

**(1981) 05 AHC CK 0037**  
**In the Allahabad High Court**  
**Case No : Second Appeal No. 2097 of 1974**

|                        |    |            |
|------------------------|----|------------|
| Uma Singh and others   | Vs | APPELLANT  |
| Virendra Kumar Agarwal |    | RESPONDENT |

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**Date of Decision :** 07-05-1981

**Acts Referred:**

Uttar Pradesh (Temporary) Control of Rent and Eviction Act, 1947 — Section 3(1)(a)

**Citation :** (1981) 05 AHC CK 0037

**Hon'ble Judges :** K.C.Agrawal, J

**Final Decision :** Dismissed

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## Judgement

K. C. Agarwal, J.

This is a tenants' second appeal preferred against a judgment and decree of the First Additional Civil Judge, Kanpur, dismissing an appeal and the crossobjection filed by the defendants and the plaintiff respectively against the judgment of the trial Court.

The brief facts are these. Claiming himself to be the Karta and Manager of the joint Hindu family, the plaintiffrespondent Virendra Kumar Agarwal filed suit No. 2540 of 1967 for eviction of the defendantappellants from a portion on the ground floor of house No. 79/10, Latouche Road, Kanpur. The allegations made in the plaint were that the defendant No 1 Smt. Usha Singh was the tenant of the aforesaid accommodation at the rate of Rs 20/ per month, and that she had not paid the rent from 141967 to 3171967 amounting to Rs. 80/, despite service of notice of demand and ejectment on 1181967, hence she was liable to eviction. The said notice also stated that defendant 1. Smt. Usha Singh had illegally sublet the accommodation in dispute to Uma Shankar Pathak, defendant 2, therefore, the two defendants were liable to be evicted on the ground of illegal subletting as well.

The suit was contested on the ground that the plaintiff Virendra Kumar Agarwal being one of the heirs of late Lala Suraj Bhan was not alone competent to sue

without joining other heirs. The allegations that the plaintiff was not the Karta and Manager of the joint family and that the notice in suit given by him was illegal, were also taken. The defendant denied that defendant 2 was the subtenant illegally admitted to the tenancy. It was asserted that defendant 2 was a partner in the business of defendant 1. The defendant No. 1 further pleaded that before taking defendant 2 as partner, the consent of Lala Suraj Bhan, the father of the plaintiff, had been taken and on that account the rent was enhanced from Rs. 12/ to Rs. 20/ per month. The allegation of default was also disputed.

The trial Court decreed the suit for ejectment of the two defendants on the ground of illegal subletting, holding that defendant 2 was not a partner in the business of defendant No. 1. It further found that defendant 1 had not taken any consent from Suraj Bhan and had illegally passed exclusive possession to defendant 2 on consideration. The trial Court, however, repelled the plea of the defendant 1 being a defaulter within the meaning of Section 3 (1) (a) of U. P. Act III of 1947, and decreed the suit for ejectment, arrears of rent amounting to Rs. 10667 paise, and damages.

Being aggrieved, the defendants filed Civil Appeal No. 292 of 1972. The plaintiff/respondent preferred a crossobjection against the finding of the trial Court holding that the defendant 1 was not a defaulter in the payment of rent. The grievance of the defendants in Civil Appeal No. 292 was that the trial Court erred in finding that Virendra Kumar Agrawal was competent to file the suit, and that defendant 1 Smt. Usha Singh had illegally admitted Uma Shankar Pathak defendant 2, as the subtenant. Both the appeal and the crossobjection were dismissed by the lower appellate Court on 14/8/1974.

Against the judgment of the lower appellate Court, the defendants filed the present second appeal.

