CIVIL WRIT

Before Bishan Narain, J.

SYED MUBARAK HUSSAIN,—*Petitioner*

versus

THE CUSTODIAN-GENERAL OF EVACUEE PROPERTY, NEW DELHI,—*Respondent*

Civil Writ No. 31-D of 1956.

1957

Jan., 28th

Surrender—Joint Tenancy—Surrender by a co-tenant of his rights in the joint tenancy—Surrender accepted by the landlord—Such co-tenant if has any interest left in the tenancy rights—Surrender —Whether amounts to transfer—Administration of Evacuee Property Act (XXXI of 1950) Section 40.

Held, that one or more co-tenants are at liberty to surrender to the landlord their rights which they hold in the land against their landlord and that no one but the parties to the transaction has any interest in the matter and there is no reason why one should not surrender his rights to the other.

Held further, that "Surrender of the demised Estate" means yielding up of the estate to the landlord, so that the leasehold interest becomes extinct by mutual agreement between the parties or by operation of law. It does not involve alienation of an estate. Under a surrender the landlord resumes possession of the property without opposition from the tenant. The legislature in section 40 of the Evacuee Act has used the word "transfer" and not surrender or abandonment, nor is the term "transfer" defined in the Act. It must, therefore be assumed that the legislature knowing the meaning attached to the word "surrender" in Courts of law did not intend to bring it within the operation of section 40 of the Act.

Petition under Articles 226 and 227 of the Constitution of India praying that (a) writ of certiorari and/or any other suitable order or direction be issued quashing the said order of the Custodian-General and (b) a writ of mandamus prohibiting the Custodian-General from interfering with the possession of the Petitioner over the lan

in dispute (c) any other suitable writ and/or order or direction which this Hon'ble Court deems fit may be passed.

ORDER.

BISHAN NARAIN, J.—Mubarak Hussain of village Ratheri in the District of Muzaffarnagar, U.P., has filed this petition under Article 226 of the Constitution for the issue of a writ of *certiorari* or any other writ quashing the order of the Custodian-General, dated the 12th May, 1952, and for issue of a writ of mandamus prohibiting the Custodian Department from interfering with the possession of the petitioner over the land in dispute. This petition arises in these circumstances: Bishan Narain, J.

On the 26th July, 1944, the petitioner created a permanent lease jointly in favour of his two sons Mohammad Naseem and Mohammad Waseem, who were at that time studying in the Muslim University at Aligarh. The possession in fact remained with the father. On the 27th of July, 1949, Mohammad Naseem executed a deed of surrender whereby he surrendered his rights in the permanent lease created in 1944, in favour of his father and in accordance with this surrender entries were made in the revenue records and the father was shown as the owner of the property. A few months later, i.e., on the 10th of January, 1950, Mohammad Waseem also surrendered his rights to his father and this surrender was also recorded in the revenue records. Mohammad Naseem migrated to Pakistan and soon after, the Assistant Custodian, Muzaffarnagar, started proceedings under section 7(1) of the Administration of Evacuee Property Act, Act XXXI of 1950, by affixing a notice on the last known place of residence of Mohammad Naseem and on the 12th of November, 1950, he passed an ex-parte order declaring the rights of Mohammad

