CALCUTTA HIGH COURT

Sailendra Nath Bhattachrjee

Vs.

Bijan Lal Chakravarty

(B.K. Mukherjea and Akram, JJ.)

10.08.1944

JUDGMENT

B.K. Mukherjea, J.

1. This appeal is on behalf of the plaintiff and it arises out of a suit, commenced by him in the Court of the 1st Munsif at Howrah, for declaration of his permanent tenancy rights in the lands in suit and for a permanent injunction restraining defendant 1 from taking khas possession of the same, in execution of the decree obtained by the latter against the plaintiff's landlords, in Title Suit NO. 466 of 1933. There was a further prayer for declaration that the decrees obtained in Title Suit No. 466 of 1933 as well as in another apportionment suit, being Money Suit No. 140 of 1929, were not binding on the plaintiff. The facts which are material for our present purposes may be stated as follows:

> The subject-matter of dispute is a small plot of land measuring 4 cottas which is a part of a bigger plot having an area of 25 bighas situated in the town of Howrah and known by the name of Choudhurybagan. The entire Choudhurybagan belonged in rent-free right to four sets of proprietors, to wit the Khan Bhaduris, the Santras and two groups of Lahiris, each of whom had a four annas share in it. At some point of time, the entire property was cut up into two halves by a narrow lane which runs north to south and under an amicable arrangement between the cosharers the eastern half was in possession of the Khan Bhaduris and one group of Lahiris, while the western half was possessed by the Santras and the other group of Lahiris. Within the eastern half, there was a tenancy known as Dolui's tenancy comprising an area of one bigha one cotta of land which existed from unknown time and carried a rental of Rupees 15-12-5 gandas a year.

2. The main point in controversy in this litigation is whether the tenancy of the Doluis is a permanent or a precarious one. It appears, that in 1879 this tenancy was held by three brothers, namely, Koilash, Bolorarn and Hari-das who described themselves as sons of Nobin Dolui and grandsons of Krishna Dolui. Koilash and Boloram sold their 2/3rds share in the tenancy to one Gopal Chandra Pal by a kobala which is dated 30th July 1879. The kobala recites that the vendors had mokarari mourashi rights in the land which they had been holding since the time of their ancestor Krishna Chandra Dolui. On 29th March 1898, the other brother, Haridas conveyed

his l/3rd share in the said tenancy to Sarat Chandra Khan Bhaduri, one of the proprietors, by a kobala which was taken in the name of one Haricharan Manna, an officer of the vendee. There was the same recital in this kobala of the vendors having ancestral mourashi mokarari rights in the land transferred. On 1st July 1899, the 2/3rds share which was acquired by Gopal Chandra Pal was sold by him to the same Sarat Chandra Khan Bhaduri who thus became the 16 annas owner of the tenancy in question. In this kobala also the interest of the vendor was described to be that of a permanent tenant. After Sarat Chandra Khan Bhaduri acquired the entire interest in Dolui's tenancy he started creating a number of permanent sub. leases with regard to different parcels of land comprised in the same. The first sublease, which we are concerned with in this suit was granted to one Sriram Chandra Pal in respect of 4 cottas of land by a potta (EX. 4-A) executed on 3rd September 1900, and the grantee was given permanent rights in the land demised. On Sriram's death his interest devolved on his widow Kusum Kumari and on 5th October 1906, Kusum Kumari transferred her interest to Sarat Chandra Khan Bhaduri himself. Thereafter, on 21st August 1907, Sarat Chandra made a fresh mokarari settlement of the same piece of land with Behari Lal Chakravarty, the father of defendant 1, by a potta which is Ex. 4 in the suit. On 6th September 1908, Behari Lal sold his interest to Sridhar Bhattacharji, the predecessor of the present plaintiff. There were two other sub-leases created in the year 1903 and 1906, respectively, which were the subject-matter of two other suits which were heard analogously with the present one. One of these suits was not proceeded with after the first Court's judgment and the other has been compromised in this Court. We are not concerned with these suits in the present appeal.

