

revision-petition, accordingly, fails and is dismissed.

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I. D. DUA, J.—I agree.
B.R.T.

Khanna, J.
Dua, J.

APPELLATE CIVIL

Before Daya Krishan Mahajan, J.

RAM SARUP,—Appellant.

Versus

CHANAN SINGH AND OTHERS,—Respondents.

Regular Second Appeal No. 325 of 1963.

Landlord and Tenant—Joint land partitioned by decree—Tenant brought on a part of the land by one of the co-owners without the consent of others—Whether can be evicted by the co-sharer to whose share that land falls in execution of the decree—Co-sharer—Whether bound by permanent lease granted by one co-sharer when the land was joint.

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Held, that a tenant settled on the joint land by one of the co-sharers does not become the tenant of the other co-sharers unless they consented to his tenancy. In order to bring about relationship of landlord and tenant there has to be a contract between the parties. It is open to the joint owners either to authorise one of the joint owners to settle a tenant on the joint land or to adopt a tenant settled by one of the joint owners as their tenant. The partition decree binds the co-owners and their tenants and a decree-holder, in execution of the partition decree, can evict the tenant who had been brought on the joint land by one of the co-sharers against whom the partition decree is passed and he is not to bring a separate suit for his eviction.

Held, that a person to whom a parcel of land has been allotted by a decree for partition of a Civil Court does not take it subject to a permanent lease granted by his former

co-owners without his concurrence when the land was the joint property of all the co-sharers.

Regular Second Appeal from the decree of the Court of Shri Om Parkash Saini, Senior Sub-Judge, with enhanced appellate powers, Ludhiana, dated the 14th day of January, 1963, reversing that of Shri Inder Mohan Malik, Additional Sub-Judge, 2nd Class, Ludhiana, dated the 23rd March, 1962, and dismissing the plaintiff's suit with costs throughout.

H. S. WASU & RAJ KUMAR, ADVOCATES, for the Appellants.

M. L. JHANJI & A. L. BAHRI, ADVOCATES, for the Respondent.

JUDGMENT

Mahajan, J.

MAHAJAN, J.—This second appeal is directed against the decision of the Senior Subordinate Judge, reversing on appeal the decision of the trial Court decreeing the plaintiff's suit.

The facts giving rise to this second appeal are as follows : Chanan Singh, Atma Singh and some other persons were co-sharers in a plot of land. This plot of land was leased out by Atma Singh to Ram Sarup appellant. Ram Sarup had taken this plot on lease for working brick-kiln and it is alleged that he had set up the kiln and had made certain constructions on the land for the purposes of the kiln. The lease-deed was executed by Atma Singh on 1st May, 1953. Chanan Singh brought a suit for partition of the joint land and obtained a decree for possession of his share on 18th December, 1959. Chanan Singh in execution applied for delivery of possession. This led to the present suit by Ram Sarup for a declaration that he is the tenant of the land and, therefore, cannot be ejected in execution of the decree for possession by partition obtained by Chanan Singh. The trial Court held that Ram Sarup was a tenant of Atma Singh and,

therefore, after partition should be deemed to have attained in favour of Chanan Singh. Accordingly, the plaintiff's suit was decreed. Against this decision, appeal was preferred by Chanan Singh. The same came up for hearing before the Senior Subordinate Judge, who reversed the decision of the trial Court on the short ground that a tenant of a co-sharer does not *ipso facto* become a tenant of the other co-sharer who has not settled that tenant on the joint land. The learned Senior Subordinate Judge took the view that by reason of partition decree the land in dispute which formed the subject-matter of the tenancy of the plaintiff had fallen to the share of Chanan Singh and, therefore, in execution of that decree Chanan Singh was entitled to possession of the same. The plaintiff derived his title from Atma Ram and as the decree bound Atma Singh, the plaintiff was consequently bound by that decree.

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The rule appears to be firmly settled that "a person to whom a parcel of land has been allotted by a decree for partition of a Civil Court does not take it subject to a permanent lease granted by his former co-owners without his concurrence when the land was the joint property of all the co-sharers" vide *Niranjan Mukherjee v. Soudamini Dasi* (1). This rule is based on the decision of the Privy Council in *Byjnath Lal v. Ramoodeen* (2), wherein their Lordships observed as follows:—

"It is therefore, clear that the mortgagor had power to pledge his own "undivided share in these villages; but it is also clear that he could not by so doing, affect the interest of other sharers in them, and that the person who took the security took it subject to the right of those sharers to enforce

(1) A.I.R. 1926 Cal. 714 (F.B.)

