

(1979) 03 AHC CK 0043

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 9609 of 1978

Arya Kumar Ghosh and others

APPELLANT

Vs

Second Addl.District Judge, Allahabad and others

RESPONDENT

Date of Decision : 08-03-1979

Acts Referred:

Constitution of India, 1950 — Article 226
Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 —
Section 12(1)(b), 14

Citation : (1979) 03 AHC CK 0043

Hon'ble Judges : R.R.Rastogi, J

Final Decision : Allowed

Judgement

R. R. Rastogi, J.

This writ petition has been filed under Article 226 of the Constitution. The facts are these : One Sri P. N. Ghosh, father of the petitioners, had constructed a house bearing municipal no. 66, Lukarganj, Allahabad some time in the year 1930. He sold that house in 1941 to Smt. Tara Devi Seth for a sum of Rs. 75000/-. There was a condition for repurchase of the house. After that sale, deed he continued to occupy the aforesaid house along with the members of his family as tenant. He died on 23rd of November, 1967 leaving behind two sons Ajal Kumar Ghosh and Bharat Kumar Ghosh and one daughter Smt. Ruby Mukerjee, who are the petitioners in this writ petition, as also his widow. His sisterinlaw Miss Jotirmoi Shukla had also been living with him in this house. Smt. Ruby Mukerjee was married to Dr. S K. Mukerjee on 6th of August, 1943 and since then has been living in Bungalow No. 5A, Mahatma Gandhi Marg, Allahabad.

It appears that there was an attempt on the part of the Smt. Tara Devi Seth to sell the aforesaid house. Hence the petitioners 1 and 2 and their mother filed a suit for injunction but ultimately it was compromised and the suit was withdrawn. Thereafter on 14.3.1972 Smt. Tara Devi Seth sold this house to Jagat Taran Education Society. The Jagat Taran Educational Society ultimately sold the house

on 3.6.1977 to Sri Atul Darbari, respondent no. 3 one Santokh Singh gave an application for allotment of this house on 26.6.1977 on the ground that it had fallen vacant. On that application the Rent Control and Eviction Officer, Allahabad respondent no. 2 called for a report from the Rent Control Inspector. The Rent Control Inspector gave his report on 7.7.1977 and a supplementary report on 13.7.1977 which was to the effect that Smt. Ruby Mukerjee was the tenant of this house but since the persons residing in it, viz., for brothers and aunt, were not members of her family within the meaning of that expression given in section 3 (g) of the U. P. Urban Building (Regulation of Rent, Letting and Eviction) Act, 1972 (U. P. Act No. 13 of 1972) (hereinafter referred to as the Act there would be deemed vacancy under section 12 (1)(b) of the Act. On receipt of that report the Rent Control and Eviction Officer, respondent no. 2, directed that the vacancy be notified and that notices be issued to all concerned. After that order respondent no. 3, Atul Darbari, made an application on 16.7.1977 for the release of this house in his favour. In the meantime Sri A. K. Ghosh, petitioner no. 1 and his aunt Miss Jotirmoi Sukhla filed an objection stating that they were in occupation of the house along with Sri B. K. Ghosh and Smt. Rema Rani, wife of Sri A. K. Ghosh as tenants since the death of Sri P. N. Ghosh, Smt. Ruby Mukerjee and Sri B. K. Ghosh also filed separate affidavits.

The Rent Control and Eviction Officer, after hearing the parties and considering the material on record, came to the conclusion that Smt. Ruby "Mukerjee was the tenant of the house, but since it was in possession of her brother who do not belong to her family within the meaning given to that expression in section 3 (g) of the Act, there was deemed vacancy. He also held that the need of Atul Darbari for the disputed house was genuine and bona fide. Hence he made an order directing the release of the house in favour of Atul Darbari.