Learned counsel for the appellants raised five points before me in this appeal. These points were as under :

1. Virendra Kumar Agrawal being a joint tenant along with other" members of his family was not competent to terminate the tenancy of the defendants by claiming himself to be a Karta of the joint Hindu family.
2. That suit filed by Virendra Kumar Agrawal in the capacity of the Karta of the joint family was incompetent as on the death of Suraj Bhan the position of the members of the family was tenants in common and the suit could be filed by all the heirs and legal representatives of Suraj Bhan, and that Virendra Kumar Agrawal had no authority to institute the suit.
3. Taking of a partner did not amount to illegal subletting.
4. No legal proof of subtenancy had been brought on record, and
5. The consent of Suraj Bhan had since been obtained by defendant 1 for admitting Uma Shankar Pathak as the tenant of the premises, there was no

illegal subletting.

The last three points are interlinked. I propose to take these points together.

The cases of the parties have been recited by me in the judgment. To recapitulate them, it may briefly be pointed out that the admitted case of the parties was that Smt. Usha Singh, defendant 1, was a tenant in a portion on the ground floor. She had illegally let out the premises to Uma Shankar Pathak, and therefore, she was liable to eviction. Section 3 (1) (a) of U P. Act III of 1947 lays down that :

"the tenant has on or after the first day of October, 1916, sublet the whole or any portion of the accommodation, without the permission of the landlord."

The fact that defendant 2 was in possession of the shop had not been disputed by defendant 1. The plea taken, however, was that the said defendant 2 was not in exclusive possession of the premises in dispute, and that he had only been admitted by defendant 1 as a partner in the business. The two Courts below concurrently found that the defendant 2 was not a partner but was in possession of the shop in his own right. The finding given by the lower appellate Court was that the partnership transaction was not genuine and was a sham transaction to conceal subletting. If it was a sham transaction never intended to be acted upon in order to give a legal mask for concealing the true nature of possession the Court would have the power to unveil the mask and to find out the real face of the transaction. The two Courts below considered the evidence of the parties led on this aspect of the matter and, after considering the evidence and the circumstances, arrived at the conclusion that defendant 2 was not a partner. He was in fact, in exclusive possession of the shop. For the above purposes, the lower appellate Court referred to the documents on record which showed that defendant 2 represented himself to be the sole proprietor of the business that was being carried on in the premises in dispute.

The Learned counsel for the defendants attempted to assail the finding on the ground that the mere assertion of defendant 2 in the documents referred to by the lower appellate Court did not lead to the conclusion that defendant 2 had claimed himself to be the exclusive owner of the shop. Counsel urged that the said assertion only showed that defendant 2 had simply asserted that he was one of the proprietors of the firm, in this light, the submission was that the inference drawn by the lower appellate Court was incorrect. The submission is not acceptable to me. The description given by defendant 2 in the papers, referred to in the judgment of the lower appellate Court, which I need not mention in my judgment, was considered along with other circumstances, and the lower appellate Court found that defendant 2 was not, in fact, a partner. These papers contained the admission of defendant 2 and were, therefore, rightly taken into account.

Apart from these documents, the lower appellate Court also referred to other documents filed in the Sales Tax Department, which showed that defendant 2 described himself as the proprietor of the Oriental Engineering Works in which

name the business was being carried on in the premises in question. In these circumstances, the finding of the two Courts below concurrently given that defendant 2 was not partner of the firm Oriental Engineering Works, is a finding of fact. The High Court has no jurisdiction to sit in appeal over a finding of fact recorded by the lower appellate Court and to reverse the same. As held by the Supreme Court in *Mst Kharbuja Kuer v. Jang Bahadur Rai* 1963 (I) S.C.R. 456 the Supreme Court held that the High Court had no jurisdiction to entertain a second appeal on findings of fact, even if it was erroneous. In this connection, the Supreme Court observed :

"It is settled law that the High Court has no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact. As the two Courts approached the evidence from a correct perspective and gave correct finding of fact, the High Court had no jurisdiction to interfere with the said finding of fact."

The law settled is that howsoever gross or inexcusable the error may seem to be, there is no jurisdiction under section 100 of the Code of Civil Procedure to correct that error. In fact, counsel could not point out any error of law which could be said to have been arrived at by the lower appellate Court in holding that the defendant 2 was not a partner.

