

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present : The Hon'ble Justice Shivakant Prasad

SMA 34 of 2013

Soma Ghosh & Anr.

Vs.

Jagannath Dey & Ors.

For the appellants	:	Mr. Mrinal Kanti Das Mr. S. Das Mr. K. Goyal
For the respondent	:	Mr. Sourav Sen Mr. T. Talukdar
CAV on	:	07.04.2021
Judgment on	:	04.06.2021

SHIVAKANT PRASAD, J.

This appeal is directed against the order dated 23.06.2011 passed by the learned Judge, 3rd Bench, City Civil Court at Calcutta in Miscellaneous Appeal No. 23 of 2010 affirming the judgment and order dated 11.03.2010 passed by the learned Judge, 5th Bench Presidency Small Causes Court, Calcutta in Miscellaneous Case No. 17 of 2008 under Order 21 Rule 97 of the Code of Civil Procedure in connection with Title Execution Case No. 256 of 2007 arising out of Ejectment Suit No. 468 of 2001 (original Ejectment Suit No. 452 of 1995 in the City Civil Court at Calcutta), *inter alia* on the grounds that the learned Trial Judge on the preliminary point of case should have sent it on remand under the provisions of Order 41 Rule 23 of the Code of Civil Procedure

instead of deciding the Appeal on merits at the Appellate stage for the first time.

Secondly, the learned Judge of the Court of Appeal below ought to have held that the suit was not maintainable in law and in fact because on the death of the original tenant Bhaskar Chandra Ghosh, all his sons and daughters who were residing with him at the time of his death became tenants-in-common and the notice of eviction should have been addressed to each of them.

Thirdly, the learned Judge of the Court of Appeal below misconceived the concept of implied surrender under Section 111(f) of the Transfer of Property Act in the facts of the case as there was never any express or implied surrender and the possession of the petitioners/appellants was in no other capacity than that of tenants and non-payment of rent even for a long period can never be a criterion for the doctrine implied surrender and if that could be the case then there was no necessity of bringing the suit against Ranjit Ghosh *inter alia*, on the ground of default alleging that he did not pay rent since the year Bhaskar Chandra Ghosh died in 1988.

Fourthly, that express or implied surrender or relinquishment can be done by the tenant to the landlord only and to no one else including to any co-tenant or tenant-in-common and the learned Judges of the Courts below have taken erroneous view in law in entertaining the Affidavit Exhibit A said to have been executed by the defendant of the

suit, which could not be accepted as piece of evidence for want of compliance of Order 19 Rule 1 of the Code of Civil Procedure.

The appellants filed Misc. Case under Order 21 Rule 101 read with Section 151 of C.P.C. against the plaintiff/decreed holder namely Jagannath Dey and the defendant namely Ranjit Ghosh and other O.P. Nos 3 to 8 contending that their father Bhaskar Chandra Ghosh was the original tenant in respect of the premises no. 3, Anath Babu Bazar Lane, Calcutta-6 who died on 30.01.88 leaving behind him, his wife, three sons and six daughters. The widow of said original tenant died on 15.6.2007, one son Lakshmi Narayan died on 28.12.07, and his daughter Rama Ghosh had died long ago. Admittedly, the appellants herein are the daughters of the original tenant in respect of the decretal premises to which they claim to have inherited the decretal premises on demise of their father.

According, to the appellants, the plaintiff/respondent namely, Jagannath Dey had filed Ejectment Suit against the only one of heirs of Bhaskar Chandra Ghosh namely, Ranjit Ghosh defendant/proforma respondent but the other heirs of the original tenant were not impleaded in the said ejectment suit. The said ejectment suit was contested by Ranjit Ghosh by filing written statement and the petition under Section 17(2) and 17(2A) (b) of the W.B.P.T. Act were also filed.

The appellant's contention is that since the death of their father, rent receipts were not issued in the name of all heirs of the original tenant and the said ejectment suit was disposed of as *ex parte* on

10.8.07 beyond the knowledge of the appellants in collusion with said Ranjit Ghosh. The ex-parte decree was put into execution by the decree holder/respondent herein in execution case no. 256/07 which according to the appellants is not binding on them as they were not parties to the said suit.

Accordingly, the appellants, prayed for declaration that they are bonafide tenants under the plaintiff/respondent herein in respect of the decretal premises by holding that the *ex parte* decree passed by the Fifth Judge, Presidency Small Causes Court at Calcutta in ejectment suit no. 468 of 2001 is not binding upon them and for an order of injunction restraining the plaintiff/respondent and his men, agent and associates from dispossessing the petitioners/appellants herein from the decretal premises without due process of law.

