

(2018) 12 DEL CK 0098

In the Delhi High Court

Case No : Regular First Appeal No. 712 Of 2018

M/S Narain Jewellers

APPELLANT

Vs

Col. Sohan Singh & Ors.

RESPONDENT

Date of Decision : 11-12-2018

Acts Referred:

Code of Civil Procedure, 1908 — Section 47, 96, 109, Order 41 Rule 5, Order 21, Rule 15
Transfer of Property Act, 1982 — Section 53A
Evidence Act, 1872 — Section 3(j), 116

Citation : (2018) 12 DEL CK 0098

Hon'ble Judges : Valmiki J. Mehta, J

Bench : Single Bench

Advocate : Amit Saxena, Naveen R. Nath, Siddarth Aggarwal

Final Decision : Disposed Off

Judgement

Valmiki J. Mehta, J.

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the defendant no.1 in the suit impugning the Judgment of the trial court dated 22.12.2017 by which the trial court has decreed the suit for possession filed by the respondent nos. 1 to 3/plaintiffs/co-owners-landlords filed for possession and mesne profits against the appellant/defendant no. 1/tenant with respect to the suit property comprising of 770 sq. ft. on the ground floor and 770 sq. ft. on the mezzanine floor in the property being showroom no. 2, New Delhi House, 27, Barakhamba Road, New Delhi. Admittedly, the respondent nos.1 to 3/plaintiffs are the co-owners of the suit property to the extent of 3/4th share with each of the three plaintiffs being an undivided co-owner to the extent of 1/4th share. The balance 1/4th share was jointly owned by the defendant nos. 2 and 3 (and who are respondent nos. 4 and 5 in this appeal), namely, Smt. Bhupinder Kaur and Sh. Aman Preet Singh Bajaj (minor). There is no dispute that the rate of rent with respect to the suit property is above Rs. 3,500/- per

month, and thus taking the premises outside the protection of the Delhi Rent Control Act, 1958.

2. The only issue to be examined is as to whether the subject suit filed by the three plaintiffs, who are only three of the co-owners of the suit property was maintainable, and in the absence of consent of one co-owner, being the respondent no.4/defendant no.2, and who was the co-owner to the extent of 1/8th share in the suit property, and noting that this is the only issue involved, at the time when the notice was issued in this appeal on 28.08.2018 when the following order was passed:-

"C.M. Appl. No. 34690/2018 (for exemption)

1. Exemption allowed, subject to all just exceptions. C.M. stands disposed of.

C.M. Appl. Nos. 34691/2018 & 34753/2018 (for delays)

2. For the reasons stated in the applications the delays of 13 days in filing the appeal and 85 days in re-filing the appeal stand condoned, subject to all just exceptions.

C.Ms. stand disposed of.

RFA 712/2018 and C.M. Appl. No. 34692/2018 (for stay)

3. Learned counsel for the appellant/defendant no. 1 argues that admittedly as per the suit plaint filed by the respondent nos. 1 to 3/plaintiffs the defendant nos. 2 and 3 were pleaded to be the other co-owners of the suit property to the extent of 1/4th share. It is argued that the defendant no. 2 filed her written statement stating that she had transferred her share in the suit property to Mr. Amrit Narain by virtue of an Agreement to Sell dated 8.4.1992. As per this Agreement to Sell it is seen that since the tenant/defendant no. 1/appellant was in possession of the suit property therefore only symbolic possession of the share of defendant no. 2-Ms. Bhupinder Kaur/respondent no. 4, was given to the appellant/defendant no. 1. In fact Mr. Amrit Narain is the Karta of the appellant which is an HUF. Accordingly, it is argued on behalf of the appellant/tenant/defendant no. 1 that once the Karta of the appellant was the co-owner of the suit property, therefore, in the face of his objection to the issue of termination of tenancy of the appellant, the tenancy of the appellant/defendant no. 1/tenant could not have been terminated. It is also argued that the Agreement executed by Smt. Bhupinder Kaur/respondent no.4/defendant no. 2 has been executed prior to 24.9.2001 when by Act 48 of 2001 under provision of Section 53 A of the Transfer of Property Act, 1982 was amended to require an agreement in the nature of part performance to be stamped and registered, and therefore the Agreement dated 8.4.1992 executed in favour of Sh. Amrit Narain, the Karta of the appellant HUF would confer rights in favour of Sh. Amrit Narain by the doctrine of part performance contained in Section 53A of the Transfer of Property Act. It is argued that unless there is consent of all the co-owners to terminate the tenancy, tenancy cannot be terminated and for which purpose reliance is