The next submission made by the Learned counsel was that defendant 2, Uma Shankar Pathak had been taken by defendant 1 with the consent of Lala Suraj Bhan, hence the finding of the lower appellate Court holding to the contrary was erroneous. For the purpose of establishing the said point, counsel relied upon the circumstance that the rent of the premises had since been increased from Rs. 12/ to Rs. 20/per month, the conclusion of the Courts below holding that defendant 2 had not been inducted into possession of the disputed premises with the consent of Surai Bhan was wrong. The Courts below found that the theory of inducting defendant 2 into possession with the consent of Surai Bhan was improbable. Defendant 1 admittedly, had nothing in her possession to show that such a consent had been obtained. Apart from the writing, the only question as to whether the consent had been obtained, was one of fact. The trial Court held that this theory of enhancement of rent and obtaining the consent of Surai Bhan had been set up by the two defendants knowing full well that the plaintiff's father was dead and there was no possibility of contradiction of their statements on this point. This was, according to "the Courts below, a false stand which had not been established from any evidence worthy of credence. This finding is again a finding of fact. The High Court cannot interfere with the conclusion of fact recorded by the lower appellate Court.

The next point is about the validity of the notice sent under Section 106 of the Transfer of Property Act. The notice had been sent by Virendra Kumar Agrawal, the plaintiff, claiming himself to be the Karta of the joint Hindu family. Counsel's submission was that as there could be no joint family after the death of Surai Bhan and all the heirs of the deceased Suraj Bhan were tenants in common, the plaintiff Virendra Kumar Agrawal was not the Karta and could not terminate the

tenancy. I will deal with the legal aspect of this question when I take up the next issue of competence of Virendra Kumar Agrawal to file the suit. At this place it would suffice to mention that as held by the Supreme Court in *ft. Dhanapal Chettiar V. Yesodai Ammal*, AI.R. 1979, S.C. 1745 in order to get a decree or order for eviction against a tenant under any State Rent Control Act, it is not necessary to give notice under Section 106 of the Transfer of Property Act. The Supreme Court observed :

"Determination of a lease in accordance with the Transfer of Property Act is unnecessary and is a mere surplus age because the landlord cannot get eviction of the tenant even after such determination. The tenant continues to be so even thereafter. That being so, making out a case under the Rent Act for eviction of the tenant by itself is sufficient and is not obligatory to find the proceedings on the basis of the determination of the lease by issue of notice in accordance with Section 106 of the T. P. Act. On the question of requirement of such a notice under Section 106 T. P. Act, the difference in the language of various State Rent Acts does not bring about any distinction."

To the same effect is the view taken by another Bench of the Supreme Court in *K. K. Krishna v. M. K. Vijaya Raghvan* 1980 (4) S.C.C. 88.

In *P. K. Bajpai v. B. B. Sarkar*, 1980 A.C.W. 288 repelling the argument of requirement of giving notice under Section 106 of the Transfer of Property Act, the Supreme Court found that the claim of the tenant that he was entitled to a double protection was without any substance. This case went from this Stage. Since, therefore, a notice under Section 106 of the Transfer of Property Act was not required to be given, the suit of the plaintiff Virendra Kumar Agrawal could not fail on the ground that it was illegal.

Reference was made to Section 20 of U. P. Act XIII of 1972 and an argument was raised on its basis that since notice was required under the said Act, a similar notice must be deemed to be necessary under Section 3 of the old Act. The language of Section 20 of the new Act is altogether different from that of Section 3 of the old Act. The two provisions are not in pan materia with each other on this aspect of the matter. Hence, for this reason, I do not consider it necessary to refer to the decision cited at the Bar in support of the contention of requirement of notice.