3. In 1906 there was a suit for partition of the entire 25 bighas started by one Umesh Chandra Mukherjee who acquired a 4 annas share in the same by purchase from one group of Lahiris, in the Court of the Subordinate Judge at Howrah which was registered as Title Suit No. 106 of 1906. The Khan Bhaduris who had a four annas share in the Choudhurybagan were defendants 1 to 11 in the suit while Radhika Prosad Lahiri who had also a 4 annas share figured as defendant 12. Defendants 13 to 18 represented the interest of the Santras who owned the remaining l/4th share in the lands. It would be necessary to state here that the 4 annas share of the Santras was originally held by two brothers, Khetra and Tarini, each one of whom had a 2 annas share. Tarini's 2 annas share was vested, at the date of the partition suit, in his two sons, Srinarayan and Jagannath, who were defendants 13 and 14 in the suit. The other 2 annas share which belonged to Khetra devolved at his death upon his two sons, Deb Narayan and Rajnarayan. The 1 anna share of Rajnarayan was sold at an execution sale and purchased by two persons, namely, Kedarnath Mitter and Asutosh Bose, though the name of Kedar alone appeared in the sale certificate. Kedar subsequently executed a deed of release in respect of the half share in favour of Golapmoni, widow of Ashutosh Bose. Deb-narayan's one anna share was mortgaged by him to one Harimohan Pal. After Hari Mohan's death, his widow and heir sold the mortgagee's rights to one Lalit Mohan Yoy. Debnarayan, on the other hand, sold his equity of redemption to one Sarat Chandra Dutt and Sarat again mortgaged this interest to Banku Chatterji. Kedar, Golapmoni, Sarat and Banku were defendants 13 to 18 in the partition suit as representing the 2 annas share of Khetra Santra in the property. Nothing was said in the plaint in this suit as regards Dolui's tenancy and Sarat Chandra Khan Bhaduri who was one of the defendants did not set up his permanent tenancy right in the one bigha one cotta plot comprised in the same. These lands were treated as khas lands of the parties unencumbered by any permanent tenancy. There was a preliminary decree in the suit in pursuance of which a Commissioner was appointed to make separate allotments in favour of the different co-sharers. After the Commissioner submitted his

report, objections were taken to it by some of the Khan Bhaduris, and it was contended that in making the allotments the Commissioner had paid no regard to the existing possession of the parties. The Court on hearing the objections set aside the allotments with regard to all the cosharers except the plaintiff and directed the defendants to put in costs for repartitioning the 3/7ths share of the property which belonged to them. These costs were not deposited and the result was that only the plaintiff's 4 annas share in the disputed property was separated and partitioned off and the interest of all the other cosharers remained joint.

4. In 1926 another suit for partition of the unpartitioned portion of the property was instituted. This was Title Suit No. 84 of 1926. The original plaintiffs in this suit were 4 persons, to wit, Bhupen, Kalicharan, Sachidebi and Herambalal. Of these, the first three had purchased the interest of Golapmoni and Heramba had acquired the interest of Kedar. The plaintiffs, therefore, altogether represented 1 anna share in the disputed property out of the 4 annas share that belonged to the Santras. During the pendency of the suit, Bhupen and Kalicharan sold their rights to one Sukumar Mukherjee who got himself substituted as plaintiff. The defendants to the suit were the persons who owned the remaining 11 annas share in the property. Of these the Khan Bhaduris had a 4 annas share and another 4 annas share belonged to Radhika Prosad Lahiri. The 2 annas share of Srinarayan and Jagannath Santra (who were defendants 13 and 14 in the earlier suit) was owned at this time by Ramsarup Serogi and the remaining 1 anna share which was held by defendants 17 and 18 in the previous suit had vested in Bijonlal Chakravarty, defendant 1. In this suit also no question was raised regarding the interest of Sarat Chandra Khan Bhaduri in the lands comprised in the tenancy of the Doluis nor were the sub-lessees in whose favour permanent sub-leases were granted by Sarat, made parties to the suit. The suit culminated in a compromise decree, and under the terms of the compromise all the parties to the suit accepted in toto the allotments made by the Commissioner in the previous partition suit. The result was that the lands constituting the tenancy of the Doluis came to be allotted to Sukumar Mukherjee and Sachidebi as representing the interest of defendants 15 and 16 of the earlier suit, to Ramsarup Serogi as the successor of defendants 13 and 14 of that suit, to Bijonlal Chakravarty as representative of defendants 17 and 18 and to Radhika Prosad Lahiri who was defendant 12 in the first partition suit. After this partition suit was disposed of, Sukumar Mukherjee and Sachidebi instituted a suit for apportionment of the rent due in respect of Dolui's tenancy held by Sarat Chandra Khan Bhaduri and for recovery of rent on the basis of the apportionment made. This was Money Suit No. 140 of 1929. Sarat Chandra Khan Bhaduri was the principal defendant in the suit and Bijonlal Chakravarty and Ramsarup Serogi were made proforma defendants. Radhika Prosad Lahiri to whom also a portion of the lands of the tenancy was allotted was not made a party at all. This suit also ended in a compromise, the material terms of which were as follows: (1) The area of the tenancy was taken to be 17 cottas as against the reputed 21 cottas and rent was assessed proportionately as L 12-12-0 annually in place of the original rental of L 15-12-5 gandas; (2) The rental was divided half and half, L 6-8-0 being payable to Sukumar Mukherjee and Sachidebi and the other L 6-8-0 to Ramsarup Serogi. Bijonlal Chakravarty was given no share in the rental and the compromise stated that he had no interest in the land. The nature of the tenancy was left open.