The plaintiff/respondent contested the Misc. Case contending *inter alia* that the case was barred by law of limitation and that since December, 1988 till the date of filing of their petition, the defendant of the suit did not pay any rent either to the plaintiff or by deposit in the Court, in compliance of order passed under Section 17(2) and 17(2A) (b) of the W.B.P.T. Act whereby the defendant was directed to deposit the arrear amount of Rs. 22,859/-. Further, the Misc. Case was filed in connivance with said defendant Ranjit Ghosh the judgment debtor to delay the execution proceeding. It is also submitted that the appellants had abandoned and surrendered their right of tenancy for more than 20

years in favour of the defendant/proforma respondent herein and did not come earlier to establish their right.

One of the appellants namely, Rita Ghosh deposed in the said Misc Case as P.W. 1 that she came to know from Lakshmi Narayan Ghosh, one of her brothers that an ex parte decree was passed in respect of the said tenancy but without furnishing any particulars as he was suffering from various ailments and ultimately died on 28.12.2007. It was after the demise of Smt. Tilakbala Ghosh widow of late Bhaskar Chandra Ghosh on 15.06.2007 that a dispute started regarding share of profit of the business of Bhaskar Chandra Ghosh and sons and that rent was being paid from the income of said business, admittedly carried on by the Ranjit Ghosh, the defendant/judgment debtor/proforma respondent herein on behalf of all his sisters and brothers.

Thus, it is evident that appellants had knowledge about the ex parte decree prior to the death of said Lakshmi Narayan. So, the learned Trial Court has rightly observed that the petitioners/appellants herein, in spite of knowing about the ex parte decree from one of the joint tenant i.e. Laskhmi Narayan, did not try to know the entire facts from Ranjit but filed information slip only in Court to file Misc. Case evincing their knowledge from the date of information to meet the period of limitation according to the provision of Article 123 of Limitation Act providing limitation period for thirty days in preferring a Misc. Case from the date of knowledge of the decree. The petitioners/appellants

knew about the *ex parte* decree after 15.06.2007 but prior to 28.12.2007, hence, the Misc. Case challenging the decree was not filed within thirty days from the date of the knowledge of the petitioners/appellants. That apart, documentary evidence being ration card and voter i.d. card were not accepted by the Trial Court on the score that the ration cards in the name of petitioners were issued in the year 1979 and the voter identity card in the name of Soma Ghosh was not issued showing the residential address at decretal premises. As such, those documents adduced by the petitioner in evidence to establish their residence at decretal premises was not substantiated. The witness has admitted in her cross-examination that Ranjit was still carrying on business on their behalf in the name and style Bhaskar Chandra Ghosh and Sons since the death of their father and has taken entire responsibility on him and admittedly she never took information from Ranjit for last 20 years since death of her father as to whether the rent was being paid to the landlord. Yet, she claims her tenancy right.

The said Misc case was dismissed by the Trial Court solely on the ground of limitation. So, the appellants preferred Miscellaneous Appeal No. 23 of 2010 in which although the Appeal Court was of the view that the Misc Case was not barred by limitation but relying upon the said document Exhibit A held that the co-tenancy of the appellants and others were surrendered and Ranjit was the only tenant who paid rent for long twenty years but was found to be a defaulter, he did not contest the suit which stood decreed *ex parte* on the ground of default and held

that all heirs of the original tenant lost their joint tenancy right for their implied surrender in favour of landlord through Ranjit Ghosh by attorning him as the sole tenant accepting him as direct tenant under the landlord and learned Appeal Court below has rightly accepted such contention, having regard to the conduct of all other heirs of the original tenant because said Ranjit Ghosh stood inducted as new tenant and the relationship of landlord and tenant was established for last twenty years prior to eviction suit.

Hence the learned lower Appellate Court was pleased to dismiss the Appeal giving rise to the instant Second Miscellaneous Appeal.