The only other question that remains to be decided is about the competence of Virendra Kumar Agrawal to file the suit claiming himself to be the Karta of the joint family. In paragraph 1 of the plaint, the assertion made was that the plaintiff was the owner and landlord of house No. 79/10, Latouche Road, Kanpur. He claimed himself to be the Karta and Manager of the joint family left by Lala Suraj Bhan, who managed the suit house. Suraj Bhan died on 11/11/1966 leaving behind his widow, two sons and daughters. Out of these daughters left by the deceased Suraj Bhan, one of them had, admittedly, been married during the life time of Suraj Bhan. The question that arises for consideration is about the right

which devolved on his heirs and legal representatives. The admitted case appears to be that Suraj Bhan was the owner of the disputed house. On his death, the property devolved on his heirs and legal representatives under Section 8 of the Hindu Succession Act, the relevant portion of which reads as under :

"The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter ;

(a) firstly, upon the heirs being relatives, specified in clause (i) of the Schedule..."

Under this section of the Hindu Succession Act, 1956, the entire law of intestate succession amongst the Hindus, to whichever school they may belong, has been thoroughly changed. There are four classes of heirs laid down by this section. We are concerned with the heirs of clause (a), which are specified in Clause (i) of the Schedule. Clause (i) of the Schedule mentions, amongst others, son, daughter, widow. Prior to the enactment of this Act the daughter came in only after the son and widow in the line of succession. Now a daughter takes along with a son and where there are more daughters than one, they take the property as tenants in common.

Section 19 of the Hindu Succession Act deals with the mode of succession of two or more heirs. This section reads as under ;

"If two or more heirs succeed together to the property of intestate, they take the property, (a) save as otherwise expressly provided in this Act, per capita and not per stirpes, and (b) as tenants in common and not as joint tenants."

Thus, reading the two provisions together, it would appear that the position of persons taking the property on the death of a Hindu without leaving any will is that they take the share in the property as tenants in common. The tenancy in common is the holding of property by several persons by several and distinct titles, there being unity of possession only. The tenants in common are such as have unity of possession and have a distinct and several titles to their shares. In other words, no privity of estate exists between them, but as between themselves their rights and interests are several, and there is no unity of title between them, each owner being considered solely and severally seized of his share. They are united only in their right to possession of the property.

Sri Yatendra Singh, counsel for the defendants, referred to Section 6 of the Hindu succession Act, and to the First proviso to the same, and urged that on the death of a male Hindu, his interest in a Mitakshara coparcenary property, if the deceased left him surviving a female relative specified in Clause (i) of the Schedule, the interest of the deceased in the coparcenary property shall devolve in accordance with the Hindu Succession Act and not by survivorship. Section 6 deals with devolution of interest in coparcenary property. It does not apply to a case of separate property of a male Hindu, which is provided in Sections, followed by Sections 9, 10, 11, 12, and 13. The argument was on the assumption that even if Suraj Bhan had only an interest in the property and the same was

not held to be his separate property, the relationship of the heirs inter se would be that of tenantsincommon. There can be no denial to this legal position. In a case governed by the proviso to Section 6, the interest shall not devolve by survivorship. It would devolve in accordance with the provisions of the Hindu Succession Act. Once the provisions of this Act apply, the inter se status of the heirs of a deceased would, be, as laid down in Section 19 of the Hindu Succession Act, that of tenantsincommon.

For the defendants, therefore, the argument was that as the interest of each of the heirs and legal representatives of Suraj Bhan was distinct and separate, Virendra Kumar Agrawal could not file the suit claiming himself to be the Karta of the joint family. Counsel urged that the joint family ceased to exist soon after the death of Suraj Bhan. As already observed above, each heir had title of his own and will own an undivided fraction, as a result of which before severance each is entitled to an interest in every inch of the house. But, no one of them is entitled to the exclusive possession of any particular part of the land, each being entitled to occupy the whole in common with others. As a matter of fact, the undivided interest of the tenantsincommon has been held to be intangible and incorporeal.