5. Some time after this, in 1933, Ramsarup Serogi brought a suit, being Title Suit No. 466 of 1933, for recovery of khas possession of the quantity of land that was allotted to his share out of the lands comprised in the tenancy of Doluis on evicting Sarat Chandra Khan Bhaduri who was alleged to have only a ticca tenancy in the same and whose tenancy was determined by a notice

to quit. During the pendency of the suit, the plaintiff transferred his interest to Bijonlal Chakravarty, defendant 1 in this suit. The trial Court dismissed the suit. On appeal, the decision of the trial Judge was reversed and the suit was decreed. This decision was affirmed in second appeal by this Court. It is said that in execution of this decree defendant 1 threatened to turn out the plaintiff who was in possession of 4 cottas of land as a permanent sub-lessee under the potta granted by Sarat Chandra Khan Bhaduri to Behari Lal on 21st August 1907, and the plaintiff was thus obliged to institute the present suit.

6. The allegations of the plaintiff in substance were that the Doluis had permanent right in the 21 cottas of land which constituted their tenancy and Sarat Chandra Khan Bhaduri as assignee of the interest of the Doluis had permanent rights in the same which he asserted all along as is testified to by the various permanent sub-leases created by him. It is said that the decrees in the two partition suits and also in the subsequent apportionment suit and the suit for ejectment were fraudulent and collusive and they were not binding on the plaintiff. The plaintiff, therefore, prayed for declaration of his permanent tenancy right in the land in suit and for an injunction restraining defendant 1 from evicting him from the said lands in execution of the decree obtained by him against Sarat Chandra Khan Bhaduri. The suit was contested by Bijonlal Chakravarty, defendant 1 and his contentions inter alia were that the Doluis had only a ticca tenancy right in the lands held by them and Sarat Chandra Khan Bradbury could not acquire higher rights by his purchase. The permanent sub-leases, granted by Sarat, were, it is said, of no avail against the proprietors of Choudhurybagan and could not endow the plaintiff with any non-evictible right in the lands in suit. It was further averred that the decrees obtained in the partition suit and also in the subsequent suits for apportionment and ejectment were perfectly valid and were not vitiated by fraud or collusion, and the plaintiffs as subtenants were bound in law by the decree for eviction passed against their lessor. The Munsif who heard the suit gave effect to the contentions of the defendant and dismissed the plaintiff's suit. On appeal the decision was affirmed by the Subordinate Judge of Howrah. The plaintiff has now come up on second appeal to this Court. The two points which require determination in this appeal and upon which arguments have been advanced at considerable lengths by the learned advocates on both sides are, first, whether the tenancy of the Doluis which was purchased by Sarat Khan Bhadury was a permanent or a ticca tenancy, and secondly, whether the decree for ejectment which is obtained by defendant 1 against Sarat Khan Bhadury is binding on the present plaintiff who purports to hold a permanent sub-lease under him.