The instant appeal was heard for Admission under Order XLI Rule 11 CPC by the Hon'ble Division Bench and the following substantial questions-of-law were formulated:

- (i) *Whether default in payment of rent can be construed as surrender of tenancy when the person claiming tenancy is in possession, use and occupation of the tenanted premises, as one of the heirs of the original tenant (since deceased)?*
- (ii) *Whether an heir of a deceased tenant, residing with the tenant at the time of his death and claiming the right of tenancy, can be evicted without notice, on the ground of surrender, when such heir claiming tenancy is in possession, use and occupation of the concerned premises?*
- (iii) *Whether an affidavit affirmed by a tenant-in-common or a joint tenant, can be construed a evidence of surrender by another tenant-in-common and/or joint tenant and that too, when that tenant-in-common and/or joint tenant is still in occupation, use and possession of the tenanted premises?*

- (iv) *Whether the learned Appellate Court below erred in law in holding that the heirs of the deceased tenant residing with the deceased tenant at the time of his death, were joint tenants and not tenants-in-common?*

It is argued on behalf of the appellants that the said respondent/landlord brought a suit being ejectment Suit No. 468 of 2001 against only Ranjit Kumar Ghosh, one of the sons of Bhaskar Chandra without impleading other heirs of said Bhaskar Chandra including the appellants although they were residing with the said original tenant at the time of his death and without service of any legal notice of ejectment upon them and obtained the decree ex parte in the said suit in collusion with the defendant Ranjit Ghosh, one of the brothers of the appellants herein, hence, ex parte decree of eviction is not binding upon them inasmuch as after the demise of said Bhaskar Chandra, all his heirs had not consented for mutual agreement among themselves to issue rent receipt in the name of said Ranjit and urged that Trial Court is required to hold a detailed enquiry about the right, title and interest of the appellants as to their inheritance of tenancy and to ascertain their actual physical possession of the suit premises in view of mandatory provision under Order 21 Rule 101 CPC.

It is also submitted that in the said Misc. Case Smt. Rita Ghosh appellant no. 2 deposed on behalf of all the appellants including the appellant no. 1 being authorized by her, who deposed that both the appellants were all along residing at the suit premises along with their

father, the original tenant and continued to do so till date even after his death and they were never served with any legal notice of ejectment. It is pointed out that rent of the premises was all along being paid from the joint family business of the Bhaskar Chandra by the said Ranjit.

The landlord respondent deposed in the said suit and adduced a document Exhibit-A shown as an affidavit which has not been affirmed by the said Ranjit on 20.07.1988 before any Notary Public on a stamp paper purchased in the name of a separate person in which it was stated that the other heirs of Sri Bhaskar Chandra relinquished their rights in the said tenancy.

I do agree with the submission of learned Advocate for the appellants that an affidavit cannot be admitted in evidence without being notarized before a notary public or before the Magistrate or sworn before the Magistrate but on careful comparison of signatures of Ranjit Ghosh as appearing in his Vokalatnama, Written Statement and other petitions filed before the learned Courts below and the said document Exhibit-A, I find that the said defendant/proforma respondent herein had signed which are not in dispute. Therefore, the document Exhibit A written and signed by Ranjit Ghosh can very well be admitted in absence of any evidence to the contrary. The said document Exhibit A reflects in clear crystal term that the appellants and all other heirs of original tenant had surrendered/abandoned the tenancy in favour of the proforma respondent Ranjit Ghosh.

It is salutary to have the conception clear about the difference of the connotations namely, joint tenant and tenant in common which are frequently in use in respect of tenancy law. The prime consideration in respect of a joint tenancy is that a notice of eviction to one of the joint tenants can be construed as a notice to all the joint tenants and the concerned eviction will not fail in the absence of notice to each of the joint tenant which is a mandatory feature in respect of eviction of a tenant from suit premises but in case of a tenancy in common the position is that the statutory notice of eviction must be served upon each individual comprising the tenancy. In the absence of notice to anyone such tenant in common, the eviction suit is bound to fail.

In this regard there are conflicting decisions of the Hon'ble Apex Court as to whether in case of death of the original tenant, his heirs inherited the tenancy as joint tenant or tenancy in common. Learned counsel for the appellants referred to a decision in case of ***Textile Association (India) Bombay Unit Vs Balmohan Gopal Kurup*** reported in ***AIR 1990 SC 2053*** to submit that the heirs of the deceased original tenant take the tenancy as tenant in common with the result that service of statutory notice of eviction is a must to each individual comprising such tenancy and in the absence of it the eviction suit must fail.