Petitioners nos. 1 and 2 preferred a revision under section 18(1) of the Act against the order before the District Judge, Allahabad. The revision came up for hearing before the II Additional District Judge, Allahabad, who dismissed it by his order dated 11.11.1973. The learned Additional District Judge has held that the house has throughout remained in the occupation of these petitioners and they are still in its occupation and that Smt. Ruby Mukerjee was never in its possession, even though she might have been visiting the house and staying there off and on with her brothers. This position continued even after the demise of late Sri P. N. Ghosh in the year 1967. He has further held that the tenancy right enjoyed by Sri P.N. Ghosh in respect of this house was a heritable right and after his death it devolved upon his two sons, his daughter and widow. He has, however, held that the effect of Smt. Ruby Mukerjee disclaiming any interest in the tenancy rights would amount to surrender on her part of that right. After the transfer of the house by Smt. Tara Devieth to Jagat Taran Educational Society, Smt. Ruby Mukerjee paid the rent of the house and that was in her own right and a new tenancy was created in her favour while the tenancy rights of petitioners nos. 1 and 2 stood determined under section 11(c) read with section 109 of the Transfer of Property Act. According to the court below the payment of rent by

Smt. Ruby Mukerjee to the Jagat Taran Educational Society would not endure to the benefit of her brothers. The contention raised on their behalf that they were entitled to the benefit of section 14 of the Act was also repelled. Ultimately it was held that after the determination of leasehold rights of petitioners 1 and 2 there was creation of a fresh lease in favour of Smt. Ruby Mukerjee and since she was not in possession of the house and her brothers and aunt were in its possession and these persons cannot be treated to be members of her family, it was a case in which there was a deemed vacancy under section 12(IXb) of the Act. There were some other pleas taken on behalf of the petitioners, but they did not find favour with the court below and in the result their revision was dismissed with costs. It is these orders of the Rent Control and Eviction Officer, respondent no. 2 and that of the Additional District Judge, respondent no. 1 which are sought to be quashed in this writ petition and there is further prayer for the issue of a writ, order or direction in the nature of mandamus commanding the respondents not to interfere with the possession of petitioners no. 1 and 2 over the disputed house.

A preliminary objection was raised on behalf of the respondents and it was that inasmuch as false and wrong facts have been averred in the writ petition, the petitioners are not entitled to avail of the jurisdiction of this court under article 226 of the Constitution. Certain allegations made in paragraphs 5, 6, 9, 10 and 19 were referred to in this behalf and those allegations are that Miss Jotirmoi Shukla also lived in the house as a tenant and on the death of Sri P. N. Ghosh inherited the tenancy rights. The date of sale deed executed by Smt. Tara Devi Seth has been mentioned in paragraph 9 as 23.6.1970 instead of 14.3.1972 which was done deliberately to lend credence to certain rent receipts of that period filed by petitioner nos. 1 and 2 before respondent no. 2. Another averment to which my attention was drawn was that Smt. Ruby Mukerjee paid rent on behalf of all the tenants whereas in none of the affidavits filed before the Rent Control and Eviction Officer it was said that Smt. Ruby Mukerjee had paid the rent as a cotenant on behalf of all the tenants. I do not think that any serious objection can be taken to the aforesaid averments. It is correct that Miss Jotirmoi Shukla could not have inherited tenancy rights after the death of Sri. P. N. Ghosh and the averment in that behalf was not correct. That may be due to wrong understanding of legal position. Certainly it would not have been treated as a false allegation. As regards the mistake in the date of sale deed executed by Smt. Tara Devi Seth it cannot be said that it was deliberate and false. It was accidental only. As for the allegation that Smt. Ruby Mukerjee paid rent on behalf of all the tenants, an averment was made in the affidavit filed by Sri B. K. Ghosh before the Rent Control and Eviction Officer that if any rent was paid by Smt. Ruby Mukerjee that was paid on behalf of all the tenants. I would show a little later that it has been asserted by the petitioner all along that the petitioners 1 and 2 continued to occupy the house in suit since the death of their father as tenants. In my opinion, therefore, the observations in *Asiatic Engineering Co. v. Achhru Ram A. I. R. 1951 Alld. 746 at p. 767 (F.B.) para 51*, cannot be applied to