7. So far as the first question is concerned, it is an admitted fact that there is no document in writing under which the tenancy of the Doluis came into existence. Whether the tenancy was permanent or otherwise at its inception, must, therefore, be an inference from facts which have been admitted or proved in this case. It is now settled by the pronouncements of the Judicial Committee that the question, whether a tenancy is permanent or not, is a legal inference from proved facts and though the findings of fact properly arrived at by the first appellate Court are binding on the High Court, its conclusions as to their effect in law are not; and this Court, therefore, is free to draw its own conclusion as to the permanent character of the tenancy provided that no inference of permanency could be drawn unless the facts and circumstances are such that they are not explicable on any other hypothesis : see *Dhannamal v. Motisagar*[1], *Shankar Rao v. Sambhu*[2], It is also well established that the legal inference of permanency is to be drawn from the ascertained facts taken as a whole. It is not proper to take each element by itself and to reject them one after another as insufficient. On the other hand, the effect of a

number of facts pointing to permanency may altogether be destroyed by one piece of negative evidence: see *Debendra Nath v. Pashupati*[3],

8. We will consider the facts admitted and proved in this case in the light of the above principles. It has been found as a fact by both the Courts below that the origin of the tenancy held by the Doluis is unknown. It came into existence long before the passing of the Transfer of Property Act and the terms under which the tenant was let into possession cannot now be ascertained. It is said that the plaintiff failed to prove that the tenancy was anterior to the Permanent Settlement of Bengal, but that is quite immaterial for our present purposes. The lower appellate Court has held definitely that the tenancy is residential in its character and the lands have all along been used for purposes of residence. The Court of appeal below has also in a way come to the conclusion that there is no available evidence to show any variation in the rate of rent. In the earliest document (Ex. 21) relating to the tenancy which is dated 80th July 1879, the annual rent payable for it is stated to be L 15-12-5 gandas. The same rental is repeated in Exs. 2-J and 2-H which are of the years 1898 and 1899, respectively. Thus the rent remained constant between 1879 and 1899. As has been said already, in the year 1900, Sarat Khan Bhadury created a permanent sub-lease in favour of Sriram Chandra Pal by a potta Ex. 4A. In this document the rent of the superior tenancy was stated to be L 15-4-0 a year though in the subsequent documents of 1903 and 1906 the rent was again described as L 15-12-5 gandas. We think that the Subordinate Judge was quite right in holding that the potta (EX. 4-A) does not show any variation of rent in the year 1900 and the statement of rent made in that document might be due to a mistake. In the compromise filed in Money Suit No. 140 of 1929 the area of the tenancy was stated to be 17 cottas instead of 21 cottas and the rent was reduced to L 12-12-0. This amount, as the Subordinate Judge points out, bears the same proportion to L 15-12-0 as 17 cottas bears to 21 cottas. So, there was no variation of rent even in 1929. The Subordinate Judge lays stress on the fact that there is no evidence of realization of rent adduced in this case. We do not think that the plaintiff is to blame for that. He is in the position of a sub-lessee and it is difficult for him to prove realisation of rent by the superior landlords from his own lessor. Sarat Khan Bhadury, or rather his heirs were the best persons to say as to whether the rent was ever realised from them at any varied rate, but they kept altogether reticent on the matter and did not choose to produce their rent receipts. So far as the evidence on the record goes, there is nothing to show that there was any variation of rent and it is not disputed that on the basis of the compromise decree in Money Suit No. 140 of 1929, rents were as a matter of fact realised at the same rate. It must be held therefore that the tenancy has been held at a uniform rate throughout. Mere payment of rent at a uniform rate is not ordinarily an unequivocal fact from which an inference of permanency of the tenancy necessarily follows, but the position is different where the land is situated in a growing town where land values have increased abnormally: see *Bireswar v. Trailakya*[4], In this case the land is situated within the Howrah Municipality and in a most populous part of the town. It is

[1] AIR 1927 PC 102 : 1927-26-LW 634 : 101 Ind. Cas. 355
[2] AIR 1940 PC 192 : 1940-52-LW 966
[3] AIR 1932 Cal 198 : 136 Ind. Cas. 889
[4] 96 I.C. 315

admitted that the price and letting value of lands in that locality have increased many times within the last 30 or 40 years. If is such circumstances the rent remained unchanged ever since the inception of the tenancy, a presumption can certainly be drawn.

