K. N. Srivastava, J.

S. A. No. 2103 of 1971 against the judgment and decree passed by Sri Hari Mohan Srivastava, II Temporary Civil Judge, Mirzapur on 10th August 1971 in C. A. No. 74 of 1970.

Decided on March 21, 1972.

MEWA LAL and others (Appellants)

v.

Smt. TARA RANI (Respondent)

● TRANSFER OF PROPERTY ACT, 1882, S. 131—Notice under—Sale of disputed property—Landlord claimed rent by virtue of this sale, which accrued after the sale—Realisation of rent even if taken to be an actionable claim, as there was no transfer of right of realisation of rent alone, there was no need for a notice as required u/S. 131. (Para 6)

● SECOND APPEAL—Finding of fact —Finding based on evidence cannot be said to be perverse finding and a finding based on legal and good evidence cannot be disturbed in second appeal. (Para 10)

● U. P. (TEMP.) CONTROL OF RENT AND EVICTION ACT, 1947, S. 2 (1)—Accommodation—Land surrounded on three sides by boundary walls cannot be said to be an accommodation within the meaning of the Act. (Para 20)

● TRANSFER OF PROPERTY ACT, 1882, S. 106—Lease for manufacturing process—Drying of husk cannot be said to be a manufacturing process. (Para 23)

● TRANSFER OF PROPERTY ACT, 1882, S. 106—Notice under—Tenancy terminated by using present tense, terminated as provided u/S. 106 and the tenant was allowed to stay till the period prescribed u/S. 106 and then to vacate it—Cannot be said that termination of tenancy was in presenti. (Para 25)

Sidheshwari Prasad, C. M. Srivastava and S. P. Sinha for appellants.

Beni Prasad Agarwal for respondent.

ORDER:—The facts giving rise to this appeal are as follows :—

The defendants are tenants of the disputed property on a monthly rent of Rs. 18/-. The property originally belonged to one Kanhaiyalal who died in the year 1933. Raj Kumar Agrawal is said to be the son of Kanhaiya Lal. Smt. Nanhi Bibi is the widow of Kanhaiyalal. According to the plaintiff, Raj Kumar Agrawal was born seven months after the death of Kanhaiyalal and was the natural son of Kanhaiyalal. The property in dispute was sold by Smt. Nanhi Bibi to Smt. Tara Rani, plaintiff respondent on 7-3-1967. It was then realised that the property belonged to Raj Kumar Agrawal who was the natural son of Kanhaiyalal. Raj Kumar Agrawal then executed another sale-deed on 24-4-1967 in favour of Smt. Tara Rani. Smt. Tara Rani then served a notice on the defendants alleging that they were in arrears of rent and that their tenancy was terminated in accordance to S. 106 of the Transfer of Property Act. After this notice, the suit for ejectment and arrears of rent was filed.

2. The suit was contested by the defendant appellants on various grounds. The first ground was that no title and interest passed to the plaintiff in the disputed property by the sale-deeds. The second contention was that the notice u/S. 106 of the Transfer of Property Act was invalid. The third contention was that a building stood on the land in dispute in 1950 which was an accommodation as provided under the U. P. Temporary Control of Rent and Eviction Act (hereinafter referred to as 'the Act'), and, therefore, no suit for ejectment of the defendant-appellants could be filed without complying with the provisions of S. 3 of the Act. In this very connection, it was also contended that admittedly there was a building on this land which was constructed in 1949 and when the Act came into force, it was an accommodation governed by the Act. The other contention was that Smt. Nanhi Bibi had remarried another person after the death of Kanhaiyalal and that Raj Kumar Agrawal was the son born of the second husband of Smt. Nanhi Bibi and was not entitled to the property in dispute. All these contentions did not find favour with the trial court and the lower appellate court. The plaintiffs suit was, therefore, decreed. Being dissatisfied, the defendants have filed this appeal.

3. The first contention of the learned counsel for the appellant was that it was a transferable and actionable claim and as provided u/S. 131 of the Transfer of Property Act, there being no notice of transfer of actionable claim in writing, the suit was not maintainable. S. 131 of the Transfer of Property Act reads as below :—

"Every notice of transfer of an actionable claim shall be in writing, signed by the transferor or his agent duly authorised in this behalf, or, in case the transferor refuses to sign, by the transferee or his agent, and shall state the name and address of the transferee."