the instant case. That observation is that a person obtaining an ex parte order or a rule nisi by means of a petition for exercise of the extraordinary powers under Article 226 of the Constitution must come with clean hands, must not suppress any relevant facts from the court, must refrain from making misleading statements and from giving incorrect information to the court. If, of course, it is found that any misleading statement has been made or an incorrect information has been given or the petitioner has not come with clean hands then the petitioner should be sent out of court without hearing on merits. There can be no dispute in regard to the principle but in the present case the averments pointed out above cannot be said to be misrepresentations or wrong or false statements made deliberately to mislead the court. Hence the preliminary objection is not of much substance and is rejected.

Sri S. S. Bhatnagar, learned counsel for the petitioners, made the following submission before me :

Firstly, that on the purchase of this dispute house by the Jagat Taran Education Society the tenancy of A. K. Ghosh and B. K. Ghosh would not be determined and the payment of rent by Smt. Ruby Mukerjee to the Jagat Taran Educational Society would not amount to the ordation of tenancy In her favour and hence declaration of vacancy under section 12 (1) (b) of the Act was unjustified.

Secondly that section 14 of the Act fully covered the Instant case.

Thirdly that the courts below totally misunderstood the legal aspect of surrender and the findings given are based on no evidence and

Lastly that section 12 of the Act is prospective in its application and not retrospective and that being so it could not have been invoked in this case.

Having heard learned counsel for the parties at considerable length in my opinion the impugned order cannot be sustained.

It would be seen that the undisputed facts are that P. N. Ghosh lived in the house in dispute as tenant until his death which took place on 23.11.1967. At the time of his death his two sons Ajai Kumar Ghosh and Bharat Kumar Ghosh, his widow and his sisterinlaw were living with him in this house. His daughter Smt. Ruby Mukerjee, who had been married in 1943 had been living with her husband in another house. Tenancy rights being property rights are heritable and hence on the death of Sri P. N. Ghosh these rights were inherited by his two sons, daughter and widow. It was a tenancyincommon. It is also not disputed that Smt. Ruby Mukerjee did not claim any tenancy rights in this house and the effect of this disclaimer would be that she was never a tenant of this house. Almost a similar situation arose in *Bundu v. Akbar* Alt 1976 U.P. R.C.C. 215. In that case the disputed property belonged to one G and was in the tenancy of I. G sold that property to A along with arrears of rent due to him from the tenant. In the meantime the tenant died and A served a combined notice of termination of tenancy as also of demand of arrears or" rent on the sons and wife of the

deceased. Since that notice was not complied with, A filed a suit for ejectment and arrears of rent and damages against the sons and wife of the deceased tenant. One of the pleas taken in defence was that the suit was bad for non joinder of Smt. Bundi, daughter of the deceased and as such one of the heirs and legal representatives. The suit was decreed by the trial court and a revision against that decree also proved of no avail. A further revision was filed before this court. On these facts this court held that since Smt. Bundi admittedly was married and living with her husband and did not claim any right of residence in the property in dispute and further in proceedings under section 3 of the U. P. Act 3 of 1947 only the sons and widow of the deceased tenant had claimed tenancy rights, it was not possible to hold that Smt. Bundhi was also one of the heirs and legal representatives of the deceased tenant. It would be seen that the facts of the instant case are almost similar. Smt. Ruby Mukerjee was married and was living with her husband and did not claim any right of residence in the house at any time whatsoever. Apart from this when Smt. Tara Devi Seth wanted to sell this house A. K. Ghosh and B. K. Ghosh and their mother filed a suit for injunction. It was, however, compromised and dismissed as not pressed. Immediately after that Smt. Seth sold it to the Jagat Taran Educational Society of which Smt. Ruby Mukerjee was office bearer. In these circumstances it cannot be said that Smt. Ruby Mukerjee was an heir of Sri P. N. Ghosh in respect of these tenancy rights. In any event if her disclaiming any right of residence in this house after her father's death, amounts to implied surrender, it would not have any effect on the rights of the sons and widow of Sri P. N. Ghosh and they continued to remain tenants of Smt. Tara Devi Seth. This position continued till Smt. Seth sold this house on 14.3.1972 to the Jagat Taran Educational Society. It has been found by the courts below and in my opinion that finding cannot be disputed that after the aforesaid sale the rent of this house was paid by Smt. Ruby Mukerjee till the house was sold by the Jagat Taran Educational Society to Atul Darbari on 3.6.1977.