placed upon the judgment passed by this Court on 17.7.2018 in the case titled as Navin Chander Anand Vs. Union Bank of India and Ors. in RFA No. 544/2018.

4. In view of the arguments urged on behalf of the appellant, till further orders unless varied by the Court there shall be stay of operation of the impugned Judgment dated 22.12.2017 in CS No. 9021/16 titled as Col. Sohan Singh and Ors. Vs. Narain Jewelers and Ors. passed by the court of Ms. Vandana Chauhan, ADJ-01, West District, Tis Hazari Courts, Delhi, to the extent that possession would continue to remain with the appellant/defendant no. 1.

5. However, there is no stay of the impugned judgment and decree to the extent it passes a money decree in view of the provision of Order 41 Rule 5 CPC, inasmuch as, the appellant is not ready to deposit even 50% of the decretal amount in this Court, and which is sought in view of the fact that at best the Karta of the appellant will only be 1/4th owner of the suit property and therefore ordinarily the appellant/defendant no. 1 could not have been called upon to deposit 75% of the decretal amount.

6. Accordingly, there will be no stay of operation of the impugned judgment and decree so far as the same is a money decree.

7. Notice be issued to the respondents on filing of process fee, both in the ordinary method as well as by registered AD post, returnable on 11th December, 2018."

3. The aforesaid order crystallizes the issue which is required to be decided as to whether the subject suit for possession could have been filed on behalf of only three plaintiffs/three co-owners to the extent of 3/4th co-ownership interest in the suit property and where there did not exist the consent of one of the co-owners to the extent of 1/8th share of the property, being respondent no.4/defendant no.2/Smt. Bhupinder Kaur, by also further noting that even the Notice of Termination of tenancy dated 07.07.1992 issued to the appellant/defendant no. 1/tenant was not on behalf of all the co-owners but was only on behalf of the three respondent nos.1 to 3/plaintiffs/co-owners. In the order dated 28.08.2018, this Court has referred to the judgment passed by this Court on 17.07.2018 in the case of Navin Chander Anand v. Union Bank of India and Ors. In RFA No. 544/2018. Since the judgment is a short judgment of seven paras, the same is reproduced as under:-

"C.M. No. 27796/2018 (exemption)

1. Exemption allowed subject to just exceptions. C.M. stands disposed of.

RFA No. 544/2018

2. This Regular First Appeal under Section 96 of the Code of Civil Procedure, 1908 (CPC) is filed by the plaintiff in the suit impugning the judgment of the Trial Court dated 22.2.2018 by which trial court has dismissed the suit for possession and mesne profits filed by the appellant/plaintiff. It is noted that possession of

the suit premises has already been received by the appellant/plaintiff along with other co-owners/co-landlords and who were the defendant nos.2 to 5 in the suit (respondent nos.2 to 5 in this appeal), and therefore, the only issue in this appeal to be decided is as to whether the appellant/plaintiff is entitled to mesne profits with respect to period of the alleged illegal stay of the respondent no.1/defendant no.1/tenant on account of alleged termination of tenancy. The suit premises comprises of ground floor and half portion basement of property no.26/2, East Patel Nagar, New Delhi. It may be noted that subject suit has been dismissed on the ground that the appellant/plaintiff, being only one co-owner/co-landlord cannot claim possession and recovery of damages once the other co-owners being respondent nos.2 to 5 /defendant nos.2 to 5 have not supported the appellant/plaintiff and have in fact opposed the termination of tenancy by the appellant/plaintiff of the respondent no.1/defendant no.1/tenant.

