CALCUTTA HIGH COURT

Annapurna Seal

Vs.

Tincowrie Dutt

A.F.O.D. 24 of 1959

(P.B. Mukharji and Bachawat, JJ.)

19.09.1960

JUDGMENT

P.B. Mukharji and Bachawat, J.

1. This is an appeal from the judgment of H.K. Bose, J. dismissing the Plaintiff's suit for ejectment, on the main ground that the Defendants are ticca tenants under the Calcutta Thika Tenancy Act, 1949, as amended by the Act of 1953. A letting which took place in, 1925, thirty-five years ago long before this present Statute was contemplated and which contains today a permanent two-storied regular masonry building is claimed to be a thika tenancy. The Appeal involves interpretation of the Calcutta Thika Tenancy Act and of the definition of a ticca tenant there under.

2. Before considering this question, it will be relevant to set out the broad relevant and essential facts. The Plaintiff Sm. Anna-purna Seal, as Administratrix to the estate of Rakhal Das Sea deceased, instituted this suit on November 19, 1957 against the two Defendants, Tincowrie Dutt and Dilip Kumar Sett. The Plaintiff's case briefly is that by an Indenture of Lease dated May 26, 1925 between the Administrator General of Bengal as the sole executor of the last will and testament of one Bhagabati Das Seal as lessor and Jogendra Nath Dutt and Ram Chandra Sett as lessees, premises Nos. A to E of 119, Bowbazar Street Calcutta, were let out for a period of twelve years commencing from July 1, 1925. The lessees in 1925-1926 built certain structures on the said land. Thereafter there was partition of the estate of the said Bhagabati Das Seal deceased amongst his three sons. The property in suit was allotted to one Rakhal Das Sea as his one-third share of the said estate. The present Plaintiff is the Administratrix to the estate of the said Rakhal Das Seal since deceased.

3. The Plaintiff's further case is that this lease for twelve years expired in the year 1937 and a fresh lease was granted by Rakhal to the said lessees for, another period of twelve years from

July 1937 at a rent of Rs. 600 per month. This second lease of July 5, 1937 contains a clause for renewal for a further period of three years. It may also be noted here that a sum of Rs. 1,200 was deposited by the lessees as security under this lease Rakhal Das died in 1946 during the currency of the second lease and the Plaintiff obtained Letters of Administration to the esta(sic) of her husband on November 14, 1946.
4. There are two notices to quit in this case. The first notice quit is dated January 7, 1952 and the second one is date September 24, 1957. The terms and effect of these two notice will have to be considered at their proper place. The two present Defendants are respectively the sons of the said Jogendra Nath Dutt and Earn Chandra Sett, the original lessees, who have died. The Plaintiff's case is that in spite of the notices to quit the Defendants have continued in wrongful occupation. She, therefore, claims recovery of possession of the demised property including all buildings and structures now standing thereon and also claims mesne profits from November 2, 1957 until possession.

5. The defense is a claim to be ticca tenants under the Calcutta 'Thika Tenancy Act. The joint written statement of the two Defendants admits that the original lessees erected "valuable "buildings and structures" on the land. The Defendants deny the Plaintiff's case that the lease dated July 5, 1937 was renewed for a further term of three years or that the whole term thereof terminated by efflux of time on July 1, 1952. The Defendants plead that the said lease expired on or about July 1, 1949 and the option for renewal thereunder was not exercised. They also plead that in any event the alleged rennewal of lease was invalid because of the absence of a registered lease. The case of the Defendants is pleaded in, para. 7 of their written statement which states that on the expiry of the term of twelve years under the lease dated July 5, 1937, the said lessees with the consent of the Plaintiff as the Administratrix held over the said land and continued in possession thereof and paid rent to her which she accepted. She is also alleged to have continued to hold the sum of Rs. 1,200 which was paid as security. The plea of the Defendants in that paragraph is that in those circumstances the said lessees became monthly thika tenants in respect of the said land under the Plaintiff after the expiry of the term of twelve years under the said lease, dated July 5, 1937. The Defendants' further defense is that the second notice to quit, dated September 24, 1957, is bad in law. Finally, in para. 18 of the written statement, the Defendants plead that they are thika tenants under the Plaintiff and that this Court hag no jurisdiction to entertain this suit Under the Calcutta Thika Tenancy Act.

6. Before, the learned trial Judge about 9 issues were raised. On the first issue whether what was let out was vaacnt land or land with structure under the two leases, dated May 26, 1925 and July 5, 1937, the learned Judge came to the conclusion that only vacant land was let out and the boundary wall which was there on the land did not take it out of the purview of the Calcutta Thika Tenancy Act. On the 2nd and 3rd issues raising the question whether there was a renewal of the lease or holding over, the learned Judge came to the conclusion that the Defendants held over as monthly tenants. On the 4th, 7th and 8th issues raising the question whether the Calcutta Thika, Tenancy Act applied or not, the learned Judge held that it did, and, therefore, this Court

had no jurisdiction to try the suit. On the 5th Issue regarding the validity of the notice to quit, dated September 24, 1957, the learned Judge found in favour of the Plaintiff and held the notice to be valid and good. On the 6th Issue relating to the title to the structures, the learned Judge's conclusion is that the title to or ownership of the structures remained with the Defendants at all material times.

7. So far as the Plaintiff is concerned, oral evidence on her behalf was given by three witnesses-(1) Suresh Chandra Chatterjee who looks after the Plaintiff's affairs, (2) Hemanta Kumar Mallick, a clerk of the Plaintiff's Solicitor who was only a formal witness to prove two Corporation records and receipts, and (3) Surendra Nath Chatterjee who was also a formal witness, a clerk in the Assessment Department of the Corporation of Calcutta and whose evidence concerned the relative Assessment Register of the Corporation. On, behalf of the Defendant, only one witness was called, namely, Tincowri Dutt, who is the first Defendant in the suit.

8. Documentary evidence in this case consists of the two leases, a Survey Plan, counter-parts of rent receipts, rent bills, postal money orders, and copies of correspondence.
9. Before embarking on an interpretation of the Calcuta Thika Tenancy Act, it will be necessary to marshal the relevant facts which will determine the question whether the Defendants are thika tenants within the meaning of the Statute or not. To be a thika tenant within the meaning of the Calcutta Thika Tenancy Act, it is essential to remember the broad features of the present definition which include (1) a person who holds land under another person, and (2) has erected or acquired by purchase or gift or succession any structure on such land for a residential, manufacturing or business purpose, and (3) does not include a person who holds such land under a registered lease in which the duration is expressly stated to be. for a period of not less than 12 years. I shall quote the section later on. But at this stage to understand the evidence and facts, it is enough to bear in mind these features that the person has to errect or acquire by purchase or gift or succession any structure. It will be necessary to construe these words and what they mean. Before doing so, let us see what the evidence discloses about the nature of structure in this case.