The question that falls for consideration is as to what is the effect of this payment of rent on the rights of A. K. Ghosh and B. K. Ghosh when admittedly they have been in possession of this house all along without any objection of any sort from the Jagat Taran Educational society. According to the learned Additional District Judge since Smt. Ruby Mukerjee paid the rent of this house in her own right and the tenancy of A. K. Ghosh and B. K. Ghosh and their mother stood determined under Section 111 (c) read with section 109 of the Transfer of Property Act new tenancy was created in her favour. According to Sri Bhatnagar this view was erroneous in law in as much as Smt. Ruby Mukerjee was an office bearer of the Jagat Taran Educational Society and the tenants who were in actual possession of this house were her own brothers and since the society wanted payment of rent by cheque she paid it on their behalf and as such that payment of rent has no effect whatsoever on the right of her brothers. Further, the question as to whether any rent was paid or not was not a relevant point for consideration because A. K. Ghosh and B. K. Ghosh were never treated in

default. The society never had any grievance in this behalf whatsoever. Evidently there were no arrears due from the tenants. They were never treated in default since no suit was ever filed against them nor was there any transfer of arrears by the society to Atul Darbari. Apart from that there was no evidence on the record to show that A. K. Ghosh and B. K. Ghosh surrendered their tenancy rights. Thus, according to Sri Bhatnagar it was only an arrangement between Smt. Ruby Mukerjee on the one hand and her two brothers on the other in pursuance of which rent was paid by her for and on behalf of her brothers. It was emphasised that it is the liability to pay which determines the status of tenant and not as to who actually pays the rent. The finding given by the court below is based on no evidence.

On the other hand according to Sri K. B. L. Gaur, learned counsel for respondent no. 3 the immediate effect of the transfer made by Smt. Seth in favour of the Society on 15.3.1972 was that the lease of A. K. Ghosh, B.K.Ghosh and their mother stood determined under section 11 I(o) of the Transfer of Property Act. This transfer could have been subject to the liabilities of the transferor if the lessees so elected as required under section 109 of the Transfer of Property Act, but for that according to Sri Gaur, there was not a word in the evidence on record to show that the Ghosh brothers elected to continue as tenants of the Society. Therefore, their tenancy automatically came to an end and Smt. Ruby Mukerjee started paying rent after that transfer. That payment was not as cotenant and she being a third person, in view of normal human conduct it would be taken that she paid the rent on her own behalf. It was stated that the case earlier taken by the Ghosh brothers, that they paid the money in cash to their sister and she paid it to the society by cheque, was given up. It would be seen, therefore, that the Ghosh brothers never asserted their interest as tenants and hence payment of rent by Smt. Ruby Mukerjee for a long period of time casts a cloud on their rights and a heavy burden lay on them to show that they were tenants. According to Sri Gaur this onus could have been discharged by showing that the Ghosh brothers were liable to pay rent or that some one does so paid the rent on their behalf, but for that no such case was taken in any of the affidavits.

