CALCUTTA HIGH COURT

Subodh Chand Mitter

Vs

Bhagwandas Sha

(Lodge, J.)

11.07.1946

JUDGMENT

Lodge, J.

1. This appeal arises out of a suit for ejectment. The original plaintiff, Subodh Chand Mitter was the Receiver in charge of a debutter estate, under a scheme of management framed by this Court in Suit No. 258 of 1886. The property now in dispute belongs to that debutter estate. It was formerly known as 124 Cornwallis Street but is now described as 43/4 Baghbazar Street. Prior to 1933, one Prasadi Saha was in possession of the land as a monthly tenant. The Receiver obtained a decree against the said Prasadi Saha for arrears of rent. In execution of that decree, the structures on the land were put to sale and were purchased by the original defendant, Bhagwandas Saha.

2. Thereafter Bhagwandas Saha entered into negotiations with the Receiver for a lease, and was put in possession of the property. He erected substantial structures on the property under the encouragement and with the active assistance of the Receiver.

3. Then in the year 1940, the Receiver Subodh Chand Mitter instituted the present suit for ejectment and for recovery of arrears of rent. The suit was contested. The suit was heard by Gentle J. and was dismissed with costs.

4. Gentle J. accepted the defence version of the negotiations between the Receiver and Bhagwandas Saha and came to this finding of fact: The defendant purchased the old huts at the sale in the Small Cause Court for the purpose of repair and to live there. The plaintiff himself suggested that the defendant should demolish the huts, erect a substantial and good building upon the land which the plaintiff was in a position to let to him and in the event of the defendant doing this, he would never be evicted nor ejected by the plaintiff from the land. There was also the oral promise that the defendant would become a permanent tenant. The plaintiff himself carried out

the negotiations to obtain the sanction of the Corporation and was paid by the defendant for so doing, a sum not less than Rs. 100. In addition, I find also that a sum of Rs. 500, and not Rs. 125 was paid by the defendant as salami, but the plaintiff entered in the estate account books that a sum of Rs. 125 has been received as a fee toregister him as a tenant of the estate. And in a later portion of the judgment, the learned Judge added this description of the facts: In the case before me that is not the position. The plaintiff expressly informed the defendant that if he built a new structure, he would not be evicted nor ejected, and further he not only encouraged him, but he participated in the structure being built by undertaking for reward which he received, all the negotiations with the Municipal Authorities to obtain the necessary sanction for the building to be erected. Gentle J. accordingly held that the case was distinguishable from Ariff v. Jadunath Mazumdar and also that the plaintiff was estopped from recovering possession of this property from the defendant, and as-stated above, ordered that the suit be dismissed with costs.

5. Plaintiff appealed. When the appeal first came up for hearing, there was talk of compromise, and the hearing was adjourned to give the parties an opportunity to compromise. No compromise however was effected.

6. When the appeal nest came up for hearing, the case in Ariff v. Jadunath Mazumdar was cited before the Court. The question was then raised whether the respondent was still in a position to institute a suit for specific performance of the oral contract entered into by the parties to grant a permanent lease of this property. An adjournment was granted to enable the parties to examine the position from this point of view. We have been in-formed that suit for specific performance of that contract is now barred by limitation.

7. In the meantime the original plaintiff and the original defendant have both died. Amar Chand Mitter has been appointed Receiver of the debutter estate and has been substituted in place of the deceased appellant Subodh Chand Mitter. Badri Prosad Saha has been substituted in place of the original respondent, Bhagwandas Saha.

8. For the appellants, Mr. S.P. Chowdhury has stated that for the purpose of this appeal he does not question the findings of fact of the Court of first instance; he has argued that on those findings of fact, the suit ought to have been decreed.

9. During the hearing, however, arguments were placed before us which seemed to suggest that the findings of fact arrived "at by Gentle J. differed from the case made out by the defendant. It seems desirable, therefore, in order to understand what exactly are the findings of fact, to set out the evidence of the defendant, on which those findings were based.

10. The material evidence is to be found in question and answers Nos. 3, 4, 5, 8, 9, 21 in

examination-in-chief and Nos. 41, 42, 44, 45, 47, 48, 49, 54, 55, 82 and 84.

3 Q.--Who is the landlord?

A.--Subodh Chandra Mitter. He wanted me to make some arrangement with him with regard to the huts that I had purchased. Ho asked me to make some arrangement with him and to become a permanent tenant of his, I asked him toilet me know as to how I could become a tenant of his. He said that I could become a permanent tenant if I paid him a salami of Rs. 1000 and a monthly rent of Rs. 101.

4 Q.--Then what happened. Tell his Lordship?

A.--The rent of that land had been Rs. 70. I told him that I was not in a position to pay him such a salami and such a high rent. Nothing came off on that day and after I had had this conversation with him I came away. Ten or 12 days thereafter I again went to him, I told him that I was willing to become a tenant of his and I asked him to let me know the proper terms. He said you pay me that-salami and that rent, the salami and the rent that I have already told yon about, and then you get your house constructed and become a permanent tenant of mine; I shall get your plans sanctioned for your house. I told him that I was quite willing to become a permanent tenant of his but that I was unable to pay such a high salami and such a high rent. I further told him that the rent had been only Rs. 70.

5 Q.--Kindly tell his Lordship what happened after that. How much did you pay as salami?

A.--Then it was fixed up at a salami of Rs. 500 and a rent of Rs. 101.

8 Q.--After you paid salami what happened? How did you come to build that house?

A.--After I had paid him that salami of Rs. 500 he asked me to sell off those huts and thereupon I sold the huts.

9 Q.--Then what happened?

A.--Thereafter, I went to the Babu Mr. Subodh Chandra Mitter and I asked him as to how the house was to be built. He told me to pay him the costs required for the plan and said that he would get the plan sanctioned and further said that I could then get the house constructed.