9. There are indeed no pucca structures on the land. The finding of the lower appellate Court is that there are pucca privy and pucca plinth but the house is a two storeyed mudcotta which was erected by the plaintiff's predecessor after his purchase. The learned Judge calls the structures

semi-substantial. Be that as it may, we cannot say that the structures are of such a character that a tenant cannot without imprudence raise in the absence of a permanent right, though at the same time we do not think that it is absolutely necessary that pucca structures should exist in order that presumption of permanency may arise: vide *Kamal Kumar Dutta v. Nandalal Duley*[5], There have been several instances of succession in this case, but when the tenancy is an old one, devolutions by inheritance must necessarily take place and their value cannot be rated too high having regard to the general reluctance on the part of the landlords in this part of the country to eject a tenant simply because his father or grandfather had died. But the most important circumstance which, in our opinion, weighs very strongly in favor of the plaintiff is the fact that the tenancy has been treated as transferable at least from 1879 which was prior to the passing of the Transfer of Property Act. It is well settled that in the absence of a custom non- permanent tenancies created before the Transfer of Property Act were not transferable. Consequently, if in case of a tenancy of unknown origin we find that there are instances of transfer, one of them being prior to the passing of the Transfer of Property Act, and the transferees have been accepted as tenants without any payment of selami or increase of rent, we can certainly infer that the tenancy must have been a permanent one at its inception. The earliest transfer on record in this case is a sale by Kailash and Balaram to Gopal on 30th July 1879. The second one was about 11 years afterwards when Haridas the other co-sharer, transferred his one third share to the benamdar of Sarat Khan Bhadury. Lastly, there was a sale on 1st July 1899, by Gopal to Sarat. Prom this last document, it is quite obvious that Gopal was accepted as a tenant by the landlords. The Subordinate Judge observes in his judgment that there is no indication that the transfer in favor of Sarat was recognized by the landlord as soon as made. As has been already said, it is difficult for the present plaintiff to prove realization of rent from Sarat. That Sarat was accepted as a tenant and on the same rent as before is conclusively established by the proceedings in Money Suit No. 140 of 1929. The transferees all along remained in possession of the land and dealt with it as their own. It is not necessary, in our opinion, to show that the landlords expressly recognized the mourashi character of the tenancy so long as they accepted the transferees as tenants and allowed them to remain on the land in the same way as before without making any claim of higher rent or selami. The fact that no mention was made of this permanent right in Doluis' tenancy in the partition suits of 1906 and 1926 does not, in our opinion, affect the situation in the least. We will deal with this aspect of the case later on.

10. Mr. Chandra Sekhar Sen, appearing for the respondents, has argued before us that as Sarat was one of the landlords it was not possible for his cosharers to eject him from the land as a notice to quit would have to be signed by all the landlords including Sarat Khan Bhadury himself. The only remedy, he says, of the cosharer landlords to get rid of the tenancy right was to institute a suit for partition and this they did in the year 1906. We are

[5] AIR 1929 Cal 37 : (1929) ILR 56 Cal 738

not at all impressed by this argument. If, as a matter of fact, the tenancy was a ticca tenancy, it could not have been transferable as it had its origin prior to the passing of the Transfer of Property Act. The transferee, therefore, could not acquire any rights by his purchase and it was not necessary for the landlords to serve upon him any notice to quit at all. The other cosharer landlords could very well institute a suit for eviction and recover possession of the property to the extent of their shares. The partition suit of 1906 was brought by Umesh who was a stranger purchaser and presumably unacquainted with the affairs relating to this particular tenancy. The suit for partition was instituted by him to have his one-fourth share in the property demarcated by metes and bounds. The purchase by Sarat of the tenancy of the Doluis had nothing to do with the

institution of the partition suit.