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Naseem in the land in dispute to be evacuee property. In this order it is held that the relinquishment deed by the evacuee at the time of his departure to Pakistan in favour of his father is not *bona fide* and genuine and, therefore, it confers no rights on his father. On the 16th of November, 1950, the Custodian demanded surrender of possession of the share of Mohammad Naseem from his father Mubarak Hussain under section 8(4) of the Act. Mubarak Hussain filed objections on various grounds. He urged that he being an interested party should have been served in the proceedings under section 7 of the Evacuee Act. He further urged that after Mohammad Naseem had relinquished his rights in favour of the objector no rights were left in him and, therefore, the property in dispute could not be considered to be evacuee property nor could the Custodian Department demand possession of it. The Assistant Custodian held that the surrender amounted to transfer within the Evacuee Act and as it had not been confirmed under section 40 of the Act the surrender was not effective. The Assistant Custodian further held that the order under section 7 cannot be reviewed and if Mubarak Hussain has any grievance against that order then he should file an appeal as provided under the Act. Mubarak Hussain being dissatisfied with that order filed a revision before the Custodian who dismissed the revision petition affirming the finding of the Assistant Custodian to the effect that the surrender amounted to transfer and required confirmation. He, however, held that the Custodian could not demand actual possession of the share of Mohammad Naseem unless and until the property of Mohammad Naseem was separated. Mubarak Hussain then filed a revision petition before the Custodian-General. The Custodian-General came to the conclusion that this surrender did not amount to transfer. He, however, held that the surrender by

a co-tenant having joint interest with another tenant is not valid. The operative portion of his judgment reads—

> "Where several persons have a joint interest in a certain property and one of them decides to release his interest in that property his act, unless consented to by the others, cannot be binding upon them and the law does not recognise the individual surrender by various tenants. The learned counsel for the petitioner urges that in this case it should be held that when Mohammad Naseem made the surrender, he had the consent or acquiescence of his brother Mohammad Waseem as he also surrendered his rights six months after. To me it appears to be a case of two individual surrenders on two different occasions and there is nothing whatsoever in the act of either of them to show that the other had consented or acquiesced in it. In the circumstances, there is no escape from the conclusion that the surrender by Mohammad Naseem in favour of his father, the petitioner, was inoperative in law."

On this finding the revision petition was dismissed and it is this order that is being challenged by this writ petition.

As this petition was filed in this Court on the 16th of January, 1956, it is necessary to give a few facts, which the petitioner has alleged, to explain the delay. The Custodian-General's order was passed on the 12th of May, 1952, and the petitioner on the 14th July, 1952, applied under Article 226 of the Constitution to the High Court at Allahabad. This application was rejected by that High Court on or

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about the 23rd of March, 1955, on the ground that that Court had no jurisdiction to set aside an order passed by the Custodian-General of India. The petitioner then filed an application for special leave to appeal under Article 136 of the Constitution after the expiry of three months, the Supreme Court dismissed this as barred by time. On the 6th April, 1955, the petitioner also filed a writ petition under Article 32 in the Supreme Court and this was dismissed on the 16th of December, 1955. Within a month of the dismissal by the Supreme Court the present writ petition was filed in this Court. In these circumstances, I have no hesitation in holding that the petitioner has explained the delay in filing the petition in this Court satisfactorily and indeed the learned counsel for the respondent has not argued that the petition is too stale to be entertained now.

It has been argued by the learned counsel for the petitioner that the property now in dispute was not an evacuee property and that the order that was passed by the Assistant Custodian on the 12th of November, 1950, was not a valid order. The petitioner has alleged in the present petition that he was not served with a notice although the Assistant Custodian was aware that he was a person interested. It appears to me, however, that this order under section 7 can be set aside only if Mubarak Hussain can satisfactorily show that he was the owner of the property in dispute and that his son Mohammad Naseem had no interest therein. This is the very same objection which had been raised under section 8(4) of the Act. I pointed out in the course of arguments that when the petitioner's application for setting aside the order under section 7 of the Act was dismissed, he had a right to file an appeal under section 24 of the Act, and when he had not availed of this opportunity he had no right to agitate this matter in

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these proceedings. The learned counsel for the petitioner, however, urged that in fact an appeal was filed but in view of the fact that the same question was involved in those objections as well as in the objections to the order of the Assistant Custodian under section 8(4) of the Act, it was of no consequence whether this matter was decided in the order under section 8(4) or in the application for review of the order under section 7. I am also of the opinion that this is a matter of form only because the substance of the dispute was before the Custodian Department in all these proceedings. The learned counsel for the respondent Shri Porus Mehta conceded before me that in the proceedings under section 8(4) of the Act the validity of the order under section 7 could be gone into. I. therefore, proceed to decide this matter on the merits.