21 Q.--Did Subodh Mitter come to the spot where the building was being erected?

A.--Yes, they always used to go there and inspect the work of construction. Subodh Mitter, his son and Subodh's brother, Bimal Chandra Mitter. Subodh Mitter used to ask me to get the house

properly constructed, and Subodh Mitter told me that the land was debutter property and that there would never be any occasion for him to eject me. He asked me to get the house properly constructed. He told us that I could stay there permanently and asked me to pay the rent regularly, and he also told me that he was the owner of the property and that there would be no trouble. He also said that if ever any trouble arose he himself would be responsible for it, and asked me not to worry.

41 Q.--Do you seriously suggest that not knowing the plaintiff before 1933 at the time you entered into a tenancy with him you were not careful about the actual terms of the tenancy because you were not a person belonging^ Calcutta?

A.--I found that other people were building houses similarly and occupying them. I thought I would build a house for myself and live there. Besides Subodh Mitter asked me to build a good house, so that I may be able to live there permanently.

42 Q.--We will come presently to what Subodh Mitter is alleged to have told you. Tell us before that. Was it because others were building houses, and living there that led you to enter into an arrangement with this plaintiff?

A.--After I had purchased the huts at the sale I thought of building a house.

44 Q.--So it was the general impression that other persons were building houses and living there that led you to think of building a house on Suhodh's land?

A.--Subodh Miiter told me emphatically that he was going to enter into a permanent arrangement with me. If he had not done that why on earth would I have spent such a large amount and built a house there?

45 Q.--That is what 1 want to know. Who bought these huts for you in the Small Cause Court. Did you have the assistance of a lawyer?

A.--No.

47 Q.--When did Subodh tell you that?

A.--He had been telling me that all along, ever since I started going to his place.

48 Q.--Do you seriously suggest that, you were not contemplating building a house on somebody else's land at a very large expense without knowing what rights-you have in respect of the land?

A.--Why should I spend all this money of my own-on another man's property? Subodh Mitter

told me emphatically that he would never raise any trouble. He said that he was a zemindar and the owner of the land, and he further said that the land was there for the purpose of being let out, and he said that if I built a house there he himself would be responsible and would see that I was never ejected. He promised that ho would never eject me.

49 Q.--Do I take it you were wholly content on that?

A.--The zemindar was telling me quite emphatically that he would never eject me, and he was further asking me to construct the house and was telling me that he would get the plans sanctioned. It was only upon his giving that undertaking that I was satisfied and built a house.

54 Q.--You told us a few minutes ago that you originally intended to have a house constructed on the land?

A.--I never had any such idea at the very start. It was after all this that I have told you had taken place that the idea of building a house arose, otherwise I would have let the huts remain there, the huts that I had purchased.

55 Q.--Didn't you tell us in your examination-in-chief to my learned friend's question that it was originally your intention before you purchased the house in the Small Cause Court sale to build a house on the land, also in answer to me?

A.--No. I purchased the huts with the object of repairing them and living in them.

82 Q.--Whether you constructed a house on the land or you did not was a matter of indifference to him because the rent agreed upon had to be paid in any event, isn't that so?

A.--I had purchased those huts at the sale and my idea was to repair those huts and to live there, it was upon his asking me to build a house that I got the house constructed otherwise why should I have done it.

84 Q.--Still that is not an answer to my question. I give you another chance to answer my question which I think is very important?

A.--It was he who told me to break up those old dilapidated huts and to throw them away and it was he who asked me to build a house. It was upon that, that I built the house otherwise why should I have built a house on another man's land.

11. This is the evidence which Gentle J. believed and on which he based his findings of fact. Prom this evidence and from the finding of fact, we therefore derive the following facts:

respondent purchased the huts of Prasadi Sana before entering into any negotiations with the appellant for a lease. Before he had taken any steps in this direction,9 the appellant sent for him, and in the first interview suggested that respondent take a permanent lease of the land and erect substantial structures on it. Respondent was willing to take a permanent lease, but considered appellant's terms too high. Ultimately respondent agreed to take a permanent lease, agreeing to pay a salami of Rs. 800 and a monthly rent of its. 101. Appellant agreed to grant him a permanent lease on these terms, agreed never to evict or eject him if he erected substantial structures, agreed to assist respondent in getting the building erected and accepted payment from the respondent for his work in connection with obtaining sanction for the building from the municipal authorities.

12. The respondent seems to have entered into possession of the property while the terms were still being discussed, but he did not commence to erect any building until after the terms of the lease had been agreed upon: Thereafter respondent paid Rs. 500 to the appellant as salami, made regular payments of rent at the rate of Rs. 101 per month, and took steps for the erection of a building. The building was erected within the course of two years, and the respondent deposed that he spent Rs. 15,000 or Rs. 16,000 on that building.

13. Gentle J. held that the building was a substantial structure. This finding too has not been challenged, and is borne out by the photographs, which were produced and exhibited in the case.

14. In this state of facts, two questions arise for decision. They are set out as alternatives in issue 2 in Gentle J.'s judgment. They are: Is the plaintiff estopped by his own conduct from evicting the defendant? In the alternative, is the plaintiff bound to pay the value of the structures standing on the land as compensation to the defendant as a condition precedent to an order of eviction?

15. Mr. S.P. Choudhury has argued that the facts of the present case are not different in any material particular from the facts in Ariff v. Jadunath Mazumdar and that a decision similar to the one given in that case ought to have been given.

16. Thus if the relevant facts in the present case are stated in the manner in which the relevant facts in Ariff v. Jadunath Mazumdar were stated in the judgment of the Judicial Committee, they will be these: In 1340 a verbal agreement was made between the appellant and the respondent for the grant to the respondent by the appellant of a permanent lease of a small parcel of land at a total rent of Rs. 101 per month and on condition that a salami of Rs. 500 be paid by the respondent. In anticipation of the execution of the lease, the respondent was let into possession in Bhadra 1340 B.S. and shortly thereafter he erected certain structures on the land with the knowledge and approval of the appellant. No lease was ever executed.