Under section 105 of the Transfer of Property Act a lease of immoveable property is a transfer of right to enjoy such property, made for certain time, express or implied or in perpetuity, in consideration of a price paid or promised, or of money, the share of crops, service or any other thing of value, to be rendered periodically or on specified occasions, to the transferor by the transferee who accepts the transfer on such terms. The right of enjoyment contemplated by this section is an Interest in the property. Unless there is a transfer of such interest, there can be no lease. One of the relevant and material tests to determine whether or not there is a lease, is the intention to deliver possession. Another requirement of consideration for lease shows that it can only be an outcome of a contract. The mere demand of rent by the owner from the person in possession or a mere offer of tenancy to such person would not create lease. A contract of

lease may be express or implied. The contract may be implied from the conduct of the parties and other circumstances of the case. Thus as held in *Sardari Lal Vishwanath v Prltam Singh A. I. R. 1978 S.C. 1518 p. 18* :

"Lease of immoveable property represents a contract between the lessor and the lessee. If the contract is to be put to an end it has to be terminated by a notice to quit as envisaged under section 106 of the Transfer of Property Act. But it is equally clear as provided by section 111 of the Transfer of Property Act that the lease, of Immoveable property determines by various modes therein prescribed. Now, if the lease of immovable property determines In one of the modes prescribed in section 111, the contract of lease comes to an end and the landlord can exercise his right of reentry. This right of reentry is further restricted and fettered by the provisions of Rent Restriction Act. Nonetheless, the contract of lease has expired and the tenant lessee continues in possession under the protective wing of the Rent Restriction Act until the lessee loses protection."

The position, therefore, is that on the transfer of the disputed property by Smt. Tara Devi Seth in favour of Jagat Taran Educational Society the lease stood determined under section 111(c) of the Transfer of Property Act. However, since at that time U. P. Act No. 3 of 1947 was In force the tenantleases continued In possession under the protective wing thereof. Under section 109 of the Transfer of Property Act of course the rights and liabilities attached to property, that is, arising out of possession and control of the property will pass with the property. The rights and liabilities not attached to the property but arising out of some personal relationship of the parties cannot be taken to have been transferred because a person can transfer his rights but not his obligation. Thus on transfer of the property will pass but not the liabilities unless the lessee elects to hold the transferor's liabilities. Any how, because of the protective wing of Act 3 of 1947, the how, because of the protective wing of Act 3 1947, the fact that the Ghosh brothers and their mother did not expressly elect to hold the Jagat Taran Educational Society liable for the contractual obligation In respect of their lease would not have any effect. Though, at the same time it may be noted that during its period of ownership which extended from 14.3.1972 to 3.6.1978, the Society never had any objection to their possession :over the house in suit nor had any complaint that the rent in respect thereof had not been paid to it. It never treated the Ghosh brothers and their mother In default of rent and there was no arrears of rent as a fact also because there was no transfer of any such arrears at the time of the transfer of the property. The question is whether in view of these circumstances can it be inferred that there was any implied surrender on the part of the Ghosh brothers and their mother and this leads me to consider as to what Is meant by surrender.

The term "surrender" is well known to law. It is generally distinguished from abandonment. In its general sense a surrender is the yielding up of an estate for life or years to him who has the immediate estate in reversion or remainder wherein the estate for life or years may merge by mutual agreement. It must be

made only to the lessor. A surrender by one of several lessees is valid as to his share. Surrender can be express or implied. To constitute an express surrender there must be actual agreement between the lessor and the lessee in pursuance of which the lessee yields up his interest to the lessor. The requirement as to the yielding up of the lessee's interest implies that the lessee must give up possession of the holding. As for implied surrender it occurs (a) by creation of new relationship, or (b) by relinquishment of possession. As observed in *Puran Chand v. Rent Control and Eviction Officer* 1959 A.L.J. 343. A tenant vacates the accommodation or ceases to occupy it only when he transfers possession to another or surrenders it to the landlord with intention to transfer or surrender it, as the case may be. The existence of the intention to transfer or surrender it, as the case may be. The existence of the intention to transfer or surrender possession is crucial. I do not think that in the present case from any evidence on record or from any circumstance it can be spelled out that the Ghosh brothers and their mother ever surrendered the possession of the disputed accommodation to the landlord. It is correct that the rent during this period was all along paid by Smt. Ruby Mukerjee but It were they who were in possession of the disputed accommodation. They had been in possession as tenants. When the tenancy was determined they did not surrender possession to the lessor. The necessary inference be that the payment of rent by Smt. Ruby Mukerjee was on their behalf and not on her own behalf. As has been stated above mere payment of rent cannot necessarily create the relationship of landlord and tenant. On the fact? and the circumstances of the instant case it cannot be held that the payment of rent by Smt. Ruby Mukerjee created the relationship of landlord and tenant between her and Jagat Taran Educational Society.