4. "Actionable claim" has been defined u/S. 3 of the Transfer of Property Act which reads as below :—

"Actionable claim" means a claim to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property, or to any beneficial interest in moveable property not in the possession, either actual or constructive,

of the claimant, which the Civil Courts recognise as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent."

5. Thus in order to apply S. 131 of the Transfer of Property Act to the facts of this case, it has to be seen as to whether the sale of the house and the right of realisation of rent from the tenant under the sale-deed was an actionable claim. According to the learned counsel for the appellants, the right to realise rent from the defendant-appellants was an actionable claim because it was a debt which could be recovered from the tenant. In the instant case, there was no transfer of right to realise rent. S. 130 of the Transfer of Property Act provides the manner in which actionable claim can be transferred. In the instant case, there was a sale of the disputed property. By virtue of this sale, the plaintiff has claimed the rent which accrued after the sale. Therefore, in the instant case, even if the realisation of rent be taken to be an actionable claim, there was no transfer of the right of realisation of rent alone and, therefore, their was no need for a notice as required u/S. 131 of the Transfer of Property Act.

6. S. 131 of the Transfer of Property Act has been enacted for the benefit of the Debtor. After an actionable claim is transferred in accordance with S. 130 of the Transfer of Property Act, the Debtor may have dealing with the original owner and it is estopped from having dealing with the original owner on the moment the transferor has a notice u/S. 131 of the Transfer of Property Act. Actionable claim can be transferred only by execution of an instrument in writing signed by the transferor or his duly authorised agent, whereas u/S. 54 of the Transfer of Property Act, "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. This payment of price, in full or in part or promised is by the purchaser to the seller. The sale of a property of a value of more than Rs. 100/- has to be compulsorily registered, whereas, an actionable claim of any amount can be had only by execution of an instrument. Thus the sale of a property and sale of an actionable claim are two different things and one has no relation with the other. As the transfer of an actionable claim is not done by a registered deed, therefore, the notice u/S. 131 of the Transfer of Property Act is necessary. In the instant case, the sale was of the entire property and not only the right of realisation of rent. It was by virture of the sale-deed that the purchaser i.e., the plaintiff-respondent claimed rent from the defendant-appellants from a date subsequent to the date of the sale which is 24—4—1967.

7. A perusal of the notice Ext. 23 would clearly show that arrears of rent was demanded from 24-4-1967. This further proves that the rent was being demanded on the right of ownership which has passed to the plaintiff-respondent by virtue of execution of the sale-deed Ext. 18 which was executed by Raj Kumar Agrawal on 24-4-1967. For the above reason, this argument has no force in it.

8. The next contention of the learned counsel for the appellants was that the sale-deed by Raj Kumar Agrawal in favour of Smt. Tara Rani was without consideration and by this sale-deed, no right and interest passed to Smt. Tara Rani. This argument has no force in it. Earlier Smt. Tara Rani had purchased this house from Smt. Nanhi Bibi on 7-3-1967. It was then discovered that Smt. Nanhi Bibi had no saleable interest in this property. There was danger of a litigation between Smt. Tara Rani and Smt. Nanhi Bibi. Not only this, there was chance of Smt. Tara Rani prosecuting Smt. Nanhi Bibi in a criminal court. Realising this, Raj Kumar Agrawal who was the owner of the property executed the sale-deed Ext. 18. He clearly mentioned in it that he would not like his mother to be involved in litigation and trouble and, therefore, he agreed to execute the sale-deed of this property in favour of Smt. Tara Rani. It be known here that the sale consideration which Smt. Nanhi Bibi has received under sale-deed Ext. 17 was Rs. 10,000/-. Raj Kumar Agrawal acknowledged in his sale deed Ext. 18 that he has received an amount of Rs. 10,000/- earlier. According to the learned counsel for the appellants, this amount was nothing else than the amount which had been received by Smt. Nanhi Bibi. Even if it be so, it cannot be said that Raj Kumar Agrawal had executed the sale-deed without any consideration. Smt. Nanhi Bibi was en-

titled to refund the sale consideration mentioned in the sale deed as she had no interest and title in the property. Instead of a suit being filed against Smt. Nanhi Bibi for the return of the sale-consideration which she had received, Raj Kumar Agrawal, her son, to avoid all this litigation, admitted in the sale-deed that he had received the amount mentioned in the sale deed. The above contention has, therefore, no force in it.

