

CASE NO.:
Appeal (civil) 336 of 2004

PETITIONER:
Pramod Kumar Jaiswal and Others

RESPONDENT:
Bibi Husn Bano and Others

DATE OF JUDGMENT: 03/05/2005

BENCH:
CJI R.C. Lahoti

JUDGMENT:
J U D G M E N T

R.C. Lahoti, CJI.

I have gone through the judgment proposed by brother P.K. Balasubramanyan, J. I find myself in agreement with the conclusion arrived at by him and also with the reasonings assigned by him excepting for his opinion formed on the case of Nalakath Sainuddin v. Koorikadan Sulaiman (2002) 6 SCC 1, with which opinion I have not been able to persuade myself to agree and in that regard I am constrained to record my separate opinion.

The decision of two-Judges Bench of this Court in Indra Perfumery v. Moti Lal & Ors. (1969) 2 SCWR 967 was not brought to the notice of the two-Judges Bench deciding Nalakath Sainuddin's case (supra); else the former decision would have certainly received consideration of the Court in the latter case. I propose to deal with these two cases.

With respect to the learned Judges who decided Indra Perfumery's case (supra), I have certain comments to offer on the case. It is a brief judgment which does not deal with the law in-depth. The impact of Section 109 of the Transfer of Property Act has not been considered. The doctrine of merger, well-accepted and well-established, has also not received the consideration of the Court in its expanse and then applied to the facts of the case. A very brief statement of law is to be found contained in para 4 thereof and therein the Court has said that Section 111(d) of the Transfer of Property Act has no application, unless the interest of the lessor and the lessee in the whole of the property is vested in the same person. The Court has gone on to observe that the appellant is the 'owner' of the house and is also a 'tenant' of a part of the house of which the respondents were tenants from Mohd. Shafi.

If one were to agree with the principle so propounded, certain anomalous consequences will follow, as can be demonstrated. The facts of Indra Perfumery's case show that M was the owner of the house which was let out in its entirety to T. T sub-let a part of the house to IP, the sub-tenant. IP purchased the interest of M, the owner, in the whole of the property and, therefore, IP stepped into the shoes of M. If M would have filed a suit for recovery of possession against T on determination of the latter's lease, then, in that suit T would have been impleaded as a defendant and IP could also have been joined as additional defendant being a sub-tenant in

possession of a part of the tenanted premises. Whether IP was joined as a party to the suit or not, the estate vesting in IP being subordinate to the estate of T, in the execution of decree of eviction passed against T, M would have been entitled to evict T and IP both. Ever since the date of purchase by IP, M can neither determine the tenancy of T nor file a suit for eviction against him as he has lost the title in the property which title has come to vest in IP. The only person who can determine the tenancy and claim recovery of possession is IP inasmuch as the whole of the interest in whole of the property has come to vest in IP by purchase. Now, if IP were to file a suit for eviction against T, would IP, the plaintiff also join IP itself as an additional defendant? Or, would it be the requirement of law that IP, in its capacity as sub-tenant, must first deliver possession to T, the tenant and then, the tenant must deliver possession to IP itself in its capacity as owner? This is what will follow if we were to agree with the observation made by the learned Judges in Indra Perfumery case (supra) that, "the appellant is the owner of the house, it is also a tenant of a part of the house of which the respondent are tenants from Mohd. Shafi".

The conclusion drawn in Indra Perfumery's case (supra) would have been different if only the attention of the learned Judges would have been invited to Section 109 of the Transfer of Property Act and the doctrines of 'statutory attornment' and of 'merger' with all the ramifications. This was done in Nalakath Sainuddin's case. It has been clearly held on a detailed examination of all the relevant statutory provisions and the doctrine of merger : -

(i) that merger is founded on the principle that two estates \026 one larger and one smaller cannot \026 and need not \026 coexist, if the smaller estate can in equity, and must in law, sink or merge into the larger estate. One cannot be an owner and sub-lessee both at the same time. The smaller estate of sub-tenancy shall sink or drown into the larger estate of ownership as the two cannot co-exist;

(ii) that Section 109 of the TP Act does away with the need for consensual attornment. The attornment is brought about by operation of law. The limitation on the right of the landlord against splitting up of the integrity of the tenancy, inhering in the inhibitions of his own contract, does not visit the assignee of the part of the reversion. The severance of the reversion and the assignment of the part so severed do not need the consent of the tenant. [See \026 Mohar Singh (dead) by LRs v. Devi Charan & Ors., (1988) 3 SCC 63]

Ownership of the property which is the subject matter of tenancy is certainly a larger estate than the tenancy itself and naturally larger than the sub-tenancy. If the sub-tenant acquires the entire interest of the owner in the whole of the estate forming the subject matter of sub-tenancy, the sub-tenancy merges into ownership and the estate of sub-tenant stands enlarged into that of a full owner. The sub-tenant cannot be the owner and the sub-tenant both at the same time. Of course, the situation would have been different if the sub-tenant would not have acquired the entire estate of the owner or the ownership interest in the entire estate forming subject matter of sub-lease, as was the case in Badri Narain Jha & Ors. v. Rameshwar Dayal Singh & Ors. AIR 1951 SC 186 or in Shaikh Faqir Bakhsh v. Murli Dhar & Ors. AIR 1931 PC 63.

In the case of Nalakath Sainuddin the sub-tenant had acquired not a share only of the landlord-owner's estate nor an ownership in only a part confined to sub-tenancy premises; what he had acquired under the deed dated 12-9-1988 was the full ownership in the entire premises. The right of reversion, vesting in the erstwhile owners, had come to vest fully and entirely in the sub-tenant.

In my humble opinion Indra Perfumery case (supra) was not correctly decided and does not lay down the correct law. Subject to this much opinion only, which I am placing on record as my view and which is in divergence with the view expressed by my learned brother P.K. Balasubramanyan, J., I am in agreement that the appeal has no merit and deserves to be dismissed confirming the order of the High Court.