The facts as far as they are relevant for the purpose of this application are not in dispute. Mubarak Hussain executed a permanent lease of 91 *bighas*, 5 *biswas* out of his land in his village in favour of his two sons Mohammad Naseem and Mohammad Waseem by the same document. It is agreed that by this document the two sons became joint tenants. It is well settled that joint tenants are not only tenants in respect of their shares but they are tenants of the entire area and that in cases of joint tenancy each tenant has a right to occupy the entire leased property. Admittedly, Mohammad Naseem surrendered his rights in the lease to his father. The surrender was accepted by the father and entries were made in the revenue records in accordance with the surrender. The other son Mohammad Waseem is not objecting to this surrender. In fact he himself surrended his rights in the lease a few months later. Undoubtedly, as held by the Custodian-General, one co-tenant cannot surrender the lease rights so as to bind the other

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co-tenants. But the question arises whether a co-tenant who surrenders his rights in the joint tenancy has any interest left in the tenancy rights after the surrender which has been accepted by the landlord. The legal position has been described in Volume 51, of Corpus Juris Secundum, section 127 in these words—

> "Ordinarily one of several co-lessees cannot surrender the premises without the consent of the other lessees so as to affect them, although it has been held that where lessees stipulated to surrender the lease on the happening of a certain contingency, each lessee is the agent of the other to make the surrender when the contingency happens. It has also been held that if one co-tenant enters into an agreement with the landlord at variance with the lease, the other co-tenant may treat the original lease as surrendered or insist on performance of the original lease as written, and that any agreement between the landlord and a co-tenant which affects the right of occupancy of the premises creates a presumption of a new lease and surrender of the old."

From this it appears that on surrender of the rights by one of the co-tenants the other has a right to recognise the surrender or to insist on the performance of the original lease deed. In *Doe, Lessee of Whayman and others* v. *Chaplin* (1), it was held that when four co-tenants further lease the property, then three of them by giving notice to quit can take possession of three-fourths of the demised property. This can

(1) 12 Revised Reports 615.

obviously be done only if each co-tenant can be held to have a right to deal with his own share.

In *Doe* v. *Summersett* (1), it was held, that "joint tenants are seized not only of their respective shares, per my, but also of the entirety, per tout;". This is a technical subject and in England it is well settled that all the tenants can surrender a part of the demised property. In my opinion Mohammad Naseem is bound by the deed of transfer that he signed particularly when his father, the lessor, had also accepted it and had got the revenue entries made in accordance with the surrender. There is nothing in law to compel one to hold that a co-tenant should not be held bound by the deed of surrender that he executes. It was argued before Macnair, Officiating Chief Justice, in *Rindu and others* v. *Vithoba* (1), that the surrender of unascertained undefined portion of a holding by some of the tenants is not valid in law. This contention, however, was over-ruled and it was held that one or more co-tenants are at liberty to surrender to the landlord their rights which they hold in the land against their landlord and that no one but the parties to the transaction has any interest in the matter and there is no reason why one should not surrender his rights to the other. I am in respectful agreement with this enunciation of the legal position.

In *Beary Mohun Mondal and others* v. *Radhika Mohun Hazara and others* (2), it was assumed that a co-tenant could validly relinquish his rights in favour of the landlords. In that case Bannerjee, J., then proceeded to hold that a relinquishment made in favour of the landlord by some of several tenants of a joint occupancy holding does not operate by way of enlarging the rights of the other co-sharers who did not relinquish.

(1) 109 E.R. 738.
(2) A.I.R. 1931 Nag. 159.
(3) 8 C.W.N. 315.

