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.

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.

1964

Feb., 17th.

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.

Held, that when two grounds for the ejectment 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

suit is barred by the Fourth Explanation in section 11 of the Code of Civil Procedure, 1908.

Held, that where tenant converts the user of a building from residential to business purposes after the commencement of the tenancy and the conversion of such user comes to the knowledge of the landlord some years later, the landlord is not estopped from basing his suit for eviction of the tenant on the provisions of section 13(1) (k) of the Act.

Application under section 35 of Act XXXVIII of 1952 for revision of the decree of the Court of the District Judge, Delhi, dated the 21st day of August, 1959, affirming that of Shri O. P. Garg, Sub-Judge, Ist Class, Delhi, dated the 12th June, 1958, decreeing the plaintiff's suit with costs for defendant's eviction under section 13(1) (k) of the Rent Control Act, 1952 and for recovery of Rs. 573.

S. L. SETHI AND R. L. TANDON, ADVOCATES, for the Petitioner.

R. S. NARULA AND S. L. GANDHI, ADVOCATES, for the Respondent.

ORDER

Falshaw, C.J.

D. FALSHAW, C.J..—This is a tenant's revision petition under section 35 of the Delhi & Ajmer Rent Control Act of 1952 which has been referred to a larger Bench.

The relevant facts are that the premises in suit consist of part of a house No. 1, Curzon Road, New Delhi. This house is owned by B. D. Gupta, who built it on a site whch he had taken on a perpetual lease from the Government for the purpose of building a house. In July, 1951, the landlord instituted a suit for the ejectment of the tenant under section 9(1)(b)(i) the Delhi & Ajmer-Merwara Rent Control Act of 1947 on the ground that the premises were leased to the tenant for residential purposes and that he had used them for another purpose by using them in a connection with his business. The suit was dismissed on the

30th of June, 1953, on the findings that although the lease deed mentioned a house, it did not specifically state that the premises were being let solely for residential purposes, and that the landlord had gone on accepting rent from the tenant for at least two years from 1949 to 1951, after he had come to know of the fact that the tenant was using the premses for the purpose of storing and selling tractors and other heavy equipment, this being held to amount to waiver even if there had been any misuser of the premises.

The suit from which the present revision has arisen was instituted by the landlord on the 12th of June, 1958, for the ejectment of the tenant on the ground contained in section 13(1)(k) of the Act of 1952, the relevant portion of which reads —

> "that the tenant has, whether before or after the commencement of this Act..... notwithstanding previous notice used or dealt with the premises in a manner contrary to any condition imposed on the landlord by the Government or the Delhi Improvement Trust while giving him a lease of the land in which the premises are situated."

This was based on the fact that one of the terms of the lease of the plot granted by the Government to the landlord was that the lessee, i.e., the plaintiff could not without the consent of the Government carry on or permit to be carried on the said premises any trade or business whatsoever, or use the same or permit the same to be used for any purpose other than for residence.

It seems from the judgment in the previous suit of which a copy was exhibited as D. I. that a copy of

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this lease was produced in that case in support of the landlord's plea that the tenant was using the premises for business purposes, but it was held that the terms of the landlord's lease from the Government did not affect the terms of the lease between the parties to the suit, which was silent on the purpose for which the parties were being let.

However, among the pleas' taken by the tenant was that the trial of the issue relating to his liability to eviction under section 13(1)(k) was barred by the principle of *res judicata* by reason of the earlier judgment. This plea was rejected by the trial Court which granted the plaintiff a decree for ejectment. This decision was upheld by the learned District Judge in appeal.

Before I proceed to deal with two ponts of difficulty on account of which the learned Single Judge thought it necessary to refer the case to a larger Bench, I may, since the whole case has been referred and not merely questions of law, deal with an argument raised on behalf of the respondent which arises out of the judgment of the learned District Judge before whom the objection was taken that the appeal was barred by time. The case was decided by the trial Court on the 12th June, 1958 and when the appeal was filed it was only accompanied by an unattested copy of the order of the trial Court on account of the fact that the appeal had to be filed quickly in order to obtain an order for staying the tenant's ejectment. The copy of the trial Court's order had been applied for on the 17th of June, 1958, only five days after the date of the decision. As the copies of the decree and judgment were not supplied for same time further applications were filed to the Copying Agency on the 4th of July and the 2nd of August, 1958, for treating the application as urgent. However, the copies could not be supplied by the Copying Agency by that time because the

record had already gone to the Court of the District Judge in connection with the appeal, and the original application was returned to the appellant on the 22nd of September, 1958, with a report to the effect that the file had gone to the appellate Court. Without any delay the appellant filed an application in the Court of the learned District Judge praying either that the file should be sent back to the District Copying Agency so that the copies could be prepared or also that copies should be supplied by that Court and also for treating this application as a continuation of the original application. The appellant was directed to file a fresh application for the supply of copies from the Court of the District Judge. The necessary copies were prepared and promptly filed in connection with the appeal.