10. The evidence on, the nature of structure is documentary and oral. An analysis of the documentary evidence reveals the following points. The first documents, in this respect are the two leases dated respectively May 26, 1925 and July 5, 1937. The first lease describes in the Habendum the piece or parcel of land "With all pucca walls boundaries trees wells sewers drains "water-courses water-connection and rights privileges easements and appurtenances thereto belonging." This was the lease granted by the Administrator-General. A contemporaneous letter from the office of the Administrator-General, dated May 20, 1925, describes it as "vacant land", although the lease described it as "with pucca walls boundaries", etc. The second lease, dated July 5, 193T, describes the property as the demised "premises" and the description includes the same words and ' expression as I have quoted above from the first lease. It also mentions "existing structures" and "all buildings and structures "which they have erected". Apparently

there were already existing "buildings and structures" when the second lease of 1937 was granted and when this second lease was granted it was no longer vacant land. The Smart's Survey Plan is the next document and describes this property as "presmises". The Map, however, contains no other linguistic description of the nature of structure, but the geometric configurations appearing there indicate the existence of structures. The next document is the series of rent receipts beginning from March 20, 1949 to June 21, 1952 where the property is uniformly described as "premises" No. 119. Bowbazar Street and not land only. When disputes arose and money orders were being refused, attempt was made by the lessees to state and describe the premises as "land". These refusals of postal money order acknowledgment exhibited mostly for the year 1957 being after dispute, have, therefore, little value in describing the nature of structure or of the land. The fourth series of documents are provided by the Corporation records of the Assessment Department marked Ex. E. In; describing this property under the column for "Description" what is stated there is "corrugated shed and land", "dairy firm" and "shops". The fifth series of documents are the Challans. The evidence furnished by these Challans is that in two of them it is described as "land" while in another it is described as "premises". That is a brief survey of the documentary evidence on the nature of strictures.

11. The oral testimony on the structures can be gathered from the evidence of the Defendant Tincowri Dutt. Speaking of the condition of the premises in 1925, he says in, answer to Q. 13 that it was an open plot of vacant land with only a boundary wall on the western side. According to his answer, this boundary wall did not cover the entire western side but covered a portion of it about 40 to 50 ft. This evidence is to be found in answer to qq. 13 and 14. He says further in answer to q. 16 that apart from this wall on the portion of the western side, there was no other structure on the premises. That was the position in 1925.

12. This witness also speaks on what happened after the lease of 1925 was taken. He admits in answer to q. 20 that on a portion of the land about 8 cottas out of 1 1/2 bighas of land the lessees erected these buildings for the purpose of residence and for carrying on business (q. 21). He also admits in answer to q. 22 that there were other structures on other portions of the land. These structures were with corrugated sheet roofing (q. 22). In answer to q. 23 he says that these buildings and structures areused for residence and business, in front there being a few shop rooms while on the inner side the rooms are for residence. In cross-examination Tincowri's evidence is that in 1937 when the second lease was executed the land was not vacant at all and at that time there was a two-storeyed building on that land (q. 48). He also says that there were sewers (q. 52). He admits in answer to qq,. 78-79 that all these structures were completed within 1925-1926.

13. On these facts, the question now falls for determination whether the Defendants under the second lease of 1937 could be called thika tenants within, the meaning and interpretation of that expression under the Calcutta Thika Tenancy Act.

14. Mr. Subimal Roy, the Learned Counsel for the Appellant, has raised a large number of points of construction under this Statute. The nature of the points urged by him may be briefly indicated at the outset. His first submission is that a land with a boundary wall is not a vacant land and. therefore, does not come within the meaning of the Calcutta Thika Tenancy Act. His second submission, is that a boundary wall to which has been added a two-storeyed pucca building- and a number of other structures and which were let out under the second lease cannot in any view of the matter come under the purview of the Calcutta Thika Tenancy Act. His third submision is that in any event the nature of structure within the meaning of the Calcutta Thika Tenancy Act is kutcha or temporary structure and not pucca or permanent structure. His fourth submission is that in order to be a thika tenant under the Act, the tenant has to erect as a tenant the structure or acquire it by purchase or gift or succession and he contends that in this case the lessees under the second lease did not do so. His fifth submission is that a lessee who had held for over 24 years in two successive periods of 12 years under registered leases cannot on their expiry either by holding, over or by a renewal of the existing leases become a thika tenant within the meaning of the Act. Each one of these submissions raises important questions of high consideration.

15. In support of these propositions, Mr. Roy has also relied on a number of decisions. A brief reference to them at this point will not be inappropriate before interpreting the Statute. Some them are also referred to in the judgment of the learned trial judge.

16. His first reliance is on the decision of a Division Bench of this Court in *Shantilata Bey v. Saraju Bala Devi*[1], where the judgment was delivered by my learned brother. At p. 644, while construing Section 2, Sub-sections (3) and (5) of the Calcutta Thika Tenancy Act, he observed:

> "The word 'land' may mean land together with structure situated on the lands at may also mean the bare land, the ground, the soil or the site of the land exclusive, of such structure. We are of the opinion, that the word 'land' is Sub-sections (3) and (5) of Section 2 of the Calcutta Thika Tenancy Act, 1949, means the bare land exclusive of structures situated thereon. The thika tenant must be a person or the successor-in-interest of a person who holds bare land under another person. A holding of looth land and structures situated thereon is not a holding of bare land and is not a thika tenancy."

17. It is on the last sentence of these observations that Mr. Roy has based his argument.
18. He next relied on the decision of Banerjee, J. in *Manmatha Nath Mukherji v. Sm. Banarashi and Ors*[2]., who after noticing the decision of *Khirodamoyee Sen v. Ashutosh Roy*[3], observed that the Calcutta Thika Tenancy Act was not a complete Code by itself and therefore the Court should fall back on Section 108 of the Transfer of Property Act and said at p. 831:

> "The provisions contained in Section 2(5) of the Calcutta Thika Tenancy Act and those in Section 108 (p) of the Transfer of Property Act are not necessarily repugnant. It is possible to harmonies the provisions contained in the two sections, if it be held that the

expression 'any structure' in Section 2(5) of the Calcutta Thika Tenancy Act means any structure other than the type of structure referred to in Section 108(p) of the Transfer of Property Act, the construction whereof is prohibited under the latter section."

19. The learned Judge, therefore, came to the conclusion at page 832 of the report as follows:

"I hold that "any structure" in Section 2(5) of the Calcutta Thika Tenancy Act, 1949' does not include a permanent structure."

