

---

**(1992) 09 AHC CK 0042**

**In the Allahabad High Court**

**Case No : First Appeal From Order No. 959 of 1992**

Smt. Anju Sharma

APPELLANT

Vs

Sri Suresh Chand Jain and others

RESPONDENT

---

**Date of Decision : 30-09-1992**

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 13, Order 39 Rule 1, Order 39 Rule 2, 47

Transfer of Property Act, 1882 — Section 106

**Citation : AIR 1993 All 109 : (1993) 1 AWC 123**

**Hon'ble Judges : G.S.N. Tripathi, J;G.D. Dube, J**

**Bench : Division Bench**

**Advocate : V.K. Burman, for the Appellant; R. Tandon, for the Respondent**

---

## **Judgement**

G.D. Dube, J,

1. This appeal has been preferred against the judgment and order of Civil Judge, Mathura, rejecting an application for temporary injunction.

2. A suit No. 120 of 1984 was filed by respondent No. I against respondents 2 and 3 and Manju Goswami, daughter of Shyam Kishan Goswami, in the Court of Judge, Small Causes, Mathura. This suit was decreed ex parte on 27-5-1985. As against this order, an application under Order I, Rule 13, C.P.C. was moved by the respondents 2 and 3. This was rejected on 17-2-1986. The respondents 2 and 3 preferred a revision before the District Judge, Mathura. This revision was rejected on 22-1-1987. Thereafter, respondents 2 and 3 moved Writ Petition No. 2386 of 1987. Jai Kishan Goswami v. District Judge, Mathura. This writ petition was rejected on 12-5-1992. The High Court allowed three months time to respondents 2 and 3 to vacate the premises, provided they furnished adequate undertaking before the Court of Judge, Small Causes. Despite this undertaking, respondents 2 and 3 resorted to the proceedings u/s 47, C.P.C. This application was rejected on 12-8-1992. Aggrieved by this order, respondents 2 and 3 filed Writ Petition No. Nil of 1992. Jai Kishan Goswami v. Third Additional Civil Judge,

Mathura. This writ petition was rejected on 18-8-1992.

3. On 11-8-1992, the appellant (Smt. Anju Sharma) filed suit before the Civil Judge, Mathura, praying that the Court may declare the decree passed in SCC Suit No. 102 of 1984 as void and not binding on the plaintiff. Another prayer was made that respondent No. 1 be restrained from taking possession of the property in dispute. The grounds mentioned in the suit were that after the death of her father, who was the sole tenant, she became a co-tenant of the premises in dispute. She was not made a party. On the other hand, Manju Sharma was made a party to the suit. She was never served with any summon in the suit. Consequently, any decree passed in the suit was not binding on her. It was also alleged that the property given in the tenancy of her father was the land. It was not a building. Therefore, the Small Cause Court had no jurisdiction to entertain the suit. It was also urged that respondents 2 and 3 are in collusion with respondent No. 1 and had not taken proper care of the suit and allowed it to proceed ex parte. On the above facts, an application for temporary injunction was moved before the Court below. It was prayed that respondent No. 1 be restrained from taking possession over the property in dispute for the execution of decree in Suit No. 102 of 1984.

4. It has been argued by learned counsel for the appellant that the J.S.C. Court had no jurisdiction to pass the decree and this plea could be raised at any time. The respondent No. 1 was only landlord of the land on which the buildings were constructed by the lessee. Consequently, the respondent No. 1 could not have filed the suit in the Small Cause Court. It was also urged that the appellant was not served with summons and, therefore, she had no knowledge of the suit. She was, therefore, entitled to get that decree cancelled.

5. Learned counsel for the respondents urged that the appellant had signed the acknowledgement on the registered envelope as "Anju". Therefore, she had full knowledge of the suit and she cannot say that she had no knowledge of the suit. It was also urged that this aspect had been considered by the District Judge, Mathura, in his judgment in the revision. It was also pointed out that the question of jurisdiction was considered by this Court and this Court had not accepted the plea of respondents 2 and 3 that the Small Cause Court had no jurisdiction to entertain the suit.

6. Learned counsel for the appellant has cited *Sunehri v. Chatru*: 1990 (2) Revenue Law Reporter 179. In this case, the Punjab and Haryana High Court had defined as to what is meant by prima facie case. It was held in this case that the concept of "prima facie" for purposes of temporary injunction means that if what is averred is assumed to be correct whether the case disclosed a cause of action on which relief can be given by the Court. It was urged that on the basis of this definition the plaintiff has sufficient cause of action for obtaining a relief as claimed in the plaint. It was also urged that if the appellant is evicted from the premises in question she will suffer irreparable loss. It was also urged that the balance of convenience lies in her favour.