The learned District Judge held on these facts that the time from the date of the original application to the date of the supply of the copies from his Court was to be excluded in calculating the period of limitation under section 12 of the Limitation Act, or in the alternative that there were grounds for condoning the delay. In my opinion, it was perfectly proper in the above circumstances to treat the application filed in the Court of the District Judge on which the copies were actually supplied as a continuation of the original application and therefore, it was rightly held that the appeal was not barred by time.

The two questions which arise in the case are whether the doctrine of constructive *res judicata* applies in this case and whether the landlord, having permitted the premises to be used for business purposes from 1949 to 1958 before he claimed the ejectment of the tenant on the ground contained in section 13(1)(k) is estopped by his conduct from ejecting the

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tenant on that ground. Section 11 of the Code of Civil Procedure reads:—

> "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

Explanation IV, which is relied on by the tenant, read—

> "Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

It is pointed out that a similar ground for ejectment existed in the Act of 1947, under which the previous suit was brought, in section 9(1)(i), and therefore, it was obviously open to the landlord to base his suit on that ground. Indeed, it appears to be rather surprising that this ground was not taken in view of the fact that the landlord in the earlier suit relied on his own lease from the Government as a piece of evidence in support of his allegation that the tenant was using the premises for a purpose other than that for which they were let. In fact, the use of the premises for business purpose would have formed a common basis for both the pleas, that the tenant had used the premises for a purpose other than that for which they were let by the landlord, and also that he was dealing

with the premises in a manner contrary to a condition imposed by the Government on the landlord while giving him the lease of the land on which the premises are situated. It is, therefore, contended that the case is clearly covered by the Fourth Explanation since the landlord might and ought to have based his suit on the second plea as well as the first and particularly so in view of the fact that both pleas are based on the same ground of fact.

At first sight, it would be hard to imagine a clearer case for the application of the Fourth Explanation, since where a plaintiff bases his claim for ejectment on what amounts to a breach of contract regarding the use to which the premises are to be put, and the law permits him to base his claim both on the terms of his own contract with the tenant and on the terms of his own building lease with the Government, he not only can but ought to include both grounds in his suit.

It is, however, contended on behalf of the landlord that in fact he could not at that time have based his previous suit on the second ground. In this connection he relied on the words 'notwithstanding previous notice' which occur both in section 9(1)(k) of the Act of 1947, and section 13(1)(k) of the Act of 1952. It is contended that when the earlier suit was instituted the landlord had not given any notice to the tenant to desist from misusing the premises for business purposes and calling on him to confine their use to residential purposes, and the serving of such a notice and the giving to the tenant an opportunity to comply with it is evidently a necessary preliminary to a suit based on this ground. It is pointed out that the later suit was only filed after such a notice had been given to the tenant and he had failed to comply with it, and it was only after this had been done that the suit could be brought. It is thus contended that the

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previous suit could not have been based on this ground and therefore, the question does not arise whether it ought to have been.

It might certainly be argued on behalf of the tenant that the landlord could and ought to have also included this ground in the earlier suit, and that therefore, he ought to have paved the way for it by serving the required notice, and reliance was placed on the decision in *Ch. Ganga Singh* v. *Lachmi Narain* (1), in which a certain suit was held to be barred by *res judicata* after a reference to a third learned Judge on a difference of opinion between the two learned Judges who first heard the appeal. It seems that before the learned Single Judge in this case the learned counsel for the tenant had relied on a passage from one of the judgments in the Outh case cited by Chitaley in his commentary. This passage reads—

> "It is contended that he could have a cause of action had he expressed in the plaint his willingness to redeem the former mortgage or had he paid it off, but in my opinion the words 'ground of defence or attack' in section 13 do not include a ground of defence or attack which may come into existence by some act of the plaintiff, such as the payment of money to another."

It turns out, however, that this passage comes from the learned Judge, who found himself in the minority. Briefly, the facts of that case were that a suit had been brought by a mortgagee to bring a village to sale for the realisation of his mortgage debt and that suit was dismissed because the plaintiff had no right to bring the village to sale without first redeeming an

(1) 10 Oudh cases 145.

existing prior mortgage. He then brought another suit for the purpose of bringing the village to sale and merely included an offer to redeem the previous mortgage in his plaint, and it was held by the majority that the second suit was barred by the principle of *res judicata*. I cannot see any difference in principle between that case and the present one in which the landlord was only barred from taking the second ground of ejectment by reason of the fact that he had not brought the terms of his own lease from the Government to the notice of his tenant, which, in my opinion, he might and ought to have done. In other words, when two grounds for the ejectment 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, and I am, therefore, of the opinion that the landlord's suit was barred by the Fourth Explanation in section 11 Civil Procedure Code.