20. Mr. Subimal Roy, Learned Counsel for the Appellant in, support of his argument that his client is protected under Section 2(5)(b) of the Calcutta Thika Tenancy Act, has tried to distinguish some of the cases on Section 116 of the Transfer of Property Act, The main argument on this branch has been whether the lease has been dewed under the clause for renewal or it has been held over and a new tenancy created under Section 116 of the Transfer of Property Act. For this purpose of Mr. Roy first argues on the interpretation and significance of what a "renewal" is and relied on the following observations of

[1](1956) 60 WCN 642 [3](1959) 63 CWN 565,
[2](1959) 63 CWN 824

Knight Bruce, V,C. in *Rickards v. Richards*[4], quoted is *Lani Mia v. Muhammad Easin Mea*[5], by a Division Bench of this Court at p. 950:

"It is not every new lease that is a renewal of a lease. The word "renewal' is a relative term, which of necessity requires to be construed by reference to something else. By reference to what ? To the lease that he has at the moment; it can be construed with reference to nothing else. But it is said that the word 'renewal' though referring to the same property as included in that lease may not mean the same or similar species of lease. That, I apprehend, is an inaccurate interpretation of the word. I take it that the term "renewal" means renovation, a restoration of something to a former or original state, a repetition, a beginning again; it may man each or either of those things, so far as there is any difference between them ; it must, however, be a renewal, a renovatin, or repetition or restoration of the same subject. A renewal of a lease, where the context does not require any different interpretation to be given to it, must, therefore, mean the obtaining of the lease as near as possible in every practicable circumstance to the existing lease, as if the subject, worn or wearing out, was to begin again."

21. The Division Bench of the Calcutta High Court in that case came to the conclusion that when there was a covenant for renewal, if the option did not state the terms of the renewal the new lease would be for the same period and on the same terms as the original lease in respect of all the essential conditions thereof except as to the covenant for renewal itself. Mr. Roy, also relied on the Division '(Bench decision of this Court delivered by Rankin. C.J. in *Bengal National Bank v. Janaki Nath Roy*[6],

22. The learned trial Judge in this case found against the Appellant by holding that this was not a renewal but a new tenancy on the ground that the express terms of the clause of the renewal in the lease required (1) a request in writing by the lessees and (2) that such request to be made three months prior to the expiration of the period of the lease and these written conditions of the renewal clause have not been satisfied. The learned Judge, however, failed to consider whether these conditions stipulating a written request and the time for such written request to be made three months prior to the expiration have been waived by the act and conduct of the parties and if so, whether there could be renewal in such circumstances. Indeed para. 6 of the plaint to which the learned Judge refers on this point in his judgment itself raises this consideration by expressly pleading {hat although the fresh lease was not executed in terms of the expiring lease, the lease in fact was renewed by parties consenting to occupation and payment of rent. Renewal of a lease is always a question of agreement, express or implied, between the parties concerned.

23. The Federal Court in *Kali Khushroo Bezonjee Capadia v. Bai Jerhai Hirjibhoy Warden and Anr*[7]*.,* discusser "holding "over" and "new tenancy" and what Mukherjee J. says there at p. 271 is:

> "It is perfectly right that the tenancy which is created by the 'holding over of a lessee or under-lessee is a new tenancy in law even though many of the terms of

[4](1843) 2 Y and C (Ch.) 419, at p. 427
[5](1915) 20 CWN 948
[6](1927) ILR 54 Cal. 813
[7](1949) FCE 262

> the old lease might be continued in it, by implication; and it cannot be disputed that to bring a new tenancy into existence, there must be a bilateral act. What Section 116 of the Transfer of Property Act contemplates is that on one side there should be an offer of taking a renewed or fresh demise evidenced by the leassee's or sub-lessee's continuing in occpation of the property after his interest in it has ceased and on the other side there must be a definite assent to this continuation of possession by the landlord expressed by acceptance of rent or otherwise. It can scarcely be disputed that assent of the landlord which is founded on acceptance of rent must be acceptance of rent as such and in clear recognition of the tenancy right asserted by the person who pays it. But, while all this may be conceded, I do not think that these principles are really of any assistance to the Appellant in the present case."

24. The observations of Mukherjee, J. in the above passage read as a whole do not lay down any new principle which is not contained in Section 116 of the Transfer of Property Act expressly and read as a whole they do not help the contention of the Respondents on this point. On the facts of that case in the Federal Court, the majority decision as expressed by Mukherjee, J. was that rent paid by the lessees must be deemed to have been paid by the Defendants as rent and also received by the Plaintiff as rent and consequently the monthly tenancy under Section 116 of the Transfer of Property Act came into existence and as that tenancy had not been lawfully

determined, the suit for ejectment was not maintainable. Patanjali Sastri, J. dissented from this view and expressed the opinion that Section 116 of the Transfer of Property Act did not create a statutory tenancy but was based on an implied or presumed contractual relationship and the test for continuation of the tenancy was the consensus of the lessor and the lessee or sub-lessee holding over, and not an option exercisable by the lessor alone. Patanjali Sastri, J. was of the opinion that the question in each case depended on what inference could be drawn from the facts of that particular case.

25. One other decision to which reference has been made is *Karnani Industrial, Bank Ltd. v. Province of Bengal*[8], distinguishing the Federal Court decision. The Supreme Court has now definitely laid down in that decision at p. 287:

> "A reference to Section 116 of the Transfer of Property Act will show that for the application of that section two things are necessary: (1) lessee should be in possession after the termination of the lease and (2) the lessor or his representative should accept rent' or otherwise assent to his continuing in possession. The use of the word 'otherwise' suggests that acceptance of rent by the landlord has been treated as a form of his giving assent to the tenant's continuation of possession."

26. Mr. Sir en De, Learned Counsel for the Respondent, contends that the Calcutta Thika Tenancy Act applies to this case on the ground that boundary wall is not structure within the meaning of Section 2(5) of the Calcutta Thika Tenancy Act and that such structure that existed there did not exclude the operation of the Statute. This submission however does not meet the Appellant's argument that even then what was let out under the second lease of 1937 was not bare land with boundary wall but land with two-storeyed building

[8] AIR 1951 SC 285

and other structures.

27. His next submission was that the Appellant could not come under Section 2(5)(6) of the Act because the lease had expired and a new tenancy had come in with the result that the Statute applied and the Respondent became a thika tenant.

28. Lastly, he challenged both the notices to quit as bad and illegal on the ground that *Benoy v. Salsiccioni*[9], applied to the facts of this case making the first notice dated January 7, 1952 bad. Mr. De's argument to contest the validity of the second notice, dated September 24, 1957, was threefold. He challenged the second notice on the ground first that there was no existing tenancy at the time and the notice proceeds on the basis that his clients were trespassers and was therefore bad. His second argument on this point was that the notice was a contingent notice in. the sense that it was qualified with many "ifs" and "buts". His third submission on this point was that because this notice used the words, "without prejudice", therefore, it was bad on the ground of the decision reported in *In re : Weston and Thomas's Contract*[10], which, however, was not a case

of lease at all but a case on vendor and purchaser's summons.