9. In this very connection, the learned counsel for the appellants contended that u/S. 54 of the Transfer of Property Act, the word used is 'price' and not 'consideration'. He contended that if any thing other than cash was received as price, the document will amount to an exchange or a barter but not a saledeed. This contention has no force in it. Raj Kumar Agrawal admitted in his sale-deed Ext. 18 that he had received the price of the sale. There is no evidence that this admission was wrong or actually Raj Kumar Agrawal had not received any consideration for executing the sale-deed Ext. 18. In this view of the matter, the above argument has no force in it.

10. The learned counsel for the appellants next contended that the finding in the earlier suit which was filed by a sister of Kanhaiyalal against Smt. Nanhi Bibi would not operate as res-judicata against the appellants who were not parties to that suit and, therefore, the finding of the learned lower appellate court that Raj Kumar Agrawal was the son of Kanhaiyalal after relying on the finding of the earlier suit as res-judicata between the present parties was wrong and illegal. The lower appellate court has based his finding on two grounds. The first ground was acceptance of oral evidence of Smt. Nanhi Bibi that Raj Kumar Agrawal was born of Kanhaiyalal and his natural father after seven months of Kanhaiyalal's death. The second ground was that in the earlier suit, this matter had been settled that Raj Kumar Agrawal was son of Kanhaiyalal and the same cannot be agitated in this suit. Even if the second ground is not taken into consideration for the reasons it was attacked by the learned counsel for the appellants, this finding can be maintained on the first ground. According to the learnd counsel for the appellants, when one of the grounds failed, the very foundation of this finding became shaky and, as such, this finding could not be acted upon. I do not agree with this contention. Even if the finding cannot be based on the principle of res-judicata, there is evidence of Smt. Nanhi Bibi that Raj Kumar Agarwal was son of Kanhaiyalal and was born seven months after his death. This evidence of Smt. Nanhi Bibi was accepted by the trial court. A finding based on the evidence cannot be said to be a perverse finding and, therefore, in this second appeal, the finding that Raj Kumar Agrawal was the son of Kanhaiyalal being based on legal and good evidence, cannot be disturbed.

11. The evidence about the fact that Smt. Nanhi Bibi had married another person after the death of Kanhaiyalal is wholly untrustworthy and it has been rightly rejected by both the courts below. The finding of the courts below that Smt. Nanhi Bibi did not marry any one after the death of Kanhaiyalal and remained throughout as his widow is a finding of fact which too cannot be disturbed in this second appeal.

12. The next argument about the notice u/S. 106 of the Transfer of Property Act being defective has also no locus standi. It was primarily attacked on the argument based on the interpretation of S. 131 of the Transfer of Property Act. According to the learned counsel for the appellants, a reading of this section made it clear that it was in the mind of the person who gave the notice that the provisions of S. 131 of the Transfer of Property Act had to be complied. I have read the notice myself and it has also been read over to me by the learned counsel for the appellants. I have not come across any thing in the notice from which the above inference could be drawn. It was a simple notice demanding arrears of rent and terminating the tenancy. There is nothing in it to even indicate slightly that the person who gave this notice had in his mind the provisions of S. 131 of the Transfer of Property Act.

13. The next question which has to be decided in this case is as to what was the property which was leased out to the defendants in the year 1957. It has come in evidence that there was boundary walls on three sides of the disputed land. There is the report of the Commissioner which has been marked Ext. 14 that the building standing

on the land had been fallen down and the materials had been auctioned. The Commissioner Sri Vishwanath Prasad Agrawal who was appointed in the earlier suit between the sister of Kanhaiyalal and Smt. Nanhi Bibi was examined as PW 3. He supported his above report. The plaintiffs evidence has been believed by both the courts that there was no building on this land except the three boundary walls. This finding is based on evidence and, as such, it cannot be disturbed in the second appeal.