11. The other point that requires consideration is whether the decree for possession obtained by defendant 1 against Sarat Khan Bhadury is binding on the plaintiff, he being a sub-lessee under the latter. The question is of some importance and the judicial opinion on this point does not seem to be quite uniform. When the period of a lease expires or the [ease is determined by a proper notice to quit, there is no doubt that the sub-lease, if any, created by the lessee comes to an end. It is not necessary for the lessor to serve a notice to quit on the sub-lessee as well; the underlease is determined by the notice to quit that is given to the lessee (vide Foer on Landlord and Tenant, 6th Edn. p. 683). The same consequences arise when a forfeiture is incurred by the tenant unless he has collusively or fraudulently brought it about; though the position is different in case of surrender as the lessee cannot derogate from his own grant and cannot surrender his interest to the prejudice of the under-lessee (vide Section 115, *Transfer of Property Act. G. W. By. Co. v. Smith*[6], on appeal, *Smith v. G.W. By. Co*[7]*.,* Though the sub-lease is extinguished when the lease itself is determined by lapse of time or service of proper notice to quit, the question arises whether in a suit for eviction instituted by the lessor against the lessee on any of these grounds the sub-lessee is a necessary party, or whether the latter would be bound by the decree which the lessor might obtain against the lessee and could be evicted in execution of the same. In English law it is settled that if a sub-lessee remains in possession after the lessor has obtained a judgment against the lessee, he can be turned out of possession by the sherif in execution of the writ of possession and for the wrongful occupation of the sub-lessee the lessee is bound to compensate the lessor: see *Boe v. Wiggs*[8]

12. In *Minet v. Johnson*[9] the plaintiff had obtained a judgment to recover possession of a house against one Johnson. The sheriff in pursuance of the writ of possession ejected one Hartley who was in possession of the premises and the latter thereupon applied to the Court to set aside all the proceedings and restore possession of the house to him. Lord Rsher, M.E., held that if Hartley was a tenant of Johnson he must go out, but as he claimed an independent title he had a right to be added as a party defendant to the suit under Order 12, Rule 25 of the Rules of the Supreme Court and allowed to defend the suit. The result was that the judgment and the writ of possession were set aside so far as they affected Hartley and liberty was given to him to be added as a party defendant to the suit under Order 12, Rule 25 of the Rules of the Supreme Court. This view has been accepted in subsequent cases and reference may be made, among others, to the decision in

[6](1876) 2 Ch. D. 235
[8]2 Bos. & P. (N.B.) 330
[7](1877) 3 A. C. 165
[9](1891) 63 L. T. (N. S.) 507

Berton v. Alliance Economic Investment Co[10]*.,* In *Geen v. Herring*[11]*,* the owner of the reversions upon four leases brought four actions for recovery of houses comprised in them on the ground of forfeiture for breach of covenants to repair contained in the leases. He joined as defendants the weekly tenants holding under the lessee numbering over 119 but the lessee himself was not made a party. It was held that no costs should be allowed to the plaintiff for service of writs upon the sub-tenants who were not necessary parties, to the suit at all. In English law the position seems to be this: If the plaintiff in an action for recovery of possession does not make all the persons in possession parties defendants and the sheriff in execution of the writ of possession turns out somebody who is in actual possession of the same, two questions would arise. If the person in occupation is a sub-tenant under the defendant he would have no remedy against the plaintiff as his interest would stand annulled with that of his lessor. But if he claims an independent interest in the property in his occupation which he can assert against the plaintiff he has a right to be

added a party to the suit and defend it under Order 12, Rule 25 of the Rules of the Supreme Court.