29. The main question whether the Respondent is a thika tenant under the Calcutta Thika Tenancy Act has to be determined with reference to the terms of the Statute and the relevant sections. Tinder the new definition of a thika tenant after the amendment of the Statute in 1953, the definition in Section 2(5) reads as follows:

> "Thika tenant means any person who holds, whether under a written lease or otherwise, land under another person and is or but for a special contract would be liable to pay rent, at a monthly or any other periodical rate, for that land to that another person and has erected or acquired by purchase or gift any structure on such land for a residential, manufacturing or business purpose and includes the successors-in-interest of such person, but does not include a person..
> (a) who holds such land under that another person in perpetuty or
> (b) who holds such land under that another person under a registered lease, in which the duration of the lease is expressly stated to be for a period of not less than twelve years; or
> (c) who holds such land under that another person and uses or occupies such land as a khattal."

30. On a plain reading of the definition, it is clear that thika tenancy arises where there is a division of title between the land and the structure standing thereon. The thika tenant erects structures on the land of somebody else and not his own. The title to the land, therefore, does not belong to the tenant. But the title to the structures belongs to. him either by (1) erection or (2) by purchase or (3) by gift or (4) by succession. The limitation of purpose is indicated by the three-fold objects specified, namely, (1) residential, (2) manufacturing and (3) business.

31. The word "structure" is not defined by the Calcutta Thika Tenancy Act. Section 2(6) of the Act says that all words and expressions used but not defined in the Act and used in

[9](1932) LB 59 IA 414
[10](1907) 1 Ch 244

the Transfer of Property Act or the Bengal Tenancy Act have the same meanings as in those Acts. But neither the Transfer of Property Act nor the Bengal Tenancy Act defines a structure. Structure is an ambiguous word. If it was intended to include a building, a "building" or "premises" would have been the more common words to use.

32. A Division Bench of the Lahore High Court in *Md. Umar and Anr. v. Fayazuddin and Ors*[11]., observed at p. 172 that:

> "The word building or structure is not defined in the Act (there the Court was considering the Punjab Preemption Act which used the word "structure") but it may be stated that every building is a structure though every structure is not a building and the word "structure" can be applied to a wall or shed or any other unsubstantial erection for which

the word "building" cannot be used."

33. Ambiguous words such as "structure" used in other Acts and construed for those Acts are not safe guides in construing the word "structure" in the context and purpose of a different Statute and I expressed this same view in *Tulsi Ram. Shaw v. R.C. Pal Ltd*[12]*.,* The above observation is only intended to show that the word "structure" is ambiguous.

34. In Volume 5 of Burrows' Words and Phrases Judicially Defined, at pp. 186-188, a number of cases is collected to indicate the ambiguity of the word "structure" and how it has been construed differently under different statutes. In fact, even a road has been interpreted as a structure while a show-case has been held not to be a structure. (See *London County Council v. Hancock and James*[13]*,* per Lord Alverstone, C.J. at p. 48; *London County Council v. Illuminated Advertisements Company*[14] , per Kennedy, J.; *Waite's Executors v. Inland Revenue Commissioners*[15]*,* at pp. 207-20S per Pickford, L.J. and *Sough Wales Aluminium Company Ltd. v. Neath Assessment Committee*[16]*,* at p. 592 per Atkinson, J. See also the observation of Humphreys, J. in *Hobday v. Nicol*[17]*,* at p. 304. I do not need to refer to the New Zealand case which Burrows quotes construing roads as structure.

35. A construction has to he given to the word "structure" in this case which must be suited to the context of the Calcutta Thika Tenancy Act. It will be inappropriate to attempt to rigidly define structure. What is or is not structure has to be decided on the facts of each case in the light of the Statute and its objects. Only certain broad principles may be indicated but no rigid definition is possible. In the first place, the land mentioned in Section 2(5) of the Act certainly has to be land without the structure contemplated in Section 2(5) of the Act. The primary object of this Statute was that only land was to be let out for subsequent structures to come upon it. If the land is already built over with structures when let out then this possibility could not be envisaged. Therefore, the land must be without the structure within the meaning of Section 2(5) of the Act. Some of the decisions which I have quoted above indicate a distinction already made by the Courts on the ground that the structure meant here is only temporary structure and not a permanent or pucca structure.

36. Here in the case on the facts, the land, to begin with, had a boundary wall. A

[11] AIR 1924 Lah 172
[12] AIR 1953 Cal. 160
[13](1907) 2 KB 45
[14](1904) 2 KBD 886 at p. 890
[15](1914) 3 KBD 196
[16](1943) 2 AER 587
[17](1944) 1 AER 302

boundary wall, by itself and nothing more, may still nevertheless make. the land come within the meaning of the Thica Tenancy Act. But then facts may be such that if what is called the boundary wall is itself used as part of the building, providing walls for rooms or for other purposes, then it might as well be not vacant land or bare land within the meaning of the Calcutta Thika Tenancy Act. The walls may be used for purposes of the business of advertisement and other similar purposes. In each case it will depend on the facts. The person who claims to be a ticca tenant has the onus to satisfy the Court that it is land within the meaning of the Calcutta Thika Tenancy Act.

In this case, except what I have said before, the purpose for which the boundary wall is in fact used is not in evidence. But then, I am of opinion, in this appeal, that this question of how far a boundary wall takes a land out of the operation of the Calcutta Thika Tenancy Act really is hypothetical and academic and does not arise and need not be decided because during the second lease and having regard both to the oral and documentary evidence on the point which I have quoted above, it is undisputed here that what was let out was land with permanent building and structures. A tenant who holds land with such buildings and structures cannot in any view be a thika tenant within the meaning of Section 2(5) of the Calcutta 'Thika Tenancy Act. It will in this context of fact be unnecessary therefore to discuss how bare the land must be or the subtleties of the word structures which will qualify a person to be a thika tenant under this Statute. No interpretation should be put upon this Calcutta Thika Tenancy Act which makes it a redundant duplicate of the cognate Statute of the West Bengal Premises Tenancy Act, 1956. To construe the words _"land" and "structure" in Section 2(5) of the Calcutta Thika Tenancy Act so liberally as to make them premises within the meaning of Section 2(f) of the West Bengal Premises Tenancy Act, 1956, will be to duplicate Statutes which could not have been the intention of the Legislature and will lead to utter confusion. If West Bengal Premises Tenancy Act or its precursor the Rent Control Act were applicable then it is difficult to understand the utility of another statute. It is because it was thought that these Acts were not sufficient to protect this class of tenants that the Calcutta Thika Tenancy Act was enacted. This Calcutta Thika Tenancy Act was fully alive to this situation and only permitted the Rent Act to apply in the case of "Bharatia" alone in the limited eventuality expressly mentioned in Section 10(2) of the Calcutta Thika Tenancy Act. Hence the ambits of the two Statutes are designedly separate and no construction should be adopted to confuse the difference so as to make both the Acts indiscriminately applicable to the same class of tenants.