14. Now the question arises as to whether these boundary walls could go to make the disputed property an 'accommodation' as provided u/S. 2 (1) of the Act. 'Accommodation' has been defined in the Act as below :—

'Accommodation' means residential and non-residential accommodation in any building or part of a building and includes—

(i) gardens, grounds and out-houses, if any, appurtenant to such building or part of a building ;

(ii) any furniture supplied by the landlord for use in such building or part of a building ;

(iii) any fitting affixed to such building or part of a building for the more beneficial enjoyment thereof, but does not include any accommodation used as a factory or for an industrial purpose where the business carried on in or upon the building is also leased out to the lessee by the same transaction."

15. The word "building" has not been defined in the Act. There are a number of decisions in which the expression "accommodation" and "building" has been considered. There are a number of decisions where the "building" has been considered in relation to the UP ZA and LR Act, but we are not concerned with those decisions because they will not afford a guiding principle for determining as to what a "building" would mean under the Act.

16. In Chandalal v. Ram Kishan (*AIR 1952 Alld. 607*), the question for consideration was as to whether an open khata constituted a 'building' within the meaning of the Act. After considering the dictionary meaning of the words accommodation' and 'building', it was observed as below :—

"This shows that in the general sense a space of land should be covered by building and that mere wall or fence is not to be termed a building. That the word 'building' connotes a roofed structure within the meaning of the Act appears to be clear from the use of the word 'includes' in Cl. (a) of S. 2. Sub-Cl. (i) of Cl. (a) includes within the definition of accommodation, gardens, grounds and outhouses, if any, appurtenant to such building or part of a building. If compounds had been intended to be considered as accommodation without reference to any building situate in them, the word 'includes' would not have been used to bring them within the definition of Accommodation".

17. Similar views were taken to Mohd. Sami v. Smt. Savitri Devi (*1957 AWR 427*) and Narayan Chand Dass v. Panna Lal (*1959 ALJ 229*).

18. In Ami Chand v. Ram Sharan Dass (*1969 AWR 4*), it was held that an accommodation must be inside a building having walls and a roof. Similar view was taken in Smt. Dhanwati Devi v. Khudavand Karaim Jalley Jalalhu (*1971 AWR 217*).

19. The above view that I have taken becomes all the more clear by a reading of S. 1-A of the Act which reads as below:—

"Nothing in this Act shall apply to any building or part of a building which was under erection or was constructed on or after Ist January, 1951."

20. The Act was enacted for the benefit of tenants of residential and non-residential accommodation. It gives certain privileges to the tenants from unauthorised and illegal ejectment. A reading of the Preamble of the Act would also clearly indicate that this Act was enforced on account of shortage of accommodation. This Act was, therefore, certainly meant for such accommodation which has a roof over it whether they were for residential or non-residential purposes. In this view of the matter also, a land surrounded on three sides by boundary walls cannot be said to be an accommodation within the meaning of the Act. I am, therefore, of the opinion that the above argument has no force in it.

21. The other argument in this connection was that there was a construction on this land when the Act came into force and, therefore, the disputed property would be governed by the Act. This argument too has no force in it because it has to be seen as to what was

the property which was rented to the defendants when the defendants took it on rent on a monthly rent of Rs. 18/-. There is definite evidence on the point that it was a vacant land and was taken on rent for tethering cattle. There is also evidence that some time later on, the defendants approached Smt. Nanhi Bibi that due to sun and wind, they were feeling trouble and they should be permitted to raise certain construction which would be removed while vacating the land. In this view of the matter, the construction which the defendant raised subsequently, and that too of a temporary nature, would not make the disputed property an 'accommodation' within the meaning of the Act.

22. The other argument of the learned counsel for the appellants was that the disputed property was rented to the appellants for manufacturing purposes and the monthly rent was not settled. This argument too has no force in it. There is a clear finding by the lower appellate court that the accommodation was not let out for manufacturing purposes and that the monthly rent of the disputed property was settled. The word 'manufacture' means at least changing the shape of a thing into another. According to the defendants, they have been drying husk on this land. There is evidence that they have rice mills on a land across the road. Drying of husk cannot be said to be a manufacturing process. In order to prove that it is a manufacturing process, a person who wants to take advantage of it, has first to prove that the property was taken on rent for manufacturing purposes or that after it was taken on rent, the manufacturing process has been going on in this land openly with the knowledge and connivance of the landlord.