17. On this statement of facts, it is difficult to distinguish the present case from Ariff v. Jadunath Mazumdar . Mr. A.C. Mitra for the respondent has contended that there is one material difference between this case and Ariff v. Jadunath Mazumdar . In the present case, after the verbal agreement for the grant of a permanent lease was made, the appellant urged the respondent to erect the structures and took an active part in obtaining sanction for those structures and assured the respondent that he would never be ejected or evicted.

18. Mr. Mitra argued that the respondent in erecting the structures acted not merely on the verbal agreement to grant a permanent lease, but on the assurance given by the appellant that he would never be ejected or evicted. Mr. Mitra argued that in Ariff v. Jadunath Mazumdar the tenant's conduct was referable wholly to the verbal agreement, but that in the present case the tenant's conduct was referable not to the verbal agreement but to the conduct of the appellant and to his repeated assurances.

19. Mr. Mitra asked us to hold that on this ground a distinction could be drawn between the facts of this case and the facts in Ariff v. Jadunath Mazumdar and to hold that the present case was one of the exception cases whose existence was recognised in the judgment in Ariff v. Jadunath Mazumdar . Mr. Mitra relied strongly on a passage in Ariff v. Jadunath Mazumdar . The passage runs:

The structures were erected on the land many years before that date, and they were erected not in any mistaken belief by the respondent of his rights in regard to the land but in assertion of rights which he correctly believed to be his; not by reason of any encouragement or abstention on the part of the appellant, but by reason of the agreement which he was then entitled to enforce against the appellant.

20. In my opinion, this passage does not indicate any real difference in the facts. The assurance given by the appellant that respondent would never be ejected or evicted, was merely a repetition of the promise to grant a permanent lease: and the encouragement given by the appellant in the matter of erecting the structures was given in furtherance of the agreement to grant a permanent lease. It is 'as true in the present case as in Ariff v. Jadunath Mazumdar that the structures were not erected in any mistaken belief by the respondent of his rights in regard to the land but in assertion of rights which he correctly believed to be his.

21. I take the last portion of the passage cited to contrast cases where the tenant acted by reason of encouragement or abstention on the part of the landlord independent of any contract, with other cases in which if there was encouragement or abstention, such encouragement or abstention was referable to the contract.

22. Mr. Mitra argued further that even in Ariff v. Jadunath Mazumdar , the Judicial Committee recognised certain equitable principles as still applicable and indicated that in proper cases relief on the basis of those principles might be given.

23. The English cases relied on by Mr. Mitra fall into three classes: (1) Cases in which there was a valid oral contract of lease or transfer--which contract could not be proved in a Court of law owing to the provisions of the statute of frauds. Equity accepted evidence of part performance of the contract as proof of the contract and then enforced the oral contract, Maddison v. Alderson (1883) 8 A.C. 467. (2) Cases in which in fact there was no contract. But one party acting in the belief that he had good title, spent money on developing another party's land. The true owner, knowing of the mistake, encouraged the first party to spend the money or stood by in silence allowing the first party to spend the money. In English law, the true owner would then reap the benefit of the expenditure. Equity compelled the true owner to act as though there had been a valid contract between the parties, and the first party had been given the right which he believed he possessed. Ramsden v. Dyson (1865-66) 1 H.L.C. 129. (3) Cases in which there existed a valid contract, but owing to misrepresentation by the real owner as to the extent of the contract the lessee was induced to spend money either on land not covered by the contract, or on the assumption that a greater right had been conferred than in fact was the case. The true owner was estopped from denying the truth of his representation. Civil Service Musical Instrument Association v. Whiteman (1899) 68 L.J. Ch. 484.

24. In the first two classes of cases, the parties were held to be governed by the oral contract--express or implied. In the third class of cases, the true owner was estopped from denying the truth of representations of existing facts, which had been believed and acted on by the lessee--in other words these were eases of estoppel as contemplated by Section 115, Evidence Act.

25. In my opinion, the present case does not fall into any of these three classes. In the present case there was in fact a valid oral con-tract, which could be proved and could have been enforced if steps had been taken in time. Respondent, however, does not seek relief on the basis of that oral contract.

26. There was also no misrepresentation as to existing facts. Mr. Mitra suggested that appellant's assurance that the respondent would never be ejected or evicted, was such a misrepresentation. But that was a statement as to appellant's Attentions for the future, not a statement as to existing facts. Respondent--assuming a knowledge of law, as the Courts are bound to do--was well aware of the exact nature of his legal rights throughout, and there was never any misrepresentation with regard to them.

27. In this connection the observation of the Earl of Selborne in Maddison v. Alderson (1883) 8 A.C. 467 may be quoted:

Estoppel by representation is applicable only to representation as to some state of facts alleged to be at the time actually in existance and not to promises de future which if binding at all must be binding as eon-tracts.

In my opinion, none of the cases relied on by Mr. Mitra are of any avail to the respondent, and the present case must be decided in accordance with the decision in Ariff v. Jadunath Mazumdar .

28. The second question for our consideration is, whether respondent is entitled to any compensation for the structures erected by him. No English case on this subject has been placed before us which is of any assistance. And, obviously the English law is so different from the Indian law, that considerations applicable in England have often no application in India. In England structures become the property of the owner of the land. In India, under the provisions of Section 108(h), T.P. Act, the tenant may remove the structures provided that he leaves the land in its original condition.

29. In England there have been cases in which Courts of equity have held that the tenant was entitled to relief on the grounds of an implied contract, but instead of enforcing that implied contract, have given compensation to the tenant. In the only case actually placed before us by Mr. Mitra in this connection viz. Duke of Beaufort v. Patrick (1853) 17 Beav. 60 compensation was allowed to the real owner after holding that he was bound by an implied contract. The Indian cases relied on viz., Badal Chandra v. Debendra Nath and Karan Singh v. Budh Sen do not discuss the principles on which such compensation is to be given and seem to overlook the provisions of Section l08(h), T.P. Act. The only Indian case in which the principles are discussed is Darbari Lal v. Raneeganj Coal Association, Ltd. 31 A.I.R. 1944 Pat. 30 which is against the respondent.