37. The primary object of the Calcutta Thika Tenancy Act is to legislate for that particular class of tenant who erects his own structures or acquires them by gift or purchase or succession on a land of another which did not have any building or structure on it, to begin with. The word "structure" cannot, in my view, be construed under this Act to make it equal to building or to mean the same thing as building. In fact, the very idea of a 'ticca tenant in the very name of the Statute "The Calcutta "Thika Tenancy Act", using the word "ticca", must provide some context for this Act. A Division Bench of this Court in *Manmatha Nath Mitter v. Anath Bandhu Pal*[18], at p. 213 repelled the argument that a ticca tenant had a permanent interest and came to the conclusion that the words "ticca tenant" as used in relatoin to the tenancies in dispute though they were situated in the District of 24-Parganas, meant interest which were not permanent. See the observations at p. 213. Similarly, the word "Bharatia" which is another expression used in the Calcutta Thika

[18](1918) 23 CWN 201

Tenancy Act, long before the Statute came into operation, had been construed by a Division Bench of this Court in *Narendra Nath Mondial v. Sannayashi Charan Das*[19], at p. 363 where B.B. Grhose, J. observed:

> "The word "bharatia" is generally used with regard to tenants who have rented a house temporarily or from month to month. It is seldom used with regard to permanent tenant or with regard to a tenant who is taking lease of a piece of land only from the landlord."

Again if one were to discover a principle behind the express exclusion of tenants in perpetuity or under registered lease for not less than twelve years under Section 2(5)'(a) and (6) of the Act, one is bound to say that principle to be to exclude such long term tenants and the Act meant to include the more temporary tenant. From these considerations it can be gathered that this particular Statute, The Calcutta Thika Tenancy Act, imports concepts of temporary nature in respect of the three notions of "ticca tenants", "bharatia" and "structure". I, therefore, hold that on the facts of this case what was let out was land with structures, and, in fact, a two-storeyed pucca building, and it could never come within the operation of the Calcutta Thika Tenancy Act. That it was not intended to come is also enforced by the further fact which is the next point in this appeal,, and that is that this particular property has really a history of 24 years of registered lease before this claim to become a ticca tenant under this Statute is made.
38. This leads me to the consideration of the construction of Section 2(5)(6) of the Calcutta Thika Tenancy Act. As I read this provision, it expressly says that a ticca tenant docs not include a person who holds such land under that another person under a registered lease in which the duration of the, lease, is expressly stated to be for a period of not less than 12 years. Recalling the facts which I have set out above, it is plain that during the currency of the second lease the Respondents really were excluded persons, and they could not be ticca tenants. The Statute expressly excluded them. Now how do they become ticca tenants on the expiry of the second lease?

39. To recapitulate the dates relevant on this point, the first lease of 1925 expired in 1937, and the second lease of 1937 expired in 1949 on the 1st July. By that time, the Thika Tenancy Ordinance of 1948 had come in to be followed by the Act which came into operation on February 28, 1949. The result, therefore, is that before July 1, 1949 when the second lease was about to expire, the Calcutta Thika Tenancy Act, 1949 had come into force. But then that Act contained a definition which was very different from the definition of the thika tenant now under the amendment of 1953. The Ordinance and the Act as they stood then have been replaced by new definition altogether by this amendment. The amendment, however, was made first by an Ordinance on October 21. 1952 followed by the Act on March 14, 1953.

40. I have found it impossible to discover how and by what legal process the Respondent becomes a ticca tenant under Section 2(5) of the Calcutta Thika Tenancy Act in the facts and circumstances of this case. When the second lease was operating until July 1, 1949, the Respondent was an, excluded person and the Calcutta Thika Tenancy Act did not apply to him, assuming but not deciding that the Act applied to a pre-statute tenancy. Immediately on the expiry of the lease on July 2, 1949, if he has to be a ticca tenant he

[19](1929) 54 CLJ 353

can only be so under the Statute. But then the land concerned was no longer a vacant or bare land or land without structures which was being let out for building structures on it within the meaning of Section 2(5) of the Calcutta Thika Tenancy Act. The buildings and structures on the land concerned had already been erected as long ago as 1925-26, long before any Calcutta Thika Tenancy Act was even contemplated. In order to become a ticca tenant under the Act, he has to answer the conditions of the Statute in Section 2(5), namely, land had to be let out to him and he has to erect structures or acquire them by purchase or gift or succeed to them. But what was being, let out on the expiry of the second lease,, when for the first time the Thika Tenancy Act or ordinance came into force, the land was no longer land within the meaning of the Calcutta Thika Tenancy Act.

41. In fact,:the building and J structures that were built were indeed built not only long before the Act could be said to apply, but also by a person who was a disqualified person to become a thika tenant under this statute by the express language of Section 2(5)(b). If a trespasser comes to somebody else's land and erects a structure, he cannot under the Statute become a thika tenant. Similarly, if a disqualified person, one who is statutorily excluded by definition from becoming a thika tenant, erects a structure he cannot by succession make his succesor a thika tenant within the meaning and definition of that expression in Section 2(5) of the Act. Such an excluded person can be said neither to hold nor erect nor be a sucessor to structure within the meaning of Section 2(5) of the Calcutta Thika Tenancy Act. Successor-in-interest cannot enlarge the original inheritance. The successor only succeeds to that interest: only which his predecessor had. If the predecessor had no interest the successor gets nothing. If the predecessor was and here could not be a "ticca tenant" his successor does not become a "ticca tenant" by an imaginary succession. If the original inheritance was not amplified enough 8 to include a thika tenant, but on the contrary excluded him, then succession does not make his successor a thika tenant.

42. It follows from the view that I am taking that it is unnecessary to decide whether the present lessees Respondents directly come within the exclusion mentioned in Section 2(5)(b) of the Calcutta Thika Tenancy Act or whether such a tenant is still holding land under a registered lease. This provision must be read with the main body of the section to give a meaning to the kind of tenant who is contemplated in the definition of Section 2(5) and that means, as I read it by paraphrasing and interpreting the section, that a person, who does not hold land under a registered lease for a period not less than twelve years and erects structures or acquires such structures by gift or purchase or by succession. This excludes the present tenants who are successors of the excluded persons. It is equally unnecessary, in the view that I am taking, to decide whether there was "renewal", or holding over under Section 116 of the Transfer of Property Act. The reason for considering both these questions immaterial and unnecessary for the facts of this appeal, is that in any view of them, the present tenants cannot be "ticca" tenants who answer the statutory condition under Section 2(5) of the Act. We are therefore not called upon to express any view on the correctness or otherwise of the learned trial Judge's ' unreported

decision in *Lalit v. Manick*[20] I am satisfied that the Defendants' defense as ticca tenants under the Statute is in any event wholly unmeritorious. These Defendants are typical middlemen. They pay rent to the plain tiff at Rs. 600 per mensem but themselves make admittedly (see Tincowrie's answer to q. 192) a

[20] Suit No. 2257 of 1955 delivered on April 24, 1958

profit by realising from their Bharatias more than double that amount, i.e., Rs. 1,200 per mensem. Admittedly again according to Defendant Tincowrie's evidence in answer to questions 127-31, they do not use or occupy any part of the holding for their own residential, manufacturing and business purposes so that if a suit for ejectment is brought against them even as ticca tenants they have no defense to ejectment whatever under Section 3(v) of the Calcutta Thika Tenancy Act. Again it is unmeritorious because even as ticca tenants these Defendants cannot resist ejectment on the ground expressly mentioned in Section 3(vi) of the Calcutta Thika Tenancy Act which provides that even a ticca tenant is liable to ejectment "when he "holds the land comprised in the holding under a registered "lease on the ground that the term of the lease has expired."