3. Though the trial court has decided the relevant issue no.6 by simply observing in para 21 of the impugned judgment that only one co-landlord cannot terminate the tenancy, and there is no discussion or reference to case law in this regard, however, I have pointed out to the counsel for the appellant/plaintiff the judgments of the Supreme Court in the cases of *Sk. Sattar Sk. Mohd. Choudhari Vs. Gundappa Amabadas Bukate* (1996) 6 SCC 373 and *Jagdish Dutt and Another Vs. Dharam Pal and Others* (1999) 3 SCC 644 and which judgments hold that one co-owner/co-landlord is not entitled on his own, in the face of opposition of other co-owners/co-landlords, to terminate the tenancy.

4(i) The relevant observations of the Supreme Court in the case of *Sk. Sattar Sk. Mohd. Choudhari* (supra) are contained in para 37 of the said judgment and which para 37 reads as under:-

"37. In view of the above discussion, it is obvious that the law with regard to the splitting of tenancy is not what the High Court has set out in the impugned judgment. As pointed out earlier, a co-sharer cannot initiate action for eviction of the tenant from the portion of the tenanted accommodation nor can he sue for his part of the rent. The tenancy cannot be split up either in estate or in rent or any other obligation by unilateral act of one of the co-owners. If, however, all the co-owners or the co-lessors agree among themselves and split by partition the demised property by metes and bounds and come to have definite, positive and identifiable shares in that property, they become separate individual owners of each severed portion and can deal with that portion as also the tenant thereof as individual owner/lessor. The right of joint lessors contemplated by Section 109 comes to be possessed by each of them separately and independently. There is no right in the tenant to prevent the joint owners or co-lessors from partitioning the tenanted accommodation among themselves. Whether the premises, which is in occupation of a tenant, shall be retained jointly by all the lessors or they would partition it among themselves, is the exclusive right of the lessors to which no objection can be taken by the tenant, particularly where the tenant knew from the very beginning that the property was jointly owned by several persons and

that, even if he was being dealt with by only one of them behalf of the whole body of the lessors, he cannot object to the transfer of any portion of the property in favour of a third person by one of the owners or to the partition of the property. It will, however, be open to the tenant to show that the partition was not bona fide and was a sham transaction to overcome the rigours of Rent Control laws which protected eviction of tenants except on specified grounds set out in the relevant statute." (underlining added)

(ii) The relevant observations of the Supreme Court in the judgment in the case of Jagdish Dutt (supra) are contained in para 7 and this para 7 reads as under:-

"7. When a decree is passed in favour of a joint family the same has to be treated as a decree in favour of all the members of the joint family in which event it becomes a joint decree. Where a joint decree for actual possession of immovable property is passed and one of the coparceners assigns or transfers his interest in the subject matter of the decree in favour of the judgment debtor, the decree gets extinguished to the extent of the interest so assigned and execution could lie only to the extent of remaining part of the decree. In case where the interest of the coparceners is undefined, indeterminate and cannot be specifically stated to be in respect of any one portion of the property, a decree cannot be given effect to before ascertaining the rights of the parties by an appropriate decree in a partition suit. It is no doubt true that the purchaser of the undivided interest of a coparcener in an immovable property cannot claim to be in joint possession of that property with all the other coparceners. However, in case where he is already in possession of the property, unless the rights are appropriately ascertained, he cannot be deprived of the possession thereof for a joint decree holder can seek for execution of a decree in the whole and not in part of the property. A joint decree can be executed as a whole since it is not divisible and it can be executed in part only where the share of the decree holders are defined or those shares can be predicted or the share is not in dispute. Otherwise the executing court cannot find out the shares of the decree holders and dispute between joint decree holders is foreign to the provisions of Section 47 CPC. Order XXI Rule 15 CPC enables a joint decree holder to execute a decree in its entirety but if whole of the decree cannot be executed, this provision cannot be of any avail. In that event also, the decree holder will have to work out his rights in an appropriate suit for partition and obtain necessary relief thereto. Various decisions cited by either side to which we have referred to do not detract us from the principle stated by us as aforesaid. Therefore, a detailed reference to them is not required." (underlining added)