30. It is true that in the present case, appellant induced respondent to erect the structures. It is true that appellant broke the oral contract. But respondent could have obtained specific performance of the contract or damages for breach of contract if he had taken action in time. He omitted to do so, and thereby lost the right to specific performance and to damages for breach of contract. He consented to remain on the land as a monthly tenant with only the rights and obligations of such a tenant. Now that the landlord seeks to exercise his rights in connection with such a tenancy, it is difficult to understand on what principles such exercise should be denied until compensation is paid, the rights to which has been lost owing to the negligence or acquiescence of the tenant.

31. Moreover, in Ariff v. Jadunath Mazumdar where the facts were very similar, the order of the

Court was merely that the tenant must be allowed a reasonable opportunity to remove the structures. I am, therefore, of opinion that the respondent is not entitled to any compensation for the structures erected by him.

32. In my opinion the appeal must be allowed, the judgment and decree of Gentle J. must be set aside and the suit be decreed in part as follows: The plaintiff is entitled to eject the defendant from premises No. 43/4 Bagh Bazar Street, Calcutta and to recover possession of the said premises. The defendant must be allowed six months time in which to remove his structures from the land. In case of failure to do so within that period, the plaintiff will be entitled to take possession through Court. The plaintiff is not entitled to recover any amount as arrears of rent inasmuch as the arrears have been paid into Court. But the plaintiff is entitled to withdraw the amount so paid into Court. The question of mesne profits is left open. The parties will bear their own costs throughout.

Chakravartti, J.

34. I have had the advantage of reading in advance the judgment prepared by my learned brother which he has just delivered and I agree entirely that the present case falls to be governed by the decision in Ariff v. Jadunath Mazumdar . As, however, we are differing from Gentle J., and the questions raised in argument appear to be of some general importance, I would like to state for myself my reasons for coming to our common conclusion.

34. Both the original plaintiff and the original defendant are now dead, but it will be convenient to refer to the parties as plaintiff and defendant. The original plaintiff was a receiver, but no question was raised as to whether assuming certain enquiries were available against him, they are equally available against his successor-in-charge who has been substituted for him and is now the appellant before us.

35. The facts and the findings have already been stated by my learned brother and need not be repeated by me. I would only add that the specific case made by the defendant in his written statement was that even at the inception of the tenancy, the plaintiff had purported to grant him a permanent lease. His own actings, he continued, had been on the basis that such a lease had been granted and would soon be put on a legal footing by the execution of a formal document. Paragraph 7 of the written statement where the defendant states the facts, as they were according to him, runs as follows:

7. This defendant further states that he took lease of the land in suit from the plaintiff from 1st Bhadra, 1340 B.S. for the purpose of building a residential house on the said plot of land with the clear understanding that the plaintiff would execute a formal and permanent lease in favour of the

defendant on payment of Rs. 500 as selami for the lease. The defendant accordingly paid Rs. 500 to the plaintiff within a few days from the inception of the tenancy. Thereafter the plaintiff put off the execution of the formal lease on various pretexts, but all the time solemnly promising that there would be no difficulty regarding the title of the defendant as a permanent lessee and he further asked the defendant to start the construction of the permanent residential house for which the lease was taken.

and para. 9 where the defendant states the effect of these facts, as also some further facts, reads thus:

9. The defendant had been all along led to believe that a permanent tenancy had been granted to him and on that belief, as well as on the express promises, consent and encouragement as advanced by the plaintiff himself, constructed the proposed permanent-two-storied buildings as sanctioned by the Corporation of Calcutta at a cost of Rs. 14,500. The plaintiff used to come regularly and inspect the buildings while in process of construction. The said building was completed in 1935.

The evidence given by the defendant, which my learned brother has quoted in extenso, is in substance to the same effect, except in one particular to which I shall presently refer. He still said that at the very first interview, the plaintiff offered or proposed a permanent tenancy, that terms were discussed and that ultimately "it" which can only mean the permanent tenancy--"was fixed up at a salami of Rs. 500 and a rent of Rs. 101." The salami, the defendant continued to state, was in due course paid and thereafter he commenced the building operation, the plaintiff actively assisting him in getting the plan sanctioned and frequently encouraging him to get the building "properly constructed" by assurance that there would be no occasion to eject him and he would never be ejected. I shall assume that "properly constructed" means, constructed as a substantial structure which would endure a long time. The case made by this evidence is that the relationship between the parties commenced with an agreement to grant a permanent tenancy, that construction of the building followed such agreement and that all the encouragement emanating from the plaintiff consisted in aiding the construction of a permanent building on a plot of land in respect of which he had already agreed to grant a permanent tenancy and in suggestion to make the building a durable one, on the footing there was no risk of the defendant being ever evicted. The same, as has been seen, was the case made in the written statement.

36. The one respect in which the defendant attempted to modify the case in his written statement was as regards the origin of the idea of constructing a building, While the case made in the written statement was that the defendant had taken a lease of the land "for the purpose of building a residential house" thereon and that he had constructed a permanent building in the belief that a

permanent tenancy had been granted to him, subject to the execution of a formal document, the case sought to be made in the evidence was that the suggestion for constructing a building came from the plaintiff and it came in the form that the defendant should build a substantial house and have a permanent lease. But for such suggestion, implemented by the offer of a permanent lease, the defendant, according to his evidence in Court, would not have thought of building any house at all. In the written statement, the only acts attributed to the plaintiff as stimulating the construction of a house were "promise, consent and encouragement," but now it was suggested that the very idea of constructing a house had emanated from him.

37. The defendant, however, did not succeed in making this change of case without involving himself in contradictions. This will appear from certain further passages in his evidence to which I would refer in addition to those quoted by my learned brother:

Q. 37--1 take it you bought the house at the sale on jour own initiative?

A.--Two of my men were there at the sale and they purchased the property. It was purchased of my own accord. I intended to build a house there and Hv6 there and also to have my shop there.

Q. 38--And also to let out rooms and have an income out of the plot of land on which it stood?

A.--Yes.