In *P. G. Reddy v. Obulamma*, A.I.R 1971 A.P. 363 the question before the Full Bench was about the interpretation of the proviso to Section 6 of the Hindu Succession Act, 1956. The question was about the effect of the suit filed for redemption of mortgage without impleading all the heirs of the mortgagee. The two Courts, against whose judgments the appeal was filed in the High Court dismissed the suit on the ground of nonjoinder. The High Court maintained the judgment, and observed ;

"On the other hand, if the proviso of Section 6 of the Act applied on account of the existence of the heirs referred to therein there will be of course no destruction of joint family status, but the coparcenary property will not include the interest of the deceased coparcener by reason of succession under the Act and it will not then be available to the coparceners and heirs as coparcenary property and the Karta in relation thereto, therefore, cannot exercise his powers as a Karta. The interest having devolved on various heirs in specified shares, and such heirs being tenantsincommon in relation to that property, the Karta of the joint family property, to which the coparceners belong cannot represent the female heirs who are not coparceners. In fact, "all being tenantsincommon, in relation to the interest of the deceased coparcener, each one of them as already discussed, as the heirs of the mortgagee is the necessary party to the suit for enforcing the mortgage security. That is the position warranted by Section 6 of the Hindu Succession Act..."

"This accords with what we have stated above. On a proper construction of Section 6 of the Hindu Succession Act, we are unable to agree with the learned counsel for the appellant that notwithstanding ascertainment of interest of the deceased coparcener by notional partition and devolution of the same by succession on various heirs, including the female heirs by operation of the

proviso to Section 6 of the Hindu Succession Act, the Karta of the Hindu Joint family can as such represent the interest devolved in specified shares on the female heirs and bring a suit for enforcement of mortgage security."

This decision makes it clear that in a case where a male Hindu dies leaving behind him the female heirs of Schedule I, the position of the heirs succeeding of the property would be that of tenants in common and no person claiming himself to be a Karta would be entitled to bring a suit on their behalf in the capacity of a Karta. To the same effect is the view taken in *Venkateshwara Pai Rama Pai v. Luis* A.I.R. 1964 Ker. 125. The Full Bench held in this case on a consideration of Section 6 of the Hindu Succession Act that the deceased having left behind him female relatives, the proviso and explanation of Section 6 were attracted with the result that the share of the deceased must be deemed to have been partitioned out immediately before his death and to have devolved upon his heirs. As that share no longer formed part of the coparcenary property, it was not competent for the Karta of the joint family to represent other heirs in the suit.

In *Narayan Prasad Ruia v. Mutuni Kahain*, A.I.R. 1909 Cal. 69 the question was whether in a suit for eviction of a tenant brought by Narain Prasad Ruia the Karta of the joint family consisting of himself and his three minor sons, one of the minor sons having died during the pendency of the suit, on February 2, 1965, and his mother, the only heir not being substituted, the suit had abated as a whole. The argument of the landlord was that since the Karta was already on the record, the suit could be continued, but the learned Judge repelled the argument holding that "Narain Prasad Ruia as Karta cannot represent his deceased son's mother and necessarily his wife upon whom devolves the share of the property after partition. The very nexus of the joint family property is gone."

In *Govind Ram Mitha Mai v. Chetu Mai Villar Das*, A.I.R. 1970 Bom. 251 the view taken was that since there were female relatives specified in Clause (i) of the Schedule, the interest of the deceased in Mitakshara coparcenary property had to devolve by testamentary or intestate succession and not by survivorship. The Learned Judge observed that the representative character of the Karta is necessarily affected and he cannot represent that property which vested in a person other than a coparcener, and since the interest of the two unmarried daughters was thus unrepresented in the suit, the frame of the suit was defective and was liable to be dismissed.

From what I have said above, it is clear that Virendra Kumar Agrawal had no capacity or legal right to file the suit on behalf of all the heirs and legal representatives of the deceased Suraj Bhan and, as such, the suit was not maintainable.