43. The next question is about the notices to quit. Mr. De first attacks the notices, on general grounds on the submission that the pleading really was not holding over but a renewal and determination of the lease by efflux of time. He tries to rely on the plaint and the grounds of appeal. But Mr. De's point can not be supported because in paragraph 15 of the plaint this is pleaded as an alternate ground. Reference may also be made to para. 16 of the plaint. Again grounds of appeal Nos. 17, 18 and 19 are taken grounds of appeal on this point. But Mr. De's contention on this point really loses all force because plain and straightforward issues were allowed to be framed, namely, issues 5 and 7. That being so, the trial proceeded on these two issues among others and the learned trial Judge has recorded his findings on them. I do not, therefore, think that that point can succeed.
Dealing with this submission on the merits of the argument that the notices are bad, I shall first take up his arguments on the first notice to quit, dated January 7, 1952. Now that notice, given by the lessor's attorney reads as follows:

> "Re: Lease in respect of premises No. 119, Bow Bazar Street, Calcutta.
> Under instructions from my client I hereby give you notice that my client desires that the term of years created by the Deed of Lease dated the 5th day of July, 1937, shall determine on the 30th day of June, 1952 in accordance with the condition in this behalf contained in the said Deed 6f Lease, and my client hereby requires you to dismantle and remove the privies and all structures created by you upto the ground level and quit and deliver vacant possession of the said premises on the said date to my client."

Mr. De contends that this notice is bad having regard to the decision of the Privy Council in *Benoy Krishna Das v. L.E. Salsiccioni and Anr*[21]*.,* followed here in Calcutta in *Sushil Neogi v. Birendrajit Shaw*[22]*,* and *Charu v. Bankim*[23]*,* by iBuckland, J. and Amir Ali, J., respectively. The

point of this argument was that really the notice should have said not on the June 30, 1952 but on, the expiry of July 1, 1952.

44. Now the decision on the Privy Council in Salsiccioni's case is distinguishable on the ground that the notice here is in very different language and terms than the notices in the Privy Council case and the other two Calcutta decisions which followed. From the language of the notice which I quoted above it will be clear that the notice meant the lessee to vacate on the expiry of the renewed lease. At that time both the lessor and the lessee were under the impression which I will presently show that there had been in fact a

[21](1932) LR 59 LA. 414 [23](1938) 42 CWN 115

[22](1934) 38 CWN 782

renewal under the old lease. The point to emphasize in this context is that the notice signifies the date to be the expiry of the lease. In fixing that date as June 30, 1952, there was an error. It was a misnomer, it was a "falsa "demonstrate". A notice to quit lias been held repeatedly by the Privy Council and other decisions of this Court should be fairly construed and not with a view to find fault with it. See *Harihar v. Ramshashi*[24], No doubt it must be reasonably read to determine the lease and in fact the time of such determination. Question is, does this particular notice indicate the time reasonably to the lessee who is conversant with the facts and circumstances, so as to leave really no room for any serious doubt? The notice plainly asked the lessee to vacate on the expiry of the renewed lease. That process of extreme legal technicality by which the lease expired not on June 30, but after July 1, 1952 does not in my. view on the facts here vitiate the notice and does not come at all within the principle laid down by the Judicial Committee in Salsiccioni's case which was construing an entirely different notice. The law laid down by the Judicial Committee on the interpretation of Section 110 and the date of expiry must have to be accepted. The question, however, here is not whether that law should be accepted or not, but whether in fact the date of quitting indicated in the notice could not essentially and really be read fairly and liberally to mean the legal date of expiry of the renewed lease.

45. It was also argued on behalf of the Appellant that the. subsequent-rent receipts and deposit of rent with the Thika Controller all show that the lessee calculated the tenancy as from English calendar month and therefore, the argument on the strength of the Salsiccioni's case should not be allowed to prevail. To that Mr. De for the Respondents pointed out that Salsiccioni's case as well as the two Calcutta decisions came to the conclusion that the subsequent rent receipts according to English calendar month did not improve matters. Whether they do or not it depends in our view on the facts of each case. In this particular case the facts are singularly clear. The circumstances are that when the first lease expired the same situation arose, but when the second lease was executed, what happened to that crucial first day is not indicated there. The second circumstance is that, certainly the rent receipts and subsequent deposits of rent all mention English calendar month. The third circumstance is the oral evidence. The Respondents' case was that they were holding over. But that is disproved by the evidence of Defendant Tincowri Dutt himself in answer to qq. 140 to 147. After rent was paid for the month of April, 1952 which was

again for the English calendar month he said that no further rent was even offered for May, June, July, August and September, 1952. If the Respondents' case of holding over is true, there is no point why such rent was either offered for the English calendar month or why it was not taken by the landlord. The three circumstances stated above, are in my opinion, conclusive to establish here that on the determination of the Lease the parties agreed, treated and accepted the month of tenancy to be the English calendar month.

46. This particular point has also been discussed by a Division Bench of this Court in *Carrara Marble and Tarrazo Company I Ad v. Charu Chandra Guha*[25], Dealing with this question at p. 412 Lahiri, J. as he then was, observed:

> "Alteration of the month of tenancy may be proved either by direct evidence by

[24](1918) LR 45 IA 222

[25](1956) 61 CWN 407

> proving a new agreement by which the month of the original tenancy was expressly altered or by circumstantial evidence."

47. In that case it was on this ground that the matter was remanded. Were we in doubt we would similarly have remanded the matter. But we consider the facts and circumstances here are far too strong and establish the fact beyond doubt that the agreement was to go by the English calendar month. The same view was held by another Division Bench, of this Court in *Baidyanath Bhattacharjee v. Nirmala Bala Devi*[26], where it was said that in determining the month of the tenancy the manner and mode of payment of rents might be an, element or factor to be considered on this point, although certainly it could not be taken as a sure indication of the month of the tenancy in all cases. In this particular case we are satisfied on the acts, circumstances, conduct and facts that the month of tenancy after the lease was agreed to be the English calendar month.

48. The question, however, on this point again does not go to the Toot of the matter because here there is the second notice. Whatever view is taken of the first notice to quit, if the second notice to quit is good, then also the Respondents' argument on this branch fails.