Q. 39--So that in any event you had to build a structure there?

A.--Ibought the land for the purpose of building a house.

38. These answers should be contrasted with those given to questions Nos. 54, 82 and 84 which my learned brother had already read. In the latter, the defendant sought to make out that in the beginning he had no intention of building a house, but the idea was ,put into his head by the plaintiff and pressed with a certain amount of insistence, coupled with the lure of a permanent lease.

39. I shall extract one more passage from the evidence of the defendant. To question 41, which related to an altogether different matter, he volunteered a reply as follows:

I found that other people were building houses similarly and occupying them. I thought I would build a house for my self and live there, Besides, Subodh Mitter, (i.e. the plaintiff) asked me to build a good house, so that I may be able to live there permanently.

40. Whether the case sought to be made in the answers I first quoted would serve the defendant's

purpose any the better, I need not now pause to enquire. The present enquiry is as to what he in fact stated. Gentle J. who saw the witness and heard him, accepted his testimony and I shall assume that throughout his evidence, he deposed truthfully. On that assumption and on the most favourable construction that can be put upon his evidence, taken as a whole, the position appears to be that, initially, the defendant had only the idea of building an ordinary hut such as a bustee tenant usually builds, but at the suggestion of the plaintiff, he decided to build a house of a substantial and expensive character.

41. When, in what manner and to what end did the plaintiff make this suggestion? Almost the whole of the argument for the defendant was advanced on the basis that he did it from the very beginning did it without any reference to a permanent tenancy--promising only that the defendant would never be ejected--and tried to induce the defendant to build a house by that promise alone. Alternatively, it was contended that the plaintiff invited the defendant to build a substantial house, promising that if and when he built one, he would be granted a permanent tenancy. But on that point, the evidence of the defendant himself is reasonably clear, even if we disregarded his written statement, as we were invited to do. The suggestion was made at the same time as, and not before, a permanent tenancy was offered and construction of a substantial house was mentioned as one of the privileges of a permanent tenant which the defendant might acquire for himself and exercise, if he would take a permanent lease. "He said you pay me that salami and that rent, the salami and the rent I have already told you about, and then you get your house constructed and become a permanent tenant of mine." This evidence of the defendant, which relates to the very first meeting between the parties, makes it perfectly plain that the plaintiff suggested to the defendant that he should build a house on and after taking a permanent lease. The evidence does not mean that the plaintiff tried to induce the defendant to build a house without any reference to a permanent tenancy and simply by a promise not to eject him, nor that he invited him to build a house first, on an assurance that a permanent tenancy would be granted later, nor that he told him that a permanent tenancy would be granted, if a house was built.

42. The finding recorded by Gentle J. appears to be based partly on this evidence and partly on another passage which occurs in the defendant's evidence' a little later. There he said: that during the construction of the house, the plaintiff went frequently to inspect it and that he "used to ask me to get the house properly constructed and--told me--that there would never be any occasion for him to eject me.... He told me that I could stay there permanently and asked me to pay the rent regularly." This evidence refers to a stage when construction of the house had already commenced after the premium for a permanent tenancy had been paid and the rent settled. The contract for a permanent tenancy was therefore complete, although there was yet no contract of tenancy valid in law. But if at that stage the plaintiff encouraged the defendant to make the

structure a durable one and reinforced the encouragement by adding that he could live there permanently and would never be ejected, all that was obviously said on the basis of the agreement for a permanent tenancy which had already been concluded and acted upon. By the encouragement the plaintiff added nothing to the rights and expectations created by the agreement.

43. There are other references, in various parts of the defendant's evidence, to statements made to him by the plaintiff that he would never be ejected. It is not clear when these statements were made, but the earliest of them could not have been made earlier than the date on which the parties first met. As has been seen, even on that date the plaintiff proposed a permanent lease and Ex. D shows that the proposal was accepted almost immediately, for, the premium and a month's rent were paid within fourteen days. In these circumstances, the statements, if made before the bargain between the parties was concluded, were a part of the offer to grant a permanent tenancy and if made after, were no more than an affirmation of one of its incidents.

44. It will now be convenient to refer to the findings recorded by Gentle J. Mr. Chowdhury, who appeared for the plaintiff, did not wish to challenge them, but suggested that they had to be understood by reference to the evidence on which they were based and required to be supplemented in certain respects. Mr. Mitra, appearing for the defendant, submitted that the findings established the facts to have been what he contended they were. The findings are contained in two passages which my learned brother has read. In the first of them, it is found not merely that the plaintiff himself suggested to the defendant that he should erect a substantial building and told him that in the event of his doing so, he would never be ejected, but, further, that there was also an oral promise that the defendant would become a permanent tenant and that the latter paid the salami of Rs. 500. In the second passage it is found that the plaintiff expressly informed the defendant that if he built a new structure, he would not be ejected and encouraged him in the building of a house both by words and active assistance. "When, in these passages, Gentle J. says that the plaintiff told the defendant that he would not be ejected, "if he built" a house or "in the event of" his building one I do not understand the learned Judge to find that, independently of any offer of a permanent tenancy, the plaintiff invited the defendant to build a house on a promise that he would never be ejected or that he promised not to eject him on condition that he built a house. The finding must be read along with the other finding that there was also an oral promise of a permanent lease which the defendant accepted and which he acted upon by paying the premium asked for. So read, and read in the light of the evidence, the finding means that the plaintiff, when offering a permanent lease, said that if the defendant accepted the offer and built a house as a permanent tenant, which he ought in his interest to do, he would at no time be ejected; and that the statement that he would not be ejected was repeated during the

construction of the house. It does not mean that the plaintiff only said that if the defendant came upon his land and built a good house, he would never be ejected and, by that promise, induced him to come and build.

45. I agree entirely with my learned brother that on the evidence and the findings, the facts of the present case are as stated by him. If I have referred to them, it is not for the purpose of re-stating the facts, which was unnecessary, but for the purpose of pointing out what the facts are not. It must not be forgotten that a tenancy of some kind is the common case of both the parties and the defendant's occupation is that of a tenant. The plaintiff's case that the tenancy was a monthly one has been rejected and what remains and what has been accepted is the defendant's case that there was an agreement for a permanent tenancy. The construction of the building was commenced after the agreement had been concluded and it was completed within two years, when a considerable part of the time within which the agreement could be enforced had yet to run.