In view of this finding it is not necessary to go into the question of estoppel on grounds other than that of constructive *res judicata*, but since the matter was raised before the learned Single Judge, before whom reliance was placed on a decision of this Court subsequent to the appellate order of the learned District Judge, I feel that I had better deal with the point. The decision referred to is in *Smt. Uma Kumari* v. *Jaswant Rai Chopra* (2).

The facts in that case were that one Dina Nath had taken a long lease of land situated on Baird Road, New Delhi, from the Delhi Improvement Trust for the purpose of building thereon.

(2) 1960 P.L.R. 460.

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One of the terms of his lease was that the premises constructed by him were not to be used for residential purposes and were only to be used for business purposes. The landlord at the time of the litigation, Smt. Uma Kumari, had purchased the premises from Dina Nath in 1956 and in the same year she instituted suits for the ejectment of the two tenants occupying different portions, Jaswant Rai Chopra and Raj Narain, on the ground contained in section 13(1)(k) of the Act of 1952. It was found as a matter of fact that the predecessor-in-interest, the original owner, had leased parts of the premises to the two tenants for residential purposes from the commencement of their tenancies in 1943 and 1950, respectively. In these circumstances it was held by Chopra, J. that the landlord was estopped from suing for ejectment under section 13(1)(k). The main part of his argument is contained in the following paragraph in the judgment:—

> "Mr. Yogeshwar Dayal, learned counsel for the petitioner, contends that there can be no waiver against a statute. The argument is that the above provision in the Act contains a clear prohibition to the use of the premises contrary to the conditions imposed on the landlord by the Government or the Delhi Improvement Trust while giving him the lease. Any agreement between the landlord and the tenant in contravention and disregard of this inhibition would be illegal and unenforceable under section 23 of the Contract Act. The provision in the Act is based on public policy and public policy demands that contravention of the express prohibition should not be allowed even though it was consented to by the landlord and agreed

upon between the parties. The entire argument in my view is based upon a wrong hypothesis and is fallacious. As I read it, clause (k) of the proviso to section 13(1) of the Act does not contain any express or even an implied prohibition to the letting out of the premises by a landlord contrary to the terms and conditions imposed on him by the Government or the Delhi Improvement Trust while giving him the lease. The clause merely contains a provision for the protection of a personal right of the landlord and is meant for his benefit. The landlord is given the right to sue for ejectment of the tenant and get him evicted if tenant, in spite of notice uses or deals with the premises contrary to the terms and conditions of the lease by the Govenment. This right was refused to him by sub-section (1) of section 13, but an exception to it was created by clause (k) of the proviso. The statute does not impose any duty or obligation on the landlord or the tenant; it merely imposes a penalty on the tenant and creates a right in the landlord, which he may or may not exercise. There being no express prohibition in the Act, there was nothing wrong in the agreement being a personal one. It could be waived by the landlord. Once it is waived the landlord would be estopped from enforcing that right".

An appeal was filed in the Supreme Court by special leave against that judgment, but unfortunately the learned Judges, who dismissed the appeal

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did not think it necessary to decide whether the view of Chopra, J. was correct or not since on the assumption that it was open to a landlord to take advantage of clause (k) even where he might himself have been originally a party to the breach of the condition of the lease in his favour, it was held that the service of notice was necessary under that clause, and no notice had been served on the tenant in that case. It seems to me that the present case is distinguishable on facts from that decided by Chopra, J. in that it was found in that case that the breach of the terms of the landlord's lease from the Improvement Trust has been present from the start of the tenancy of the tenant to whom parts of the building had been leased for residential purposes at the outset. In the present case the point at which the user was converted by the tenant from residential to business purposes was not in issue, but it would appear from the judgment in the earlier suit that the tenancy started in 1942, and that the use for business purposes at any rate to the knowledge of the landlord was only proved from 1949, i.e., about two years before the suit was instituted. In such a case it could not possibly be said that the landlord was estopped from basing his suit on the provisions of section 13(i)(k). On this finding it ceases to be necessary for me to discuss further whether the view taken by Chopra, J., was correct and on the finding that the landlord's suit was barred by the principles of constructive *res judicata* I would accept the revision petition and set aside the decree for ejectment. I consider it to be a fit case in which the parties may be left to bear their own costs.

Mehar Singh, J.—I agree.

B.R.T.