Learned counsel for the appellants further refers to a decision of Division Bench of this Hon'ble Court in case of ***Amarnath Pramanik Vs. Sanjib Dasgupta & Ors.*** reported in ***2008 (3) CHN 962*** to the

observation made in paragraph 39 to fortify his stand that after the death of the original tenant, his heirs inherit the tenancy as tenant in common and in a suit for eviction, the landlord is legally obliged to implead all heirs as defendants. Observation is reproduced for better appreciation of the facts of the instant case thus:

“39. As the Supreme Court in the case of Textile Association (supra), after considering the earlier decisions of the Supreme Court of India in the case of Kanji Manji (supra) and H.C. Pandey (supra) specifically came to the conclusion that the principle laid down in those cases relating to service of notice cannot have any application when the question of making of all the tenants as parties in a suit for eviction arises for consideration, we are bound by the said decision as the said decision has not been upset by any subsequent decision of a larger Bench. We have earlier pointed out that in the case of H.C. Pandey (supra), the earlier two decisions of the Apex Court were not taken note of.”

This Court is of the view that the discussion appearing in paragraph 39 is not according to the decision in case of Textile Association. In Textile Association (India) Bombay unit case, the suit was filed after the death of the main tenant against family members of the deceased without impleading one of his sons viz. Respondent no. 1. The suit thereafter filed by the respondent claiming that he being also a tenant decree was not binding on him. It was held that decree for eviction obtained against the other family members without impleading the respondent has to be set aside. But the observation made in the paragraph 4 of the decision is required to be taken note of which reads thus:

“4. Mr. Lalit, counsel for the appellants argued that the ex parte decree obtained against the joint tenants was equally binding on the respondent. Reference was made in this context to the decisions of this Court in [Kanji Manji v. The Trustees of the port of Bombay](#) (1962) 3 Supp. SCR 461 and [H. C. Pandey v. G. C. Paul](#) . Both the cases relate to the validity of the notice issued to one of the joint tenants. It was held that the notice issued to one of them would be valid. We do not think that the principle stated in those cases on the facts obtained are relevant to the present case. There is a finding in this case that the respondent was as much a tenant as the mother and the other brother. That being the position the ex parte decree for eviction obtained against his mother and brother without impleading him in that suit has to be set aside. It is not sufficient as the Courts below have said that the decree was not binding upon the respondent. That decree cannot be kept alive against two other tenants and possession of the premises could be exclusively given to the respondent. The respondent cannot be put into exclusive possession of the premises since his mother and brother are also equally entitled to. It seems to us, therefore, the ex parte decree for eviction should be set aside and the petitioner should be impleaded as a party to that suit and it should proceed on merits.”

It would appear that the reference in respect of the decision of the Hon’ble Supreme Court in ***Kanji Manji Vs The Trustees of the Port of Bombay*** and H.C Pandey Vs G.C. Paul was in respect of validity of a notice issued to one of the joint tenants wherein it was held that the notice issued to one of them would be valid. The Hon’ble Supreme Court in the cited case was of the view that the principles stated in those cases of the facts obtained was not relevant to the case and decision rendered in H.C Pandey (supra) was distinguished without discarding the finding relating to heirs of the deceased tenant taking tenancy as joint tenant

and about validity of notice to quit to one of such tenants resulting in maintainability of the suit for eviction.

In paragraph 38 in case of Amarnath Pramanik (supra), the decision in Sumilata Bhattacharya was taken note of, which case was decided prior in point of time when the Supreme Court has not decided the case of Textile Association (supra). Therefore, it cannot be said that the Division Bench could take notice of decision in Textile association (supra) to hold that the decision in Sumilata is contrary to the view taken in Textile Association.

Learned Advocate for the respondent has contended that the appellants and other heirs of original tenant had surrendered their tenancy and have no right to seek declaration of tenancy in their favour and relied on the decision in case of **Sumilata Bhattacharjee and Anr. Vs Smt. Nila Chatterjee** reported in **1989 Volume II CLJ** Page 351 to contend that the tenancy right may be surrendered either expressly or by conduct of the parties. In the cited case the plaintiff had filed suit for ejectment of defendants the son and the daughter of late Ashwini Kumar Ghosh who was original tenant on the ground of reasonable requirement having no reasonable, suitable accommodation elsewhere. One of the defence taken on behalf of the defendant/appellant was that the suit was not tenable because of all the heirs of late Ashwini Kumar Ghosh had not been impleaded in the suit. It so happened that late Ashwini had one predeceased daughter. The defendant claimed the children of that predeceased daughter too inherited the tenancy and

non joinder of the children of the predeceased daughter of late Ashwini would entail dismissal of the suit.