Reliance had been placed by the lower appellate Court on a decision of this Court reported in *Fateh Chand and another v. Brij Bhukhan Prakash and another*" A.I.R. 1957 All. 801. Suffice it to mention that the said case did not concern itself with the controversy that cropped up for decision in the present appeal. The

point involved was whether the joint status of the family was destructed because the widow of a deceased corparcener got an interest in the joint family property in respect of which she could claim partition. The point was decided in the negative and the view taken was that whatever had been done in the interest of the family could be held to have been done on behalf of the members, including the widow. This case is clearly distinguishable and does not assist me in resolving the controversy raised in this appeal. The decision of the Orissa High Court in *Kastura Sahuani v. Das Seth*, A.I.R. 1979 Orissa, 69 certainly supports the contention of the appellants. The view taken in this case was that the heirs succeed together as tenants in common and not as joint tenants. The Orissa High Court while coming to the above conclusion had relied upon the decision of the Andhra Pradesh High Court in *P. G. Reddy v. G. Obulamma* (supra). The Madras High Court also in *Veerasekhara Varmarayar v. Amirthavalliammal and others* A.I.R. 1975 Madras 51 held :

""Consequently, the Karta will have no right to deal with that property thereafter. Since the right of the Karta to deal with the property is dependent upon the property being the joint family property, once the particular interest ceases to be the part of the joint family or the coparcenary property, the right of the Karta with reference thereto automatically and inevitably comes to an end."

For the reasons mentioned above, therefore, I find that the Courts below were wrong in holding that the plaintiff Virendra Kumar Agrawal could file the suit. To my mind, the result would be the same irrespective of the fact whether Suraj Bhan was the exclusive owner of the disputed house or he had only an interest therein. Admittedly, he left behind female heirs, including his widow and daughters. Out of these daughters, one of them had been married. That married heir would, in law, be deemed to have gone out of the joint family. However, that is not the reason on which I wish to base my judgment for holding that the suit was not competent.

Sri R. N. Bhalla, counsel for the respondent, however, urged that as the defendant I herself admitted that the plaintiff was the landlord and made the deposit of rent under Section 7C, admitting the plaintiff to be entitled to realise the rent, the defendants were estopped from taking a contrary stand. This submission does not appear to be correct. The plaintiff's own case was that he was the Karta of the joint family and that he had brought the suit in that capacity. Whether the plaintiff was the Karta and could he bring the suit in that capacity was the question of law. Under the law, as discussed above, the plaintiff could not bring the suit for the eviction against the persons, mentioned above. Hence, the defence raised to the argument of the defendants' learned counsel must fail.

At one time view taken was that after termination of tenancy, the tenant occupying the premises became a trespasser. Since a tenant, according to the Supreme Court, can be ejected without a notice, this controversy does not arise for decision. In fact the argument of the plaintiff himself before me was that no

notice of termination was required. If notice was not required, it was superfluous. If it was superfluous, no legal consequences could flow by the fact of its service on the tenant. It had to be ignored. The net result is that the tenantdefendant I could not be considered to be a trespasser. Hence, there is no occasion to decide whether the plaintiff as one cotenant was entitled to sue for the common property as against the defendant 1, who was not a trespasser. As a general rule, said above, tenantsincommon should be joined as plaintiffs in all actions for complete determination of the controversy. In *Corus Juris Secundum*, Vol. 86, page 545, the law on the subject has been stated in the following words ;

"The ordinary common law rule requires that tenantsincommon must join as parties plaintiff in all personal actions concerning the common property. Therefore, except as the rule may be changed by Statute, it is ordinarily held that tenantsincommon should join in all actions for injuries to the common estate ex contractu or ex delicto unless there is a severance of shares, and all coparceners must join as plaintiffs in an action for damages against a third person."

In the result, the appeal succeeds and is allowed. The judgment and decree passed by the Courts below are set aside, and the suit stands dismissed. In the circumstances, the parties shall bear their own costs.