49. Coming now to the second notice to quit, it is necessary to recall that this was given on September 24, 1957, on the strength of the language used in Section 106 of the Transfer of Property Act Mr. De argues first that the notice must accept the tenancy or the lease and it is that which is to be terminable by the notice within the meaning of Section 106 of the Transfer of Property Act. He enforces this branch of his argument by reference to Sub-Clauses (g) and (h) of Section 111 of the Transfer of Property Act.

50. This argument is obviously untenable. This argument is untenable having regard to the two decisions of this Court in *Secretary of State for India in Council v. Madhusudan Mukherji*[27], at p. 920 and *Bam Charan Nashar v. Han Charan Guha*[28]where it was definitely held that the notice

was not bad because it described the tenant as a trespasser.. Mr. De's second submisison that it is a contingent notice is equally untenable. It is not contingent on an unpredictable event. It is at best an indication of the different stages, according to the different view of the law that could be taken, of an event that has already happened. The notice was not contingent on a problematic event. If anything, it was dependent on the legal interpretation of the event that had occurred. I, therefore, do mot consider this notice to be bad on that ground. Mr. De's reliance on the case of *In re : Weston and Thomas's Contract*[29], to support his third attack on this notice that the use of the words "without prejudice" vitiated it, also cannot succeed, first because that English case was not a case of a lessee at all. It considered a particular clause in a vendor and purchaser's summons relating to title and what the parties tried to do was without prejudice to enlarge the covenant or the ambit of that clause by suggesting some kind of indemnity. Here the words "without prejudice" are used not in connection with any variation in. the clause but they are used without prejudice to the contentions of the lessor. That means that the lessor had contended for one particular view of legal interpretation in the previous paragraph of the notice and the words, "without "prejudice," here mean without prejudice to that view he also alternatively relied on the ground which

[26](1957) 61 CWN 528 [28](1906) 7 CLJ 107
[27](1932) 36 CWN 918 [29](1907) 1 Ch 214

followed in the notice. I do not see how these words, "without prejudice", " therefore; made the notice bad.

51. Arising out of Mr. De's contentions on the notice, he advanced another argument to say that the plaint was bad because even on the strength of the notice the plaint was premature. His short point was that the plaint claimed the structure but Clause (d) in the lease gave time to the lessees not less six month after the termination of the lease to dismantle the structure. The notice was given on September 24, 1957, asking the tenants to vacate by the end of October but the plaint was filed on November 16, 1957 before the six months' time expired. At first, Mr. De wanted to contend that this made the whole plaint bad even for possession of the land apart from the structure. We do not consider this argument to be sound. Clause (d) of the lease on which reliance is placed for this purpose reads as follows:

> "The lessees at the expiration or sooner determination of the said terms hereby granted, shall be at liberty to dismantle and remove the privies and all structures erected and to be erected by them in the said demised premises up to the ground level within a reasonable time, not less than six months after the determination of the lease. Provided compensation is paid to the lessor for such use and occupation at the rate of Rs. 600 per month."

His first contention was that this clause meant a notice of really seven months at least, namely, one month's notice and six other months after the expiry of the notice. Mr. De contended that the words "use and occupation" meant that the lessees had a right to use and occupy for a period of six months. I do not consider this to be an unqualified clause. The words are not "use and

occupation" but "such use and occupation" and such use and occupation must be towards the purpose and end for which this time was given, that is, "to dismantle and remove "the privies and all structures." It is an auxilliary to the tenants' right to dismantle and remove and for that purpose whatever use and occupation would be necessary are the use and occupation contemplated in Clause (d). On that basis, the notice for possession is not bad.

52. Then it was contended that the claim for possession of the structure was bad because six months' time had not expired. Even on the assumption that the right to possession was subject to the right to dismantle and remove the structure, it is unnecessary to decide the point how far the claim for the structure could be granted not only because the tenant never claimed the right of six months' time to dismantle but also having regard to the fact that Mr. Roy appearing for the Appellant concedes that as his client, the Appellant, is not interested at all in the structure, any reasonable time that the Court would give, she would accept. The point, therefore, need not detain us. Lastly this specific point that the notice should have been for seven months was. not particularly taken either in the written statement or in; the specific issues or even in the grounds of appeal. For these reasons this point cannot at this stage be sustained.

53. It is admitted on either side that rent up to and including the month of August, 1960 had been deposited with the Thika Controller.
54. Having regard to these conclusions, this appeal must succeed and is allowed with costs, both here and below and certified for two counsel. The decree and judgment of the learned trial Judge are set aside. There will be a decree for possession of premises Nos. A to E of 119 Bowbazar Street with mesne profits at the rate of rent from November 1, 1957 until possesion is delivered under this decree. The Respondents will have time for a period of six months from today to dismantle and remove their structures.

55. The Respondents through their Learned Counsel state to the Court that they have deposited rent before the Thika Controller up to and including the month of August, 1960. The Appellant will be entitled to withdraw and appropriate the same towards her dues under this decree and the money so deposited and appropriated will go towards the satisfaction of mesne profits awarded by this judgment. During this period until delivery of possession the Respondents are ordered and directed to discharge all liabilities in respect of both shares including arrears, if any, of rates and taxes as provided in the lease. In default of the payment of such rates and taxes, such liabilities shall be added to the mesne profits awarded hereby.

56. On the oral application of the Learned Counsel for the Respondents, we stay the operation of the decree for a period of six months from today only in so far as possession of the land is concerned.

Bachawat, J. The learned trial Judge dismissed the suit on the ground that the Defendants were thika tenants and consequently the High Court has no jurisdiction to entertain the suit.

57. I am of the opinion that the Defendants were not tenants of land exclusive of structures within the meaning of Section 2(5) of the Calcutta Thika Tenancy Act, 1949, as explained in *Santilata Dey v. Sarajubala Devi, (1956) 60 CWN 642* (supra) and consequently they were not thika tenants.

58. On this part of the case Mr. De said that a tenancy of land as also structures for a residential, manufacturing or business purposes is not a thika tenancy, but he contended that the pucca walls with the land was demised were not structures and that in any event they were not structures for a residential, manufacturing or business purposes. But I think that the pucca walls may well be said to be structures, They are things of substantial size built up of component parts and intended to remain on the land permanently. "When the lease, dated July 5, 1937, was executed, the lessees had already built a two-storeyed pucca building and structures with corrugated sheets roofing for residential and business purposes. It is not shown that on the date of the execution, of the lease the walls were not used in connection with residential or business purposes. The walls obviously protected a portion of the boundary of the residential! and business premises. The walls cover 40 to 50 ft. of the western boundary of the premises.