In the given case it was held by the Division Bench of this Hon'ble Court that the factum of children of predeceased daughter living with their grandfather when he was alive does not *ipso facto* established that the other heirs had ever exercised their right of tenancy when such rights devolve on them after the death of the original contractual tenant. The heritable tenancy right may be accepted or abandoned or relinquished by the heirs of the original tenant. Such tenancy right may be surrendered either expressly or by conduct of the parties. In the cited case, the heirs of the predeceased daughter and the other married daughter of the original tenant had never exercised any right of joint tenancy in the disputed premises after the death of Ashwini Kumar Ghosh. On the contrary only the defendants asserted such right and claimed to be the tenants by way of inheritance of tenancy right who requested the plaintiff/landlady to issue rent receipts in their names and rent was also paid by them. The fact that the children of predeceased daughter of Ashwini never for a moment exercised the right of tenancy and their maternal uncle and aunt came to be recognized without any objection from them go a long way to show that the tenancy right of children of predeceased daughter was surrendered.

It was further held that at any rate on death of the original contractual tenant, his heirs began to hold the tenancy as joint tenants. A suit in respect of joint tenancy by issuing notice determining the

tenancy to only one of the heirs of original tenant and impleading only one of the tenant and living aside the other heirs is maintainable because the joint tenancy of the heirs of a deceased tenant is represented by one of the heirs who is also one of the joint tenants by taking notice of the Hon'ble Supreme Court's decision in **H.C. Pandey Vs. G.C. Paul** reported in **1989 AIR 1470**.

It would be apt to notice the observation in paragraph 33 of the judgment in Amarnath Pramanik, the Hon'ble Division Bench observed thus:

"33. However, in the recent decision of a three-Judges Bench of the Supreme Court viz. Shakuntala Vasant Pahadi & Ors. V. Purushottam Vasant Pethe & Ors., reported in 2007 (3) SCC 123, the decision of Surayya Begum (supra), has been approved. In the said decision, there is, however, no detailed discussion of the principles adopted in the case of Surayya Begum (supra), and at the same time, the Bench did not take note of the decision of earlier three-Judges Bench in the case of Textile Association (supra), taking a contrary view. The Bench also did not take note of the decision of a Bench of equal strength in the case of Boddu Venkatakrishna Rao (supra), where the Supreme Court took the view that in case of death of a tenant, his estate devolves upon his heirs as tenants in common and not as joint tenants. In the case of Shakuntala Vasant Pahadi (supra), the Court simply referred to Surayya Begum (supra), and followed it and even the effect of a notice to quit not addressed to all the tenants in common was not considered."

Now, it is pertinent to take notice of the facts situation of the case of **Boddu Venkatakrishna Rao & Ors. Vs. Boddu Satyabathi & Ors.** reported in **AIR 1968 SC 751** which case was with regard to answering

a question in the appeal as to whether under the terms of the Will of one of Boddu Adilaxmi, defendant nos. 4 and 5 took her properties as joint tenant and tenant in common. In the decision it was observed in paragraph 5 that the principle of joint tenancy appears to be unknown to Hindu law except in the case of coparcenary between the members of an undivided family and that it was not right to import into the construction of a Hindu Will and extremely technical rule of English conveyancing. Thus, it would appear that the decision cited above is not well nigh within the facts and circumstances of the instant case.

It has been observed in the cited judgment that the clause in the Will does not spell out a joint tenancy which is unknown to Hindu law and the testatrix did not expressly mentioned that on the death of one, all the properties would pass to the other by right of survivorship. Accordingly, on the construction of the Will, the Hon'ble Apex Court held that the testatrix never intended the foster children to take the property as joint tenants. The foster children who became tenants in common in partition of the property in exercise of their right. Therefore, the decision is quite distinguishable from the facts and circumstances of the case before this Court. I am not amenable to accept the view with due respect that on the death of tenant his estate devolves upon the heirs as tenants in common and not as joint tenants.

Therefore, it would appear from the discussion in the cited case in *Textile Association* (supra) that the principle as laid down in case of *Kanji Manji* and *H. C. Pandey* were not disturbed rather on the facts

situation of the finding in the case that the respondent was also one of the tenant as the mother and other brothers were, the decree was set aside further in view of the fact that decree cannot be executed as against to judgment debtors and the respondent could not be given exclusive possession in the suit premises. Therefore, opportunity was given for impleading the respondent as a party in the suit and direction accordingly must have been for decision on merit.

The learned Advocate for the respondent has relied on decision in case of H.C. Pandey and Sumilita Bhattacharya (supra) to contend that in the given facts of the case, the heirs of the deceased original tenant takes the tenancy as joint tenants and in view of settled principle of law the suit for eviction is maintainable upon the service of notice of eviction to one of the joint tenants and there is no necessity for such notice of eviction to all heirs of the original tenant.