(2) (1874) 1. I. A. 106.

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a partition and thereby to convert what was an undivided share in the whole into a defined portion held in severalty."

No decision to the contrary has been cited at the bar, by the learned counsel for the appellant for the proposition that a tenant let on the land by one of the co-sharers of the joint land *ipso facto* becomes a tenant of the other co-sharers. I am not unmindful of the fact that it is open to the other co-sharers to adopt the tenant let on the joint land by one of the co-sharers by their own act or conduct but that is not the case so far as the instant case goes. The plaintiff never took up the plea that though he had been brought upon the land by Atma Singh he had been accepted as tenant by the remaining co-sharers or that the remaining co-sharers acquiesced in his being the tenant of the joint land. Mr. Wasu learned counsel for the appellant, however, relied on a decision of Calcutta High Court in *Syamnessa Bibi v. Abdul Gani* (3). That decision does not in any way support his contention. All that was laid down in that authority was that departure may be made from the rule laid down by the Full Bench in *Niranjan Mukherjee's* case where certain equitable considerations had been proved. So far as the present case is concerned, no such consideration arises for determination, for none were pleaded or proved.

This brings me to the consideration of the main question that was debated before me, namely, whether in execution of the partition decree the plaintiff can be evicted, or the decree-holder in the partition decree is to bring a separate suit for the eviction of the plaintiff who is the tenant of one of the co-sharers against whom partition decree was passed. It is conceded that partition decree does bind the plaintiff but it is urged

that partition decree will have to be enforced by a separate suit and in execution of partition decree the decree-holder cannot evict the plaintiff. He can only take symbolical possession of the property and the decree can in that manner be executed and satisfied.

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To determine this question, I advert to two sets of decisions wherein it has been held that a tenant settled on the land by a mortgagee can be evicted in execution of a redemption decree and also the second type of cases where a sub-tenant can be evicted in execution of a decree obtained against a tenant. In both these types of cases, neither the tenant of the mortgagee nor the sub-tenant were parties to the suits on the basis of which the redemption decree for redemption of the mortgage against the mortgagee and a decree for eviction of the tenant against the tenant was obtained by the mortgagor or the landlord. Judicial decisions seem to be unanimous on this that such decree-holders can evict the tenant and the sub-tenant in the aforesaid two types of cases in execution of their decrees obtained against the mortgagee or the tenant. At this stage, it will be proper to set out those decisions. In the first set of decisions, I would start with the decision of the Supreme Court in *Mahabir Gope v. Harbans Narain Singh* (4), wherein their Lordships of the Supreme Court observed as under :—

“The general rule is that a person cannot by transfer or otherwise confer a better title on another than he himself has. A mortgagee cannot, therefore, create an interest in the mortgaged property which will ensure beyond the termination of his interest as mortgagee. Further, the mortgagee who takes possession of the mortgaged property, must manage it as a person of ordinary prudence would manage

(4) A.I.R. 1952 S.C. 205.

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it if it were his own; and he must not commit any act which is destructive, or permanently injurious to the property. It follows that he may grant leases not extending beyond the period of the mortgage; any leases granted by him must come to an end at redemption."

In the case before the Supreme Court the mortgagee had settled a tenant on the land. The mortgagor redeemed the land by payment in proceedings under section 83 of the Transfer of Property Act. When the plaintiff mortgagors went to take possession, they were resisted by the tenants put on the land by the mortgagee. The plaintiffs filed the suit for possession of the land. The trial Court dismissed the plaintiffs' suit but the High Court decreed their suit. Against this decision, appeal was preferred by special leave to the Supreme Court and that appeal also failed. I have already quoted the observations made by the Supreme Court while dismissing that appeal. The next case in point of time is *Ammenuddin v. Mohammad Khader Ali* (5), wherein it was observed as follows :—

"The general rule is that a person cannot by transfer or otherwise confer a better title on another than he himself has. A usufructuary out mortgagee, therefore, cannot create an interest in the mortgaged property which will enure beyond the termination of his interest as mortgagee. It follows that he may grant leases not exceeding beyond the period of a mortgage; any lease granted by him must come to an end at redemption.