46. Here, therefore, was no case of the defendant building upon the plaintiff's land, believing it to be his own, and the plaintiff encouraging him in that belief, actively or by silence. The defendant was only a tenant and knew that the land belonged to the plaintiff. Nor was here a case of the defendant entering upon the plaintiff's land under a tenancy of an unspecified character and the plaintiff making a statement to him subsequently that it was a permanent tenancy; nor a case of a tenant with limited rights spending money on constructions in the erroneous belief that he had a higher status and the landlord, knowing of his mistake, abstaining from correcting it or encouraging him in his constructions. The defendant had an agreement for a permanent tenancy from the beginning and knew that he had it. There was no case either of the defendant making any constructions after the agreement for a permanent tenancy had lapsed by efflux of time and the plaintiff standing by. At all times when the defendant was spending money on constructions and receiving encouragement from the plaintiff, his right to enforce the agreement was subsisting.

47. Here the case is one where there was an oral agreement for a permanent lease and the defendant erected structures on the land in exercise of rights created by the agreement. In so doing, he received encouragement from the plaintiff, but the acts in which he was encouraged were in no way in excess of the rights which he had under the agreement. They were all done when the agreement was alive and enforceable. The defendant, however, neglected to enforce the agreement and obtain a registered lease within the time limited by law. The plaintiff has now sued him for ejectment and he cannot avail himself of Section 53A, T.P. Act, because, although the agreement was entered into on 17- 8-1933, it was not in writing.

48. On these facts, the case seems to me to be exactly on all fours with that in Ariff v. Jadunath

Mazumdar and since Section 53A, T.P. Act is not applicable, to be governed by that decision. The case was cited before Gentle J., but he distinguished it on the ground that, in that case, there was no conduct on the part of the landlord which encouraged or caused the tenant to expend money on the property whereas, in the present case, the plaintiff not only encouraged the defendant but also 'participated in the structure being built.' The reference in the last phrase is to the fact that it was the plaintiff who carried on the negotiations with the Corporation of Calcutta for the necessary sanction for the building.

49. Before us Mr. Mitra sought to distinguish the case on the same ground and referred, as Gentle J. had done, to a passage in their Lordships' judgment where they state that the structures were erected "not by reason of any encouragement or abstention on the part of the appellant (i.e. the landlord) but by reason of the agreement which he was entitled to enforce against the appellant."

50. In my view, the passage relied on contains no ground for distinguishing the decision. It does not mean that if with regard to the constructions by Jadunath, there had been active encouragement by Ariff in stead of mere "knowledge and approval," as found, the decision would have been otherwise. When their Lordships say that the structures were not built by reason of any encouragement or abstention on the part of the landlord, they refer not to the actual absence of encouragement or abstention as a relevant factor, but to the fact that since the tenant was entitled to erect the structures in his own right under the agreement, encouragement or abstention on the part of the landlord could not be the cause of, or the inducement for, the constructions. The reference to 'abstention' as well as to 'encouragement' confirms this view, for, if their Lordships were referring to the actual facts of the case, they could not have spoken of a simultaneous absence of encouragement and abstention which would be impossible and meaningless, since Ariff knew of the constructions. Besides, since their Lordships speak of neither encouragement nor abstention as having been the reason for the erection of the structures, if presence of encouragement takes a case out of the principle of the decision, presence of abstention should have the same result and the position would be that whether the landlord encouraged the tenant actively or merely looked on as he went on with his constructions, he would be unable to obtain ejectment, even though the constructions might be within the rights of the tenant. This is exactly what Ariff v. Jadunath Mazumdar decided not to be the law, for, in that case, Ariff knew of the erection of structures and approved of it, so that there was abstention on his part, if there could be any question of abstention in such a case. The fact is that the passage in the judgment of the Judicial Committee does not bear the meaning attributed to it. It simply means that where a tenant, who has built structures, was entitled to build in his own right, under an agreement, it cannot be said that he was induced to build by any conduct on the part of the landlord creating a belief in him as to his rights. His own rights were there; they were sufficient;

and his act must be referred to an exercise of those rights. There was nothing for the landlord to acquiesce in and no further right as to which he could create a belief by encouragement.

51. It seems to me clear that in a case where there is an agreement for a permanent lease and the right to exercise it is still subsisting, there can in fact be no encouragement of the tenant by the landlord which may amount to a representation and ground an estoppel. Any encouragement, suggesting that the tenant has a permanent right, will be in accordance with his rights under the agreement and thus only a statement of a fact. It will not suggest possession of rights which the tenant does not possess and will not be a representation. Any encouragement in the construction of a house by an assurance that the tenant will not be ejected, will not be a representation of a fact but only of an intention, and even so, it will be a disclaimer of an intention to do something which the landlord cannot do. In either case, the landlord will be saying nothing new, but only repeating what he already said by agreeing to grant a permanent lease. It is clear that such encouragement cannot have the effect of adding to the belief of the tenant as to the extent of his rights and thereby making him alter his position. There can thus be no valid reason for distinguishing a case where there was active encouragement by the landlord in the construction of structures from one where there was no such encouragement. The real point is that where there is no room for the creation of a mistaken belief, active encouragement can create it no more than non-interference can. As a representation creating estoppel against the landlord, both are equally out of place, and so it was held in Ariff v. Jadunath Mazumdar . I am therefore unable to agree that Ariff v. Jadunath Mazumdar can be distinguished on the ground that in that case there was no active encouragement by the landlord and, in my opinion, the present case is governed by that decision.

52. On behalf of the defendant, however, Mr. Mitra addressed to us an argument, covering a much wider field. In my opinion, the argument is not sound, besides that on the facts found, there is no scope for it in the present case. But in view of the great elaboration with which it was put forward, I would deal with it in brief.