13. The view taken by the Bombay High Court is somewhat different though the conclusion it has reached is almost the same. It has put a different interpretation altogether upon Rules 98 and 99 of Order 21, Civil P. C., and has held that when a landlord decree, holder in attempting to take possession of the property in execution of the decree obtained against his lessee, is resisted by the sub-tenant the latter cannot be said to hold the property on his own account within the meaning of Order 21, Rule 99, Civil Procedure Code, nor is he in possession on account of some person other than the judgment-debtor: vide *Jairam Jadowji v. Nowroji Jamshedji*[12], Consequently, he cannot claim that the application should be dismissed under Order 21, Rule 99, Civil P. C. This interpretation seems to us to be somewhat far-fetched and, is directly against the view taken by Sir George Rankin in the case referred to above. The language of Rules 98 and 99 of Order 21, Civil P.O., is undoubtedly defective. In our opinion, the proper way to approach the question would be to ascertain on principles of general law as to whether a sub-lessee who is not made a party to a suit for ejectment brought by the lessor against the lessee can be said to be bound by the decree made therein. If he is so bound he would undoubtedly come within the purview of Order 21, Rule 35, Civil P. C., and the provisions of Order 21, Rules 98, and 99, Civil P. C., would not be attracted to such cases at all. Now, it is a settled principle of law that a judgment inter parties can bind only those who are parties or privies to it. In the Law of Estoppel, as Bigello points out, one person can become a privy to another, (1) by succeeding to the position of that other as regards the subject of the estoppel and (2) by holding in subordination to that other. The ground of privity is property and not personal relation. To make a man privy to an action he must have acquired an interest in the subject-matter of the action by inheritance, succession or purchase from a party subsequent to the action or he must hold the property subordinately (vide Bigello on Estoppel, Edn. 6, pp. 158 and 159). Thus, a man cannot be privy to a judgment by succession unless he has acquired the property to which the judgment relates by way of inheritance, purchase etc., subsequent to the institution of the suit. Nobody can represent an interest which he has already parted with and consequently a transferee prior to the institution of the suit cannot be privy to or bound by a judgment obtained against the transferor; but the position may be different in the case of the subordinate holder, e.g.,

[10] (1922) 1 K. B742

[11] (1905) 1 K. B. 152

[12] A.I.R. 1922 Bom. 449

when a sub-lessee holds under a lessee. If the interest of the subordinate holder is of such a character that it is entirely dependent on that of the superior holder and automatically comes to an end as soon as the superior interest is extinguished, the subordinate holder would be a privy to the judgment obtained against the superior holder even though he was not a party to the action. If the interest of the lessee, therefore, is determined in such a way that the interest of the sub-lessee is extinguished along with it, a lawful judgment against the lessee which gives effect to the determination of the lessee's rights must of necessity extinguish the subordinate rights of the under-tenant. In such cases, it is immaterial whether the interest of the under-tenant began before or after the suit. In our opinion, therefore, a sub-lessee would be bound by a decree for possession obtained by the lessor against the lessee if the eviction is based upon a ground which determines the under-lease also, unless he succeeds in showing that the judgment was vitiated by fraud or that the lessee collusively suffered the decree to be passed against him. If, however, the decree for possession proceeds on a ground which does not by itself annul the sub-lease, the

decree would not be binding on the sub-lessee nor could the sub-lessee be evicted in execution of the decree if he had acquired a statutory right or protection, e. g., under the Bengal Tenancy Act which he could assert against the lessor. Within these limits, we think a sub-lessee could be held to be bound by a decree obtained against his lessor and when he is so bound he can undoubtedly be ousted in execution of the decree obtained against his lessor under Order 21, Rule 35, Civil P. C, though he was not made a party to the suit itself.

14. This being our decision, it must be held on the facts of this case that the decree obtained by defendant 1 against the plaintiff's landlord in Title Suit No. 466 of 1933 would be binding on the plaintiff, unless he succeeds in showing that it was vitiated by fraud or collusion. On this point the learned Judge has recorded his finding against the plaintiff. It seems to us that the Subordinate Judge's approach to this question has not been proper, and, in arriving at the finding, he omitted to consider several facts noticed by him in his judgment which are essential for the right determination of the case. It is true that Sarat Chandra Khan Bhadury filed a written statement in the title suit setting up his permanent right, and the case was finally disposed of by this Court in second appeal. A suit might be ostensibly defended, but yet the defendant might fraudulently suffer a decree to be passed against him. Fraud and collusion often lie deeper than what appears on the surface of things. It is perfectly true that charges of fraud and collusion must be properly proved by established facts or inferences drawn from them, and suspicions and surmises are not permissible substitutes for those facts or inferences. But that, as their Lordships of the Judicial Committee pointed out in *Satish Gbandra v. Satish Kantha*[13], does not require that every artifice or contrivance resorted to by one accused of fraud must be completely unravelled and cleared up and made plain before a verdict can be given against him. What is necessary in such cases is to take the facts admitted and proved as a whole and to draw the legitimate inference therefrom.