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It is not necessary in this case to consider the rights of the other co-tenant who is admittedly not an evacuee. The Custodian-General has recognised that a co-tenant can acquiesce or consent to such a surrender, but he has found that there is no proof of such a consent or acquiescence. But the fact remains that it is for Mohammad Waseem, the co-tenant, to elect whether to assert his right to the entire demised land on the ground that the surrender by Mohammad Naseem alone did not bind him or to accept the surrender made by his brother. No rights in the demised property, however, have been left in Mohammad Naseem, who has surrendered his rights to his father, That being so, Mohammad Naseem's share in this property cannot vest in the Custodian. It is no concern of the Custodian Department whether the property after surrender by Mohammad Naseem vests in Mubarak Hussain or Mohammed Waseem, as both of them are, admittedly, non-evacuees. Therefore, the decision of the Custodian Department on this point is not in accordance with law and this error is apparent on the face of the order.

It was then argued by the learnel counsel for the respondent that the Custodian-General was in error in holding that the surrender under the Evacuee Act did not amount to transfer and that being so, the order made under section 8(4) has not resulted in injustice to Mohammad Waseem and the Court should not interfere with the order under Article 226 of the Constitution.

In general the words "surrender of the demised estate" mean yielding up of the estate to the landlord, so that the leasehold interest becomes extinct by mutual agreement between the parties or by operation of law. It does not involve alienation of an estate. Under a surrender the landlord resumes possession of the property without opposition from the

tenant. The term is defined in Stroud's Judicial Dictionary thus—

> "Surrender *sursum redditio,* property is a yielding up an estate for life or years to him that hath an immediate estate in reversion or remainder, wherein the estate for life or years may drown by mutual agreement between them."

This term is well known to law and is generally distinguished from abandonment which is another term that does not involve transfer. The legislature in section 40 of the Evacuee Act has used the word "transfer" and not surrender or abandonment, nor is the term "transfer" defined in the Act. It must, therefore, be assumed that the legislature knowing the meaning attached to the word "surrender" in Courts of law did not intend to bring it within the operation of section 40 of the Act. The learned counsel for the respondent relies on a decision of the Patna High Court reported in *Jumna Prasad Singh and others* v. *Baldeo Singh and others* (1), but in that case the judges were considering surrender by a Hindu widow of her estate and the decision did not depend on determining whether surrender by a widow of her estate under Hindu Law amounted to "transfer" as known to law. It is true that it is stated in the course of judgment that surrender means a transfer of the estate, but that should be considered to be merely an *obiter dicta.* The Custodian-General has given good reasons for holding that surrender does not amount to transfer within the Evacuee Act and, therefore, his contention of the learned counsel for the respondent fails

(1) 50 I.C. 872.

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For all these reasons, I accept this petition and quash the order of the Custodian-General, dated the 12th of May, 1952, and direct the issue of a writ of mandamus prohibiting the Custodian Department from interfering with the possession of the petitioner over the land in dispute. The petitioner will get the costs of this petition from the respondent.

CIVIL REFERENCE

Before Falshaw and Bishan Narain, JJ.

M/S B. N. DHEER AND SONS,—*Appellants.*

versus

THE COMMISSIONER OF INCOME-TAX, DELHI,—*Respondent*

Civil Reference No. 8 of 1954.

1957

Jan., 31st

Income-tax Act (XI of 1922)—Section 26A—Assessee alleging that it was a firm constituted in January, 1948, consisting of two parties though formal partnership deed was drawn up on 21st June, 1950—Assessee, whether entitled to registration under section 26A and for what years.

Held, that when a deed or instrument of partnership is presented for registration under section 26A, even where the partnership is alleged in the deed to have existed previously on the same terms, this should not be a bar to the registration of the firm, and it should be treated as constituted under the instrument as from the date of the instrument. Consequently registration should not be refused to the assessee firm in this case simply because the instrument of partnership executed in June, 1956, recited the previous existence of the partnership from January, 1948, onwards but that the registration should only take effect from the date of the instrument. This means that the registration should be granted so as to take effect for the assessment year 1951-52 (accounting year 1950), but not as regards the assessment years, 1949-50 and 1950-51.