5. A reading of the ratio of the aforesaid two judgments makes it clear that when there are various co-owners/co-landlords, only one co-owner/co-landlord cannot terminate the tenancy for seeking possession of the tenanted property and/or mesne profits

6(i) Learned counsel for the appellant/plaintiff has placed reliance upon the judgment of the Supreme Court in the case of Om Prakash and Another Vs.

Mishri Lal (dead) represented by his legal representative Savitri Devi (2017) 5 SCC 451 to argue that one co-owner can file a suit for possession, and in this regard paras 32 to 34 of the said judgment are relied upon and which paras read as under:-

"32. It is no longer *res integra* and is settled by this Court in *Sri Ram Pasricha v. Jagannath, Dhannalal v. Kalawatibai and India Umbrella Manufacturing Co. v. Bhagabandei Agarwalla* that a suit for eviction of a tenant can be maintained by one of the co-owners and it would be no defence to the tenant to question the maintainability of the suit on the ground that the other co-owners were not joined as parties to the suit. The judicially propounded proposition is that when the property forming the subject matter of eviction proceedings is owned by several co-owners, every co-owner owns every part and every bit of the joint property along with others and thus it cannot be said that he is only a part owner or a fractional owner of the property and that he can alone maintain a suit for eviction of the tenant without joining the other co-owners if such other co-owners do not object. In the contextual facts, not only the compromise decree, as aforementioned, has declared the Appellants to be the joint owners of the suit premises, their status as such has not been questioned at any stage by anyone interested in the title thereto.

33. Further, the original Defendant having accepted Smt. Chameli Devi as his landlady and thereafter continued to pay rent to her son Bhola Nath, the father of the Appellants, in terms of the definition of "landlord" in Section 3(j) of the Act, he during his life time and after his demise, the Respondents are estopped Under Section 116 of the Indian Evidence Act, 1872 to dispute the status of the Appellants as their landlord in a suit for his eviction from the tenanted premises.

34. That a tenant during the continuance of the tenancy is debarred on the doctrine of estoppel from denying the title of his landlord through whom he claims tenancy, as is enshrined in Section 116 of the Indian Evidence Act, 1872, is so well-settled a legal postulation that no decision need be cited to further consolidate the same. This enunciation, amongst others is reiterated by this Court in *S. Thangappan v. P. Padmavathy* and *Bhogadi Kannababu v. Vuggina Pydamma*. In any view of the matter, the Appellants, being the son of Bhola Nath, who at all relevant time, was the landlord vis-a-vis the original Defendant and the Respondents in terms of Section 3(j) of the Act, their status as landlords for the purpose of eviction under the Act, could not have been questioned so as to non suit them for want of locus."

(ii) The argument urged on behalf of the appellant/plaintiff by placing reliance upon the judgment in the case of *Om Prakash* (supra) is completely misconceived because the judgment of the Supreme Court in the case of *Om Prakash* (supra) as also the judgments which are referred to in para 32 in the judgment, only lay down the ratio that one co-owner can file a suit for eviction against a tenant if there is no opposition of the other co-owners/co-landlords. This is the settled law because in the proceedings for eviction under various Rent

Control Acts, any one co-owner can seek possession of the tenanted premises in case there is no opposition to the sole petitioner/plaintiff taking possession of the tenanted premises from the tenant by the other co-owners/co-landlords of the property. However in the present case the other co-owners, being defendant nos.2 to 5/respondent nos.2 to 5, have in fact opposed the termination of tenancy and also of the appellant/plaintiff seeking possession and mesne profits of the tenanted premises through the subject suit. Therefore, what will apply in the facts of the present case will be the ratio of the judgments of the Supreme Court in the cases of Sk. Sattar Sk. Mohd. Choudhari (supra) and Jagdish Dutt (supra) and not the ratio of the judgment in the case of Om Prakash (supra).

