructed separating the two buildings in the other parts of the

buildings which is not leased out to the bank. Therefore, the wall may be constructed in line with the already constructed wall. There is also a demarcation of boundaries on record which can also be used for that purpose. The trial Court has given a decree of eviction for the whole building constructed on plot Nos. 24 and 26 but in view of the fact that the owners of plot No. 26 have not sought any relief of eviction question of passing decree in respect of plot No. 26 does not arise at all. The costs of the suit and the appeal shall be borne by defendant No. 1 as is incurred by them. Defendant No. 1 shall also pay the costs of the suit and the appeals to the plaintiffs. Counsel's fee as per schedule. A decree be drawn accordingly.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com