53. The argument may be summarised in the following manner. The equity of part performance must be carefully distinguished from equitable estoppel, the first of which results from acts done on the basis of a contract and the second from mere conduct, where there is no contract to be regarded. It was only the former equity, explained in Maddison v. Alderson (1883) 8 A.C. 467, which the Judicial Committee held to be not applicable in India with an effect that would nullify the provisions of the statutory law. But their Lordships did not rule out the latter equity, explained in Ramsden v. Dyson (1865-66) 1 H.L.C. 129 and indeed recognised its existence, although they found it inapplicable to the case before them. The present case attracts the latter equity, for it is of the following type:

A encourages B to build upon his land and assures him that if he expends money and builds substantial structures, he will be allowed to remain there permanently upon paying rent. B builds upon the lands acting upon the assurances and being encouraged by the landlord, and then A files a suit for ejectment.

The case is not of the type where "A makes an oral grant of property to B, B builds upon the land and expends money, and is then sued by A in ejectment." The representation made by the plaintiff was that the defendant would not be ejected; the mistaken belief of the defendant was that be would be allowed to remain on the land; and he altered his position to his prejudice by making a large expenditure on the building. The propositions laid down in Willmott v. Barber (1880) 15 Ch. D. 96, as to the facts necessary to raise an estoppel were all satisfied and the defendant ought to succeed under the rule in Ramsden v. Dyson (1865-66) 1 H.L.C. 129. It will be noticed that in the illustrations given by Mr. Mitra on which his whole argument rested, be assumes the present case to be what it is not and declares it to be not what it really is. There was in this case an oral agreement to grant a permanent lease and if there was, and the acts of the parties were subsequent to and consistent with it, there could be no question of any estoppel, equitable or otherwise. The case obviously belongs to the type which Mr. Mitra excluded, by ignoring the agreement for a permanent lease, and even if it arose in England, the equity of part performance might perhaps be applied to it, but not equitable estoppel. Here, it must be decided in accordance with the principles laid down in Ariff v. Jadunath Mazumdar and since the equity of part performance is excluded by the authority of that decision, it must be decided in accordance with the statute law of India. There could be no question of applying the rule in Ramsden v. Dyson (1865-66) 1 H.L.C. 129 to facts of this case, either in England or in India.

54. Mr. Mitra was perfectly right in saying that the equitable doctrine of part performance was not the same thing as the doctrine of equitable estoppel, or, to put it more accurately, estoppel by representation. He was also right in distinguishing the two equities as arising from acts done in execution of a contract and arising from mere conduct, provided it is understood that by 'contract' is meant express contract. Discussions, marked by great refinement or reasoning, can be found in the cases as to the principles underlying the two doctrines, but it is unnecessary to enter into that subject here. One of the moot illuminating reviews of the doctrine of part performance will be found in the judgment of Romer, J. in Rawlinson v. Ames (1925) 1925 Ch. 96. The doctrine of estoppel by representation which was among Lord Mansfield's numerous importations into common law from equity and is now as much a legal as an equitable doctrine, will be found examined in such early cases as Hobbs v. Norton (1682) 1 Vern. 136 and more recently in Jordon v. Money (1854) 5 H.L.C. 185 and Low v. Bouvrie (1891) 3 Ch. 82. But apart from the principles on which the two doctrines respectively rest, one applies, to put the matter broadly,

where there is a contract, valid but not provable at law, and there have been acts in pursuance of it which prove its existence and have caused a change of position; the other applies where a person has, by his conduct, led another person to believe in the existence of a particular fact and the latter has, in such belief, acted so as to alter his position. In one case, equity intervenes to complete what was left undone; in the other law or equity simply prevents the party who made the representation from denying its truth. There does exist a difference between the two doctrines, as Mr. Mitra contended.

55. Bat precisely because there is this difference, the doctrine of estoppel by representation cannot apply in the present case, unless the facts are ignored, as they were in Mr. Mitra's illustration. It is true that in the earlier of the English cases, both these doctrines were sought to be applied to the same set of facts. Both Maddison v. Alderson (1883) 8 A.C. 467 and Ramsden v. Dyson (1865-66) 1 H.L.C. 129 are illustrations of this and in both of them, both the doctrines were pleaded. In deciding the former where there was a contract, all the noble Lords applied the doctrine of part performance and two of them, who referred to the argument as to the estoppel by representation which had been advanced on the authority of Loffus v. Maw (1862) 3 Giff. 592, expressly rejected it. In deciding the latter case, where there was no contract, Lords Cranworth, Wensleydalo and Westbury applied the doctrine of estoppel by representation, but the Lord Kingsdown applied the doctrine of part performance, as was pointed out in Ariff v. Jadunath Mazumdar and as a study of the report of the decision will show. The course of subsequent decisions has been clearer, but as Mr. Mitra complained, the error of mixing up the two doctrines persists. On the facts of the present case, there could be no room for applying the doctrine of estoppel and, if I may say so, Mr. Mitra's attempt to apply it involved the same confusion between the two doctrines against which he protested.

56. As regards the basis upon which the alleged estoppel in the present case was founded, Mr. Mitra was able to refer only to the statement of theplaintiff that he would not evict the defendant. That statement cannot serve as such basis unless it is disregarded that there was a valid agreement for a permanent lease to which it was referable or unless it is said that even where statements are made on the basis of a subsisting agreement, they can be dissociated and treated as grounding an estoppel. Clearly, neither course is permissible. But even if it be permissible to isolate the statement relied on and take it by itself, it cannot ground an estoppel for another reason. It was only a promise and thus la representation not of an existing fact but of an {intention.