7. It is therefore seen that the present appeal is a completely frivolous appeal. The suit was dismissed rightly by the trial court in view of the fact that other co-owners/co-landlords being the respondent nos.2 to 5/defendant nos.2 to 5 did not agree to termination of tenancy and the eviction of the tenant/respondent no.1/defendant no.1 from the suit property. This appeal is therefore dismissed."

4. The judgment in the case of Navin Chander Anand (supra) relies upon ratios of the two judgments of the Supreme Court in the cases of Sk. Sattar Sk. Mohd. Choudhari v. Gundappa Amabadas Bukate, (1996) 6 SCC 373 and Jagdish Dutt and Another v. Dharam Pal and Others, (1999) 3 SCC 644 and the ratios of these judgments of the Supreme Court is that unless consent of all co-owners exists to the termination of the tenancy, the tenancy of a tenant cannot be terminated. In fact, in the case of Jagdish Dutt and Another (supra), it was held by the Supreme Court that even if after the eviction decree is passed against a tenant, if the tenant becomes a co-owner by purchase of share of one co-owner, then, the possession cannot be taken in execution proceedings with respect to the decree of eviction.

5(i). It is seen that in the present case the respondent no.4/ defendant no.2/ Smt. Bhupinder Kaur had filed her written statement in the suit and in this written statement, she had clearly stated that she had transferred her 1/8th undivided share in the suit property to Sh. Amrit Narain on 08.04.1992. Hence, the respondent no.4/defendant no. 2/Smt. Bhupinder Kaur claimed that she was neither a necessary nor a proper party to the suit. As noted in detail in the order passed by this Court on 28.08.2018, since the agreement to sell executed in the favour of Sh. Amrit Narain by Smt. Bhupinder Kaur is prior to 24.09.2001, therefore, such agreement to sell will create rights in the nature of Section 53A of the Transfer of Property Act, 1882 containing the doctrine of part performance in favour of Sh. Amrit Narain. Sh. Amrit Narain, therefore, effectively has the rights/title more or less of a co-owner in the suit property to the extent of 1/8th share and which was originally owned by defendant respondent no.4/ no. 2./ Smt. Bhupinder Kaur and received by Sh. Amrit Narain under the Agreement to Sell dated 08.04.1992.

5(ii). There is no dispute that there was no consent of Smt.

Bhupinder Kaur or of Sh. Amrit Narain at the time of issuing of the Notice of Termination of tenancy dated 07.07.1992, and which on the face of it was issued by the three plaintiffs only and who are the respondents no. 1 to 3 in this appeal. Putting it in other words, the legal notice was issued only on behalf of the co-owners to the extent of 3/4th co-ownership interest in the property and there was no notice terminating tenancy on behalf of all the co-owners of the suit property. In fact the subject suit for possession and mesne profits could also not have been filed as it was filed only by three co-owners and there being no consent of the co-owner Smt. Bhupinder Kaur or of Sh. Amrit Narain.