In H.C. Pandey case, it has been clearly held that notice under Section 106 of the Transfer of Property Act served by the appellant on the respondent was a valid notice. 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 incidences of the tenancy are the same as enjoyed by the original tenant. It is single tenancy which devolves on the heirs. There is no division of the premises or of the rent payable therefor. The heirs thus succeed to the tenancy as joint tenants. In the cited case the respondent acted on behalf of the tenants, he paid rent on behalf of all

and accepted notice also on behalf of all. In the circumstances, it was held that the notice served on the respondent was sufficient and therefore, the suit must succeed.

Reliance is also placed on a Single Bench decision of this Hon'ble Court in case of **Md. Kamruddin Vs. Khurshida Bibi** reported in **2012 Volume 5 CHN 247** wherein notice of decision in Textile Association and Sakuntala Basant Pahadi (supra) has been taken wherein it has been observed that if two contrary judgments of equal strength are operating the field, the Court may rely upon the judgment which is more apt in the facts and circumstances of the case. The Single Bench also noticed a Larger Bench decision constituting five Judges of the Hon'ble Supreme Court in case of **N.K. Mohammad Sulaiman vs N. C. Mohammad Ismail** reported in **AIR 1966 SC 792** to conclude that the decree passed against the persons impleaded as heirs binds the estate, even though other persons interested in the estate are not brought on the record and the observation made in the said cited decision has been reproduced as under while dealing the case in paragraph 16 of the decision thus:

“Ordinarily the Court does not regard a decree binding upon a person who was not impleaded eo nomine in the action. But to that rule there are certain recognised exceptions. Where by the personal law governing the absent heir the heir impleaded represents his interest in the estate of the deceased. There is yet another exception which is evolved in the larger interest of administration of justice. If there be a debt justly due and no prejudice is shown to the absent heir, the decree in an action

where the plaintiff has after bona fide enquiry impleaded all the heirs known to him will ordinarily be held binding upon all persons interested in the estate. The Court will undoubtedly investigate, if invited, whether the decree was obtained by fraud, collusion or other means intended to overreach the Court. The Court will also enquire whether there was a real contest in the suit, and may for that purpose ascertain whether there was any special defence which the absent defendant could put forward, but which was not put forward. Where however on account of a bona fide error, the plaintiff seeking relief institutes his suit against a person who is not representing the estate of a deceased person against whom the plaintiff has a claim either at all or even partially, in the absence of fraud or collusion or other ground which taint the decree, a decree passed against the persons impleaded as heirs binds the estate, even though other persons interested in the estate are not brought on the record. This principle applies to all parties irrespective of their religious persuasion.”

In a recent decision in case of **Suresh Kumar Kohli vs. Rakesh Jain** reported in **(2018) 6 SCC 708** relying upon in decision in **H.C. Pandey Vs. G.C. Paul** reported in **1989 3 SCC 77**, **Mohd. Usman Vs. (Mst.) Surayya Begum** reported in **1990 2 RCR (Rent) 408**, **Mst. Surayya Begum Vs. Modh. Usman and Others** reported in **1991 3 SCC 114** and **Harish Tandon Vs. Addl. District Magistrate, U.P. and Others** reported in **1995 1 SCC 537**, it has been held that an eviction petition against one of the joint tenant is sufficient against all joint tenants and all joint tenants are bound by the order of eviction as the joint tenancy is one tenancy and is not a tenancy split into different legal heirs.

As regards implied surrender of the joint tenancy by the appellants, learned counsel for the appellants pointed out that the affidavit Exhibit A adduced in evidence in Miscellaneous Case on behalf of the landlord/respondent cannot be viewed in law as the document of implied surrender. Although, the executing Court held that the said affidavit was not tenable in law as not notarized, but Lower Appellate Court relied on Exhibit A in holding that the appellants and the other heirs of said Bhaskar Chandra Ghosh had surrendered their tenancy to Ranjit Ghosh according to said Exhibit A and as such they were not entitled to any notice because of such surrender. It is further pointed out that the Exhibit A not being affirmed before notary public is not admissible in evidence and it was also not exhibited on formal proof being dispensed with. As such the affidavit as contemplated under Order 19 Rule 1 of C.P.C is not an evidence and placed reliance on a decision in case of Smt. Sudha Devi Vs M.P. Narayanan & Ors. reported in (1988) 3 SCC 366 which reads as under—

"4. The fact that the plaintiff obtained an ex-parte decree in the earlier suit against the defendant No. 1 and 2 is established by the copy of the decree exhibited in the case. The allegation in the plaint so far as the third defendant is concerned, is in paragraph 7 in the following words:

"7. Subsequent to the said Decree on a date or dates which the plaintiff is unable to specify until after disclosure by the defendants, the first and/or second defendants wrongfully permitted and allowed the third defendant to occupy the said demised flat. The first and/or second defendants by themselves and/or by the third defendant are still in wrongful possession of the said demised flat."