The interest of a tenant of a mortgaged house, therefore, comes to an end on redemption of the mortgage and the mortgagor is entitled to actual possession of the house in "execution of his decree for redemption."

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In the case before the Hyderabad High Court, objection was taken by the tenant let in by the mortgagees at the time of execution and that objection was repelled as already stated. In the next cases, *Kamlakar & Co. v. Gulamshahi Imambhai Musalman* (6) and *Ayer Ravji Vasta v. Joshi Gopalji* (7), a similar view was adopted. No authority to the contrary has been cited at the bar by the learned counsel for the appellant.

So far as the second set of cases is concerned, reference may first be made to *Jafferji Ibrahimji v. Miyadin Mangal* (8). In that case, a sub-tenant who was not party to a decree for possession passed in favour of the landlord against the tenant was evicted in execution of the decree and it was held that such a sub-tenant is not a person who is in possession of the premises in his own right. He derives his title from the tenant and his rights come to an end as soon as the rights of the person from whom he derives title come to an end. In the same volume in *Jairam Jadovji v. Nowraji Jamshedji Plumber* (9), Macleod C.J., observed.

"A sub-tenant cannot claim to be in possession of property on his own account within the meaning of Order 21, rule 99, and if his immediate "landlord is the tenant and judgment-debtor he cannot be in possession on account of some person other than the judgment-debtor.

(6) A.I.R. 1963 Bom. 42.

(7) A.I.R. 1963 Guj. 328.

(8) A.I.R. 1922 Bom. 273.

(9) A.I.R. 1922 Bom. 449 (2).

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When a landlord gets a decree for possession against his tenant, and is resisted or obstructed in obtaining possession, it is open to him to apply to the Court to get possession under Order 21, rule 97, and if the person resisting or obstructing is in possession as a sub-tenant that person cannot claim under rule 99 that the application should be dismissed.

The words 'on his own account' in rule 99 can only refer to a person who claims to be in possession on his own title, or a tenant of some person other than the judgment-debtor."

To the same effect are the observations in *Sheikh Yusuf v. Jyotish Chandra* (10) and *Sailendra Nath v. Bijan Lal* (11). I see no difference in principle in the case of a tenant settled by one of the co-sharers on joint land for the application of the rule laid down by the aforesaid cases. Such a tenant by no stretch of imagination can become the tenant of the other co-sharers. In order to bring about relationship of landlord and tenant there has to be a contract between the parties. I have already mentioned that it is open to the joint owners either to authorise one of the joint owners to settle a tenant on the joint land or to adopt a tenant settled by one of the joint owners as their tenant, but these are questions of fact and have to be proved in each individual case. So far as the present case is concerned it was not the plaintiff's case that he had been settled on the land as a tenant with the concurrence of all the co-owners or that the other co-owners than the co-owner settling him had acquiesced in his tenancy of the joint land. The partition decree

(10) A.I.R. 1932 Cal. 241.

(11) A.I.R. 1945 Cal. 283.

binds his landlord as much as it binds him. Moreover, no hardship or injustice is caused to such a tenant because his rights by operation of law will get transferred to the land which falls to the share of his landlord (the co-sharer leasing out the part of the joint land to him). In my view, both on principle and on authority the decision of the lower appellate Court is correct and must be upheld.

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For the reasons given above, this appeal fails and is dismissed, but in view of the difficult nature of the question involved, I will make no order as to costs in this Court.

B. R. T.

REVISIONAL CIVIL

Before D. Falshaw, C.J., and Mehar Singh, J.

MAN MOHAN LAL,—Applicant.

Versus

B. D. GUPTA,—Respondent.

Revision No. 376-D of 1959.

Delhi and Ajmer Rent Control Act (XXXVIII of 1952)
—S. 13(1) (k)—Suit by landlord for eviction of the tenant filed on one of the two grounds for eviction available—Suit dismissed—Second suit on the second ground—Whether barred by *res judicata*—Conversion of use of a building from residential to business purposes—Whether entitles the landlord to file a suit for eviction of the tenant.

1964

Feb., 17th.

Held, that when two grounds for the ejection of a tenant based on the same set of facts are open to a landlord and he chooses to bring a suit based only on one of the grounds, he cannot bring a second suit based on the other ground merely on the plea that that ground was not open to him in the first suit by reason of the omission on his part to perform some formal act like serving a notice. Such a