57. As to representations of an intention, the law is well settled. Usually, as here, such a representation in a promise, express or implied, not to exercise a right which the maker of the representation has; or it is a representation that a certain act will be done in future. In either case,

the representation does not create an estoppel, because no change of position is caused by a misleading statement as to existing facts; it can be enforced, if at all, only as a binding engagement for future conduct, that is to say, as a contract. This was pointed out by the House of Lords in the old case in Jordon v. Money (1854) 5 H.L.C. 185 and repeated in Maddison v. Alderson (1883) 8 A.C. 467 where the representation of the housekeeper's master was that he would make a will. The distinction has been subjected to much caustic comment, e. g. by Mackinnon L.J. in the case in Salisbury v. Gilmore & Marcel (1942) 2 K.B. 38 at p. 51, but as pointed out by the learned Lord Justice, it remains binding, having been declared by "the voices of infallibility" and not yet abolished by legislation. The position therefore is that if there is a representation of an intention by A to B and the latter has acted in reliance thereon, he can have aright against A only on the footing of a contract having been entered into between the parties. Such contract, to be enforceable, must however be valid in law and must, among other things, be supported by consideration. It is a question whether in India, where buildings erected by a tenant do not become the property of the landlord, erection of buildings by a tenant can be ft consideration1 at all; but in any case, such a representation cannot ground an estoppel. The correct approach to a

58. In view of what has been stated above, it is not necessary to deal with all the cases cited by Mr. Mitra or to deal with any of them in detail. He relied particularly on the decision in Plimmer v. Mayor etc, of Wellington Corporation (1884) 9 A.C. 699, but that was only a case where a person entered upon certain-Crown-land as a licensee and the Privy Council found the conduct of the parties such that from it an implied contract that the interest of the licensee would be enlarged into an irrevocable license could be inferred. There was no contract and their Lordships seem to have applied the test laid down in Lala Beni Ram v. Kundan Lall ('99) 26 I.A. 58 and found it satisfied. The case in Civil Service Musical Instrument Association v. Whiteman (1899) 68 L.J. Ch. 484, again, was one where the pavement on which money was expended by the lessee was excepted from the demise and the lessor, knowing of this, stood by and looked on. The case in Canadian Pacific Rly. Co. v. The King 19 A.I.R. 1932 P.C. 108, in which, as in Ariff v. Jadunath Mazumdar the judgment was delivered by Lord Russell of Killowen, did not in any way depart from the well established rule as to the doctrine of estoppel, but really reaffirmed it. In none of these cases was the doctrine applied in spite of the existence of a subsisting contract and acts which could be explained thereby, In Municipal Corporation of the City of Bombay v. Secy. of State ('05) 29 Bom. 580 where the lessee had commenced possession under a tenancy of an indefinite character which could not be valid as a permanent lease, the Crown was held estopped from ejecting him by subsequent conduct amounting to a representation of a permanent right.

59. In the result I am of opinion that the doctrine of estoppel by representation has no application

to the present case and the contention of Mr. Mitra cannot be accepted. It must therefore be held that the plaintiff is not "estopped by his own conduct from evicting the defendant."

60. Mr. Mitra in the last place contended that even though the plaintiff might not be estopped from ejecting the defendant, he was liable to pay compensation to him. In support of this contention, he relied on two decisions of this Court: Badal Chandra v. Debendra Nath and Mahomed Ali Khan v. Kanailal Haldar as also one of a single Judge of the Allahabad High Court: Karan Singh v. Budh Sen . Reference was also made to the case in Duke of Beaufort v. Patrick (1853) 17 Beav. 60 and a passage in Kerr on Fraud.

61. It will be useful to consider first what this contention means. It means that although the defendant has no right to remain on the land, although he built the house on his own account and no encouragement by the plaintiff was really the cause of its construction, although he is entitled to remove it and although the plaintiff may have no use for it at all, still the plaintiff, if he wants to eject the defendant, must pay him compensation. I can see no principle at all by which such a contention may be supported. When the defendant has some equitable right against the plaintiff, compensation may be allowed to him in lieu of some other remedy, such as specific performance, or in addition thereto. But there can be no right to compensation where there is no equitable right at all. In England, compensation or a lien therefor is sometimes given to the person who erected a structure and is ejected, but only in lieu of his right to remain on the land when he is able to make out such right, i.e. in a case when the owner of property stands by and allows a person to spend money thereon, in the expectation that he will receive the benefit of it, with the knowledge that such person is acting under an erroneous belief that he has title. In such a case, the owner, instead of being refused ejectment may be directed to pay compensation, for the structure which, on ejectment of the stranger, becomes his property. The stranger's right to compensation is thus an alternative to or a substitute for his right to remain on the land, but no such right exists where, as here, he has no defence to a claim for ejectment at all. The matter is dealt with in Halsbury's Laws of England, vol. 20, p. 575, Article 724 to which reference may be made.

62. Apart from this general consideration, in India Section 108(h), T.P. Act, empowers the lessee to remove his structures on the termination of the lease. This right has been held to negative a right to compensation: Ismail Khan Mahomed v. Jaigun Bibi (1900) 27 Cal. 570 at p. 586. The statute makes a distinction between other transferees and a lessee and the latter is not entitled to the benefit of Section 51, even if he is a permanent lessee: see Mulla's Transfer of Property Act, Edn. 2, p. 210 and the cases cited there. The defendant in the present case, although he may not have a permanent lease, is nevertheless a lessee and Section 108(h) applies to him.

63. The Indian cases cited by Mr. Mitra proceed on no intelligible principle and ignore Section 108(h), T.P. Act. The Allahabad decision is not binding on us, nor is that in Badal Chandra v. Debendra Nath which is a decision of a Judge, sitting singly. The third decision cited is of a Division Bench, the judgment having been delivered by the same learned Judge, but even if we were to follow it, the defendant would in no way be benefited. The learned Judges held that no compensation was payable for the structure itself but only for the preliminary improvement of the land. In the present case, the defendant made no such improvement.

64. I agree with my learned brother that the correct view was taken in Darbari Lal v. Raneeganj Coal Association, Ltd. 31 A.I.R. 1944 Pat. 30 and that the defendant is not entitled to any compensation. In the result, I agree that this appeal should be allowed, the judgment and the decree passed by Gentle J. set aside and a decree passed in favour of the plaintiff in the" terms proposed by my learned brother.