The only evidence relevant to this part of the case is to be found in the oral evidence of the plaintiff's sole witness Nand Kumar Tibrewal. The High Court (in appeal) has declined to rely on his evidence mainly on the ground that the witness has not disclosed his concern with the suit property or his relationship with the plaintiff. He has been rejected as incompetent. The learned Counsel for the appellant contended that the witness (now deceased) was the husband of the plaintiff-appellant and thus he was fully conversant with the relevant facts. The criticism by the High Court that the witness did not state anything in his evidence which could connect him with the plaintiff or the property and thus make him competent was attempted to be met before us by relying on an affidavit filed in this Court. We are afraid, the plaintiff cannot be allowed to fill up the lacuna in the evidence belatedly at the Supreme Court stage. Besides, affidavits are not included in the definition of 'evidence' in [s. 3](#) of the Evidence Act and can be used as evidence only if for sufficient reason court passes an order under Order XIX, Rules 1 or 2 of the Code of Civil Procedure. This part of the argument of Mr. Tapas Ray must, therefore, be rejected."

Further with regard to surrender or relinquishment of tenancy allegedly made has to be to the landlord and to support such contention learned Counsel for the appellants referred to cases reported in AIR 1952 SC 156 (para 9); AIR 1976 SC1565 (para 19); AIR 1994 P&H 60 (DB para 8) to contend that even in case of any implied surrender, the relinquishment of the possession is a must which is absolutely lacking in the instant case.

Reliance is also placed in case of ***Martin Harris (p) Ltd. Vs. E. Properties*** reported in **1986 CWN 588** wherein it has been held that implied surrender or surrender by operation of law occurs (1) by the

creation of new relationship or (2) by relinquishment of possession. Relinquishment of possession operates as an implied surrender, but it is not necessarily a physical taking but something amounting to a virtual taking possession and further held that there is no legal impediment in the way of the tenant himself voluntarily and lawfully surrendering his tenancy and amicably yielding up possession of the entire premises excepting the two rooms and the acceptance the same by the plaintiff resulted in the termination of the tenancy at the instance of the tenant.

Yet, reference to a decision in ***Kandan Mandi @ Santal And Ors. Vs. Santi Prosad Chatterjee And Ors.*** reported in **88 CWN 789** is made to contend that non payment of rent may be one of the factors to prove the case of surrender but by itself, non payment of rent does not establish extinguishment of a tenancy as a matter of course and that a procedure of surrender of tenancy as prescribed in Section 19 (2) of the West Bengal Premises Tenancy Act, 1956 has also not been followed and non payment of rent can also not be construed as abandonment or surrender though, non payment of rent may be a factor but it cannot be the soul ground for the eviction. Therefore, in absence of physical handing over of the possession to the landlord the concept of abandonment or relinquishment or so to say surrender cannot be construed.

The decision in Kandan Mandi (supra) equally supports the case of the landlord/respondent that the appellants including other heirs of the original tenant never ventured to take steps even for deposit of

admitted rent as judged by the Trial Court. Indisputably, the evidence of P.W. 1, one of the appellants, in unequivocal term reflects no payment of rent by them after demise of the original tenant and the defendant /proforma respondent continued to pay rent to the landlord treating himself as the sole tenant in respect of the suit premises.

The given facts and circumstances of the case as discussed above and bearing in mind the evidence of P.W. 1 deposed before the Trial Court, this Court finds that one of the appellants while deposing as P.W. 1 stated on oath in unequivocal term that the proforma respondent/defendant of the suit was given all responsibility to look after the tenancy and the document Exhibit-A, as I have discussed above, spells out the real fact of implied surrender by all other heirs of the original tenant in favour of the defendant/proforma respondent, although the surrender express in writing as per the provision of Section 19(2) of W.B.P.T. Act, 1956, is required to be made before the landlord, but at the same time, this fact cannot be lost sight of that the defendant/proforma respondent being one of the heirs and son of the original tenant continued to pay rent for more than twenty years exercising his right of exclusive tenancy in respect of the suit premises and the landlord/respondent accepted him as the sole tenant but the defendant/proforma respondent failed and neglected to comply with the order of the Trial Court passed under Section 17(2) of W.B.P.T. Act, 1956 and he was held defaulter, which is a ground for eviction. It clearly reveals that the appellants had filed miscellaneous case to forestall

execution of the eviction decree without caring for their responsibilities as if they behave like the owner of the suit premises.