7. Mohd. Qadeer v. Munsif North, Lucknow: 1992 All Law Reports 752 was a case where ex parte decree had become final about thirteen years back. When this decree was put into execution, three persons filed suit alleging that their father was the original tenant of the house in suit and after his death the tenancy was inherited by them. On this basis, it was pleaded that the plaintiffs were co-tenants and as no notice of termination of tenancy was served on them nor they were impleaded in the suit, the decree is not binding on them. On these facts, Hon'ble-S.C. Mathur, J. observed :

"In my opinion even on the facts pleaded by the plaintiff-opposite-parties no relief can be granted to them. Indeed it had been held by a Division Bench of this Court in Ramesh Chand Bose Vs. Gopeshwar Pd. Sharma, , that on the death of a tenant his heirs succeed as tenants in common and each tenant in common will have to be served with notice u/s 106 of the Transfer of Property Act and will have to be impleaded in suit for eviction, but this authority stands overruled by the decision of their Lordships of the Supreme Court in H.C. Pandey Vs. G.C. Paul, . It has been observed in paragraph 4 "..... on the death of the original tenant, subject to any provision to the contrary either negating or limiting the succession, the tenancy rights devolve on the heirs of the deceased tenant. The incidents of the tenancy are the same as those enjoyed by the original tenant. It is a single tenancy which devolved on the heirs. There is no division of the premises or of the rent payable therefore. That is the position as between the landlord and the heirs of the deceased tenant. In other words, the heirs succeed to the tenancy as joint tenants". Earlier in AIR 1963 SC 568, Kanji Manji v. The Trustees of the Port of Bombay, their Lordship had laid down that in the case of joint tenancy notice to one of the joint tenants was sufficient and the suit was also good against one of them. In view of the legal position which now stands crystallized, the plaintiffs are not entitled to any relief even if all their assertions are accepted. The suit is accordingly unnecessarily pending in the Court below."

8. In the above case, reliance was placed on Smt. Mahadevi v. Civil Judge, Farrukhabad: 1987 (1) ARC 406 : (1987 All LJ 870) and Smt. Raj Kumari Kapoor v. Civil Judge, Kanpur: 1986 (2) AWC 469: 1986 All LJ1192.

9. On the basis of the above case laws, it was urged that the status of the appellant is only that of a joint tenant. In Mohd. Qadeer's case (supra), it was held by this Court that even if a notice is not served on a joint tenant and is not impleaded in the suit, then a decree is not invalidated. The decree will operate against all joint tenants who had not been impleaded in the suit for eviction of the tenant. Therefore, it was urged that even though (though not admitted) the appellant was not properly named in the suit, the ex parte decree will be binding on her.

10. We are in complete agreement with the view of Hon'ble Mr. Justice S.C. Mathur in the case of Mohd. Qadeer (supra). It is not open now to the appellant to say that the decree passed in favour of respondent No. 1 is not binding on her. Her status appears to be that of a joint tenant. She is claiming her interest in the

property in dispute by way of succession from her father who was admittedly the sole tenant of the property in dispute. In view of the above case, we are prima facie of the opinion that it is not open to the appellant to challenge the decree in question on the ground that she was not made a party to the suit.

11. In Revision No23 of 1986 between respondents 2 and 3 and respondent No. 1 and Smt. Manju Goswami, it was held by the revisional Court in paragraph 12 of its judgment that the appellant had received the summons and had signed the acknowledgement as "Anju Goswami". It was held in this judgment that the appellant had sufficient information of the suit. In his judgment in Civil Misc. Writ No. 2386 of 1987: Jai Kishan v. District Judge and others, Hon"ble S.C. Verma, J. has upheld that the service on Smt. Manju Goswami was served sufficiently. In view of these findings, it would not be appropriate to permit the appellant to allege that she is not Manju Goswami but Anju Goswami. It is not disputed that all the details of address like parentage and house number of the appellant are mentioned correctly in the plaint filed before the J.S.C. Court, It is also not disputed that Shyam Kishan Goswami had only one daughter. In the context of the facts of this case, it does not appear that the only daughter had no knowledge of the present suit.

12. The respondents 2 and 3 had given an undertaking for evicting the house in dispute within three months and delivering possession to the respondents before the Judge Small Cause Court. Despite this dispute was raised on execution side and the matter was taken up to the High Court. In these circumstances, we are of opinion that prima facie the present suit is an outcome of the scheming mind of respondents 2 and 3 to frustrate the execution of the decree.

13. The appellant has admitted in para- graph 34 of the plaint that after her marriage in 1985 she is residing at the house of her husband. Hence after the marriage, the appellant has little interest left in the property in dispute.

14. Learned counsel for the respondents has urged that after 1985 it will be deemed that the appellant's tenancy stands surrendered in favour of other joint tenants or landlord. We do not intend to make any observation on this contention. The lower court may consider this aspect.

15. For the foregoing reasons, we are of opinion that the plaintiff has no prima facie case in her favour. After such a prolonged litigation if respondent No. 1 is not able to get the decree executed and permitting fresh litigation in the suit would amount to abuse of the process of the Court. This situation obviously will cause irreparable loss to respondent No. 1. The appellant is not going to suffer any thing. She is already residing with her husband. The balance of convenience, therefore, does not tilt in favour of the appellant.

16. In the result, the appeal fails and is dismissed accordingly with costs. The undertaking given by Counsel of respondent No. 1 is discharged.

17. Appeal dismissed.