23. In certain sales-tax cases, the word 'manufacture' has been defined and for instance, we may quote a Division Bench decision of this court in Badri Prasad Prabha Shanker v. Sales Tax Commissioner, U.P., Lucknow (*STC Vol. XIV 1963 p. 308*). In order to prove that there was a manufacturing process, it is also essential to prove that the article must change its nature and it becomes an altogether different commercial article. In the instant case, by spreading wheat partly husk and allowing it to dry on the land, one neither changes husk into something different or a commodity other than what it originally was. Therefore, in the eye of law, the drying of the husk on the land in dispute cannot be said to be a manufacturing process. Secondly, as discussed above, this land was never taken for manufacturing purposes. The above argument too has, therefore, no force in it.

24. The other argument of the learned counsel for the appellants was that the notice Ext. 23, terminated the tenancy in presenti and, as such, it was an invalid notice. In support of this argument reliance was placed on a single Judge decision of this Court Hakim Ziaul Islam v. Mohammad Rafi alias Rafi Ahmad (*1971 AWR 121*). The facts of the present case are altogether different from the facts of Hakim Ziaul Islam's case. In Hakim Ziaul Islam's case, the notice read as below:—

"Your tenancy of the aforesaid house is determined with effect from to-day."

25. In the instant case, there is no such recital in the notice. All that can be said was that present tense was used in terminating the tenancy, but that would not be of any material consequence because reading the notice as a whole, there cannot be two opinions about the fact that the tenancy was terminated as provided u/S. 106 of the Transfer of Property Act and the defendant was allowed to stay in the house till the period prescribed u/S. 106 of the Transfer of Property Act and then to vacate it. So by no stretch of imagination, it can be said that there was termination of tenancy in presenti.

26. A similar question came up for decision before a Division Bench case of this court in Ahmad Ali v. Mohd. Jamal Uddin (*1963 AWR 490*). In this Division Bench case, it was observed as below :—

" He used the present tense but it does not mean that he was terminating the tenancy in presenti, the present tense is quite consistent with the termination of tenancy in future when the Act by which the tenancy is to terminate in future is done in presenti. Since it was by the act of giving the notice that the tenancy was to be terminated he could say "your tenancy is terminated." The tenancy of the respondent was terminated by the notice given by him and, therefore, on the date on which he gave the notice he could say "your tenancy is terminated." What he meant was "your tenancy is terminated after the expiry o

thirty days from the receipt of the notice" ; this was made clear by the addition that he should vacate the accommodation on the 31th day after the receipt of the notice. There is undoubtedly a distinction between terminating the tenancy at once and calling upon the tenant to deliver possession after 30 days and terminating the relationship of landlord and tenant comes to an end at once and the tenant is given a right to remain in possession for 30 days either as a licensee or as a tenant on sufferance, whereas in the latter case he remains a tenant for 30 days. But it is clear from the notice that the appellant did not intend to terminate the tenancy on the date on which he gave the notice ; he did not give the respondent a right to remain in possession for 30 days as his licensee or a tenant on sufferance after the termination of this tenancy."

27. In this view of the matter, the facts of the present case appear to be similar to the facts of this Division Bench case. Therefore, in the instant case, the tenancy was not terminated in presenti and, as such, the notice is not invalid on that ground as well.

28. The last argument of the learned counsel for the appellants was that the U. P. Urban Buildings (Regulation of Letting Rent and Eviction) Bill, 1970, only awaits the date to be notified in the Gazette and certain other legal formalities and, therefore, the appeal should be adjourned till such time as this Act is enforced. In support of this contention, an order passed by Hon'ble Asthana, J. , in S. A. No. 3041 of 1968 was shown to me. This order is about the adjournment of the case. The reasons given in an order for adjournment case cannot be equated with the reasons and principles laid down in decided cases. The new Act only awaits certain legal formalities to be fulfilled. I don't think this appeal should await decision till the above Act comes into force. This court has to decide cases in accordance with the existing law and in this view of the matter, I don't think that the decision of this appeal can be adjourned only under a hope that the decision of this appeal would be affected by the new Act which might be in conformity with the social conscience underlying the new law to be enforced.

29. For the reasons given above, the appeal has no force in it. It is hereby dismissed with costs. Appeal dismissed.