Tenant as defined in section 3(g) of U. P. Act 3 of 1947 means "the person by whom rent is, but for a contract, express or implied, would be payable for any accommodation". If this definition is analysed, it would appear that rent was not payable by Smt. Ruby Mukerjee under any expression or Implied contract. The liability to pay the rent was not hers but It was that of her brothers and mother. However, she paid the rent when the house was transferred to the society and for that though some cogent reason has not come on record, In my opinion, on the facts of the case the necessary inference can only be that it was not on her behalf but this payment was on behalf of her brothers and mother. It cannot be regarded to be a payment by a third person in the sense that Sri Gaur wanted to convey. The tenants are her own kith and kin and during the period she was an important office bearer of the society. Therefore, the payment of rent by her on behalf of her brothers and mother did not militate in any manner against the normal human conduct. It would be seen that the mere nonpayment of rent does not constitute an implied surrender.

The essential fact is that there was no relinquishment or surrender of possession by A. K. Ghosh, B. K Ghosh and their mother. Hence I find that there was no surrender express or implied as contended on behalf of respondent no. 3.

It is correct that under Act 3 of 1947 the letting out of a property on rent was not prohibited and tenancy could be created as was the view taken in *Daulat Ram v. Trilokt Nath* A.L.R 1962 All. 147 (F.B) as also in *Udhoo Dass v. Prem Prakash* and another, A.I.R 1964 All. (F.B). Thus there could be letting of an accommodation by a landlord to any person before the issue of an order under section 7(2) of Act 3 of 1947 and such letting was not hit by section 23 of the Contract Act. However, there can be letting of an accommodation to any person only when the accommodation is vacant or is about to fall vacant. The expression "about to fall vacant" came up for consideration in *Vismamitra v. Rent Control and Eviction Officer* 1967 A.L.J 500. In that case the lease had come to an end by efflux of time fixed in it but the tenant was in actual occupation without any hindrances. The landlord had not filed any suit for ejectment. It was held that in the circumstances, the accommodation was neither vacant nor was about to fall vacant and it was observed :

"Mere termination of a tenancy even by efflux of time itself will not constitute the accommodation about to fall vacant."

It would thus be seen that impending vacancy as contemplated by the definition of vacant in section 2(b) of Act 3 of 1947 must be actual and factual and not merely notional.

In *Abdul Majid v. Mukhtar Husain* 1965 A.L.J 205, it was held that the accommodation cannot be treated about to fall "vacant" simply because an ejectment decree has been passed against the tenant. In *Dr. A. C. Dass v. The Town Rationing Officer*, 1962 A.L.J 553, it was held : "Termination of tenancy in any of the manners laid down in section 111 of the Transfer of Property Act is not enough to justify the District Magistrates passing an allotment order in respect of it : the accommodation must be vacant. It was further held: "What is essential is that it must be vacant; termination of the tenancy is only one of the ways in which it can become vacant." In the instant case the tenancy of Ghosh brothers and their mother of course stood determined on the transfer of this property by Smt. Seth to the society but the accommodation had not fallen vacant. The tenant lessees had not relinquished possession and hence the new landlord, that is, the society could not have created any lease in favour of Smt. Ruby Mukerjee. Apart from this from the mere payment of rent by Ruby Mukerjee a tenancy in her favour could not be inferred. The finding given by the Additional District Judge, therefore, is, erroneous in law and on facts and cannot be sustained and there was no deemed vacancy within the ambit of section 12(1)(b) of the Act.