15. It is not disputed that Sarat Chandra Khan Bhadury purchased the tenancy of the Doluis as a permanent tenancy, and that he created permanent sub-tenancies under him on taking heavy selamis from the under-tenants. It is not necessary for us to speculate on the motive which induced Sarat Khan Bhadury to suppress these facts during the partition

[13] A.I.R. 1923 P.C. 73

suit of 1906. We may assume as has been suggested by the learned advocate for the respondent that he honestly believed that the Dolui's tenancy was a precarious one. Even then he had a clear duty to the sub-tenants under him in whose favour he purported to create permanent rights. If the existence of these sub-tenants had been disclosed or the sub-tenants had been made parties to the partition proceeding, the lands covered by the sub-tenancies could certainly have been allotted to Sarat Khan Bhadury, and the under-tenants could have enjoyed their permanent rights under him. As a matter of fact, the Commissioner in the partition suit allotted those lands to other people. Sarat Khan Bhadury did protest against these allotments and succeeded in inducing the Judge to discard the Commissioner's report, but the strangest thing found by the Subordinate Judge is that even after the Commissioner's report was set aside Sarat Khan Bhadury began to possess the very lands that were allotted to his share and started creating sub-leases in respect of the same. The finding is that in 1926 when the second partition suit was brought, Sarat Khan Bhadury had already parted with the entire land allotted to his share under the ineffectual partition decree, in favour of different sublessees under the pottas (Ex. E series). The solenama in the partition suit of 1926 was thus a device to legalise the acts which he had already done without any legal authority whatsoever. It was certainly a fraud on the, sub-tenants to whom lands had been given in

permanent right out of the lands comprised in Dolui's tenancy. They were in the first place denied the right of demanding that the lands demised to them should be allotted to their landlord, and, in the second place, they could not claim permanent tenancies in respect to the lands which were actually allotted to the share of Sarat Khan Bhadury, for these lands had been already dealt with by him, and let out to other people, long before the partition suit was brought. It is against this background that the subsequent events are to be looked at and considered.

16. The ejectment suit of 1933 was brought by Ram Sarup Serogi in respect of that portion of land comprised in Dolui's tenancy which was allotted to his share on the basis of the solenama in the partition suit of 1926. The allotments were made on the footing that the lands of Dolui's tenancy were the khas lands of the landlords or were, at any rate, not burdened with any permanent tenancy. Sarat Khan Bhadury was a party to the solenama and not only was he a consenting party but he had already created sub-leases with regard to the very land, that he wanted to have in his share. He could not certainly go against the solenama, and it would be nothing but hardihood on his part to come and say that he had permanent rights in the lands of Dolui's tenancy. It appears that side by side with the ejectment suit of 1933 there was another suit instituted by the landlords for an injunction against a sub-tenant of Sarat Khan Bhadury in respect to a portion of Dolui's lands, who wanted to raise permanent structures in his land. Sarat Khan Bhadury was a party to that suit and felt constrained to support the case of his sub-tenant. The judgment in the suit shows that he did not even care to produce the earlier documents of transfer relating to Dolui's lands which showed that the tenancy was transferred as a mourashi mokarari jama even before the passing of the Transfer of Property Act. The Judge relied very much upon this circumstance in coming to the finding that the tenancy was not permanent. The decision in the ejectment suit was based entirely upon the decision in this injunction suit. We think that all these matters which appear on the record have not been considered by the Subordinate Judge in coming to his conclusion on this point, and the omission amounts to an irregularity which has affected the decision in its merits. In our opinion, the matter requires further investigation.

17. We, therefore, set aside the judgment and decree of the lower appellate Court and send the case back in order that the question, namely, whether the decree in Title Suit No. 466 of 1933 is vitiated by fraud or collusion, may be investigated. It would be open to the Court below to direct any additional evidence to be adduced on the point if it considers proper. If, on a consideration of the entire evidence, the Court finds that the judgment in the ejectment suit is not vitiated by fraud or collusion, the previous order of dismissal of the plaintiff's suit would stand. On the other hand, if fraud or collusion is established, the plaintiff's suit will be decreed. Each party will bear his own costs up to this stage. Costs subsequent to remand will be in the discretion of the lower appellate Court.

Akram, J.

18. I agree.

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