6. No doubt, in law, one co-owner can file a suit for possession against a tenant with respect to the tenanted premises, however, this is on the basis that the other co-owners are not objecting to the termination of tenancy and for filing of a suit thereafter for taking possession of the tenanted property from the tenant. In the present case, this presumption of deemed consent will, however, not apply with respect to the 1/8th share of respondent no. 4/defendant no. 2/Smt. Bhupinder Kaur inasmuch as she had transferred her 1/8th share in the suit property to none other than the karta of the appellant/defendant no. 1 namely Sh. Amrit Narain. Sh. Amrit Narain has taken rights under the Agreement to Sell dated 08.04.1992 in his individual capacity and not for and on behalf of the appellant/defendant no. 1/tenant, which is an HUF concern. In the facts of the present case, therefore, since there is no consent of one co-owner i.e. respondent no.4/defendant no.2/Smt. Bhupinder Kaur for termination of tenancy and for filing of the suit for possession and mesne profits, the suit was hence clearly not maintainable. In fact, the suit was not maintainable against the respondent no.4/defendant no.2/Smt. Bhupinder Kaur, and in the absence of Sh. Amrit Narain because the respondent no.4/defendant no.2/Smt. Bhupinder Kaur had already transferred her rights in the suit property by Agreement to Sell dated 08.04.1992 i.e. prior even to the termination of the tenancy by the respondents nos. 1 to 3/plaintiffs vide Notice dated 07.07.1992 and also much prior to the filing of the present suit on 12.01.1993. As already stated above, Smt. Bhupinder Kaur had filed a written statement bringing to the notice of the respondents no. 1 to 3/plaintiffs that the respondent no.4/defendant no.2/Smt. Bhupinder Kaur had entered into an Agreement dated 08.04.1992 with respect to her share in favour of Sh. Amrit Narain and therefore, the respondent nos.1 to 3/plaintiffs in fact should have added Sh. Amrit Narain as a party to the suit, but this was deliberately not done because obviously Sh. Amrit Narain being none other than the karta of the appellant/defendant no.1/tenant, he would not have consented to, and in fact objected to the alleged termination of the tenancy by the Legal Notice dated 07.07.1992 and thereafter of filing of the subject suit for possession and mesne profits.

7(i). Ld. counsel for the respondent nos.1 to 3/plaintiffs have placed reliance upon the judgment of Hon'ble Supreme Court in the case of Pramod Kumar Jaiswal and Others v. Bibi Husn Bano and Others, (2005) 5 SCC 492 in support of the proposition that even if a tenant purchases a part co-ownership interest in

the suit property, the tenancy is not terminated and it continues.

7(ii). In my opinion, however, the judgment in the case of Pramod Kumar Jaiswal and Others (supra) has no application to the facts of the present case because in the present case the issue is not that a tenant has purchased co-ownership interest and is claiming that tenancy has come to an end and the tenancy has merged because of co-owner interest being purchased by the tenant but on the contrary in the present case the issue is in fact that the tenant claiming that the tenancy continues and the tenancy is not terminated as it is not terminated on behalf of all the co-owners, and that the suit has been filed on behalf of only some of the co-owners and the same is not maintainable as per the ratios of the judgment of the Hon'ble Supreme Court in the cases of Sk. Sattar Sk. Mohd. Choudhari (supra) and Jagdish Dutt and Another (supra).

8. In view of the aforesaid discussion, the impugned judgment of the trial court is clearly illegal. The suit filed by the respondent nos.1 to 3/plaintiffs was not maintainable inasmuch as there did not take place termination of the tenancy of the appellant/defendant no.1, inasmuch as the termination of the tenancy by the Legal Notice dated 07.07.1992 was illegal being only on behalf of 3/4th ownership interest owners and not all the co-owners, with the further fact that respondent no.4/ defendant no.2/Smt. Bhupinder Kaur to the extent of her co-ownership interest of 1/8th share was in fact no longer the co-owner, neither when the suit was filed on 12.01.1993 (as her co-ownership interest in the form of interest under Section 53 of the Transfer of Property Act, had already vested with Sh. Amrit Narain) nor when the Notice of Termination of tenancy dated 07.07.1992 was sent. The impugned Judgment of the trial court dated 22.12.2017 is therefore set aside. The suit filed by the respondent nos.1 to 3/ plaintiffs accordingly will stand dismissed. Parties are left to bear their own costs. Decree sheet be prepared. Trial court record be sent back.

9. Appeal is accordingly allowed and disposed of.