I do not think that the decision in *Bundu v. Akbar* All 1978 (U.P) R.C.C 215, to which reference has been made earlier can have any application to this aspect of the case. The contention urged by Sri Gaur that the finding given by the court below that Smt. Ruby Mukerjee was the tenant of the disputed accommodation is a finding of fact and cannot be set aside by this Court in exercise of its writ jurisdiction has no merit either. Reliance was placed on the decision in *Durga Singh v. Tholu* A.I.R 1963 S.C 361. What was held in that case was that in an

ejection suit a finding by the District Judge on the question whether the defendants were tenants of the plaintiff, arrived at on the consideration of all evidence, oral, documentary, adduced by the parties, is a finding of fact and cannot be set aside in second appeal by the High Court. I do not think that this principle will apply to a finding based on no evidence, but merely given on the basis of surmises and conjectures. I have referred to the facts and circumstances of the case as also to the legal aspect and in my opinion the finding given by the court below is erroneous both on facts and in law and certainly can be interfered with by this court in its writ jurisdiction.

There is another aspect and it is about the effect of section 14 of the Act. As noted above at the time of the transfer made by Smt. Seth in favour of the Society, U.P. Act 3 of 1947 was in force. With effect from 15th of July, 1972 U.P. Act No. 13 of 1972 came into effect and section 14 of this Act says :

"Notwithstanding anything contained in this Act or any other law for the time being in force, any licences (within the meaning of section 2A) or a tenant in occupation of a building with the consent of the landlord immediately before the commencement of the Uttar Pradesh Urban Building (Regulation of Letting, Rent and Eviction Amendment) Act, 1976, not being a person against whom any suit or proceedings for eviction is pending before any court or authority on the date of such commencement shall be deemed to be an authorised licensee or tenant of such building."

Now, A. K. Ghosh, B. K. Ghosh and their mother were in occupation of the disputed building and when despite the fact that the rent of this building was being paid to the society not by them but by Smt. Ruby Mukerjee and the society never objected to their occupation of the building, it would be inferred that such occupation was with the consent of the society. Further, no suit or proceeding for eviction was pending against them on the enforcement of this Act and they would be deemed to be tenants of this building.

The question about the prospective or retrospective application of section 12 does not, in view of what has been held above, directly arise in this case and, therefore, I do not propose to express any opinion on it. For this reason I do not refer to the various decisions cited before me at the bar on behalf of the parties in support of their respective contentions. To sum up, therefore, admittedly A. K. Ghosh, B. K. Ghosh and their mother, till she was alive, have continued in possession of the house in dispute. They had inherited the tenancy right from Sri P. N. Ghosh. On the transfer of this property by Smt. Tara Devi Seth their tenancy stood determined but they continued in possession under the protective wing of U. P. Act 3 of 1947. After that transfer rent was not paid by them directly to the society but it was paid by Smt. Ruby Mukerjee. That fact would not lead to an inference of any implied surrender on their part because they did not relinquish possession of this accommodation. No fresh tenancy was created in favour of Smt. Ruby Mukerjee because of the payment of rent because essence of lease is not payment of rent but transfer of possession and possession was not

transferred to her and apart from this before any tenancy could be created in her favour the accommodation should have been vacant, which it was not. The Ghosh brothers and mother, therefore, continued In occupation of the disputed building as tenants and no deemed vacancy could be declared under section 12(i) (b) of the Act. The impugned orders passed by the Rent Control and Eviction Officer and by the Additional District Judge are, therefore, liable to be quashed.

The writ petition is hence allowed and the impugned orders are quashed and the respondents are directed not to interfere in the possession of the petitioners 1 and 2 over the disputed accommodation otherwise than in accordance with law. Petitioners will get their costs from respondent no. 3.