Thus, it is conclusively proved that it is the defendant/respondent, who alone paid rent for more than twenty years since the demise of his father as the sole tenant as the appellants including other heirs of the original tenant had relinquished their right of tenancy by their conduct.

In my view, even considering that the appellants including other heirs have not surrendered or relinquished their tenancy to the landlord/respondent but on the basis of the evidence, it can be conclusively held that the defendant/proforma respondent alone had represented the tenancy being the joint tenants. So, the notice of eviction served on the defendant/respondent is valid, sufficient and legal as in joint tenancy notice to one, joint tenant is enough to maintain a suit for eviction against other heirs of original tenants and the decree of eviction against the defendant/proforma respondent herein would bind the appellants including other heirs of the original tenant.

This Court, having regard to the catena of decisions in H.C. Pandey, Harish Tandon, Gyan Devi Anand, Md. Kamruddin, Sureh Kumar Kohli (supra) discussed above and also bearing in mind the decision in case of Sakuntala (supra), is of the conclusive view and hold accordingly, that now it is well settled that after the death of original tenant, subject to any provision to the contrary either negating or limiting the succession, the tenancy right devolve on the heirs of the

deceased as joint tenants, as the incidence of the tenancy is the same as enjoyed by the original tenant. It is a single tenancy which devolves on the heirs. There is no division of the premises or of the rent payable therefor. 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.

On behalf of the respondent, reference to a decision of the Hon'ble Supreme Court in ***Dayawati And Another (SMT) Vs. Inderjit And Others*** reported in ***AIR 1966 SC 1423*** is made to contend that right of tenancy is extinguished in view of the W.B.P.T Act, 1997 and the Court can take notice of change in law and relied on the observation thus:

"9.Now as a general proposition, it may be admitted that ordinarily a court of appeal cannot take into account a new law, brought into existence after the judgment appealed from has been tendered, because the rights of the litigants in an appeal are determined under the law in force at the date of the suit. Even before the days of Coke, whose maxim-a new law ought to be prospective, not retrospective in its operation-is oft-quoted, courts have looked with disfavour upon laws which take away vested Tights or affect pending cases. Matters of procedure are, however, different and the law affecting procedure is always retrospective'. But it does not mean that there is an absolute rule of inviolability of substantive rights. If the new law speaks in language, which, expressly or by clear intendment, takes in even pending matters, the court of trial as well as the court of appeal must have regard to an intention so expressed, and the court of appeal may give effect to such a law even after the judgment of the, court of first instance. The distinction between laws affecting procedure and those affecting vested rights does not matter when

the, court is invited by law to take away from a successful plaintiff, what he has obtained under judgment. See Quilter v. Mapleson⁽¹⁾ and Stovin v. Fairbrass,⁽²⁾ which are instances of new laws being applied. In the former the vested rights of the landlord (1) (1892) 9 Q.B.D. 672. (2) [1919] 88 L.J. K.B. 1004. to recover possession and in the latter the vested right of the statutory tenant to remain in possession were taken away after judgment. See also Maxwell's Interpretation of Statutes (11th pp. 211 and 213, and Mukerjee (K. C.) v. Mst. Ramaraton,⁽¹⁾ where no saving in respect of pending suits was implied when s. 26(N) and (O) of the Bihar Tenancy Act (as amended by Bihar Tenancy Amendment Act, 1934) were clearly applicable' to all cases without exception."

True, but I am of the view that the Misc. Case under Order 21 Rule 97 CPC was filed with an object to challenge the decree ex parte passed against the appellants and ex parte decree was rendered in a suit for eviction brought under the old provision of W.B.P.T Act, 1956 as such I do not want to unnecessarily dilate the issue.

In the result, I do not find any substantial grounds for appeal. Ergo, the decree and the order impugned passed by the learned Courts below cannot be interfered with and are hereby affirmed.

Accordingly, the Appeal being SMA No. 34 of 2013 is dismissed.

Department to send the LCR to the learned Court below forthwith.

Certified website copies of the judgment, if applied for, be urgently made available to the parties, subject to compliance with all requisite formalities.

(SHIVAKANT PRASAD, J.)