59. I am also of opinion that on the date of the institution of the suit the Defendants held the property under the Plaintiff under the registered lease, dated July 5, 1937, and as such they were not thika tenants in view of Section 2(5)(b) of the Calcutta Thika Tenancy Act.
60. The lease, dated July 5, 1937, was for a period of twelve years commencing from July 1, 1937. The term of the, lease therefore expired at midnight of July 1, 1949. The lease however contained a covenant of renewal for a period of three years. The covenant reads thus:

> "...and the lessor hereby further convenants with the lessees that he will on the written request of the lessees made three months before the expiration of the term hereby created and if there shall not, at the time of such request, be any existing breach or non-observance of any of the convenants on the part of the lessees hereinbefore contained grant to them a fresh lease of the demised primises for the further term of three years from the expiration of the term hereby created at the same rent and containing the like covenants and provisos as herein contained with the exception of the present covenant for renewal the lessees being liable to bear and pay the costs of and incidental to such fresh lease."

61. The monthly rent payable under the lease was Rs. 600. Pursuant to a covenant contained in the lease two months' advance rent amounting to Rs. 1,200 was. deposited with the lessor. The lease provided that this deposit would be applied in. discharge and in liquidation of the rent for the last two months of the tenancy thereby created.

62. After the expiry of the term of twelve years on July 1, 1949 the lessees remained, in

possession of the property and they continued to pay and the lessor continued to accept rent at the rate of Rs. 600 per month for the period, July, 1949 up to April, 1952. The Defendants contend that by reason of the payment! and acceptance of rent as aforesaid a new tenancy was created and as such they can no longer be said to be persons holding under the registered lease dated July 5, 1937. They rely upon, Section 116 of the Transfer of Property Act and the judgment of the federal Court in *K.B. Capadia v. Bai Jerbai Hirjibhoy Warden Anr., (1949) FCR 262 : AIR 1949 FC 124*. (supra).

By Section 116 of the Transfer of Property Act a new tenancy is implied from the continuing possession of the demised property by the lessee after the determination of the lease and the assent of the lessor to the continuing occupation by aceptance of rent or otherwise, see *K.B. Capadia, v. Bai Jerbai Hirjibhoy Warden and Anr., (1949) FCR 262 : AIR 1949 FC 124* (supra) at 270. The implication of the new tenancy-rests upon the presumed intention of the parties and is subject to any agreement to the contrary. The presumed intention majr be negatived and it may be shown that the parties never intended to create a new tenancy. In *Gopal Chandra Rudra v. Kheter Karikar*[30], Rankin C.J.. observed at p. 1207:

> "The act of holding over after the expiration of the term does not necessarily create a tenancy of any kind, it being in each case a question of fact what the intention of the parties was."

63. The question in each case is with what intention the parties paid and accepted the rent.
In *Deo d. Chepy v. Batten*[31], Lord Mansfield observed:

> "The question therefore is, quo animo the rent was received and, what the real intention of both parties was ?"

[30](1929) 33 CWN 1207
[31](1775) 1 CWN 243

Now the evidence here is that there was no written request by the lessees for the renewal of the lease for a further term of three years. No renewed lease for the further term of three years was in fact executed. The parties proceeded upon the footing that the lease, dated July 5, 1937, of itself created two terms, firstly a term of twelve years and thereafter a further term of three years. They proceeded on the basis that under the lease itself the lessees were entitled to remain on the premises as tenants for a term of three years after the expiry of the period of twelve years and that it was not necessary to comply with the formalities required by the renewal clause. The intention of the parties is made plain, by their conduct and the correspondence. In the letter, dated January 7, 1952, Shri R. Majumdar, the attorney for the Plaintiff, wrote to the lessees:

> "Under instructions from my client I hereby give you Notice that my client desires; that the term of years created by the Deed of Lease dated the 5th day of July, 1937 shall determine on the 30th day of June, 1952 in accordance with the condition on this behalf

contained in the said deed of lease.."

64. This letter clearly shows that the Plaintiff proceeded upon the footing that the term of the lease would expire at the end of June, 1952 and not in June, 1949. The letter does not speak of any new contract of tenancy after June, 1949. Both the lessees were experienced lawyers and they deliberately chose not to send any answer to this notice (see answer to q. 90 of Tincowrie Dutta). Again by letter dated September 24, 1957 Shri P. Mallik, attorney for the Plaintiff, wrote to the Defendants thus:

> "You had been a tenant under my client under a registered lease, dated 5th July 1937, which expressly provided that the lease shall be for a period of 12 years to be computed from 1st July; 1937 with an option of renewal for a further term of 3 years. The lease therefore automatically came to an end on 30th June 1949 or 30th June, 1952 at the latest. On the expiry of 30th June, 1952 you ceased to be a tenant."

65. The Defendants did not send any reply to this letter also.

66. The sum of Rs. 1,200 kept in deposit with, the lessor was not adjusted towards payment and liquidation of the rent for the months of May and June, 1949. In accordance with the covenent in the lease one would expect that the deposit of Rs. 1,200 would be applied in discharge of the rent for May and June, 1949, but the parties proceeded on the footing that the term of the lease had not yet expired and on that footing there was no question of applying the deposit towards discharge of the rent for the months of May and June, 1949.

67. Rent continued to be paid and accepted until April, 1952 but thereafter rent was not paid and accepted. The reason was that the parties thought that the terms of the lease would expire at the end of June 1952 and that consequently the deposit of Rs. 1,200 would be applied towards discharge and liquidation of the rent for the months of May and June, 1952. The Defendants did not tender any rent during the period, May to October, 1952. After a long lapse of time in November, 1952 they for the first time tendered the rent for the months of May and June, 1952 and for the subsequent periods by money order. The conduct of the Defendants plainly shows that until November 1952 they also proceeded on the footing that the term of the lease would expire on the expiry of the month of June, 1952.

68. Reliance is placed by the Defendants upon a draft plaint prepared under the Plaintiff's instructions in the month of February, 1953 In para. 5 of the draft plaint it was averred that on the determination of the lease granted on July 5, 1937 by the efflux of the time limited thereby the Defendants without exercising the option for renewal of the lease, held over upon payment to the Plaintiff of the same rent as provided in the lease and that the Defendants thereupon became tenants from month to month under the Plaintiff in respect of the premises under Section 116 read with Section 106 of the Transfer of Property Act. But paragraph 6 of the draft plaint refers to and relies upon the notice, dated January 7, 1952, which shows that according to the Plaintiff

the term of years created by the lease would determine on June 30, 1952. Paragraph 5 of the draft plaint therefore appears to embody the personal opinion of the draftsman. The draft plaint was not signed by the Plaintiff and was eventually rejected. A new plaint was drafted when the present-suit was instituted. This new plaint does not contain any statement that the Defendants became tenants from month to month. In the circumstances the draft plaint can hardly be regarded as an admission by the Plaintiff that a new tenancy from month to month was created after the expiry of twelve years from July 1, 1937. But even regarding it as an admission, it cannot outweigh the other oral and documentary evidence on the record which shows that the parties did not intend to create a new tenancy by payment and acceptance of rent since July, 1949 and that the rent was paid and accepted on the footing that the original lease dated July 5, 1937 itself created a second term of three years which expired on June 30, 1952.

69. In the circumstances I see no reason to disbelieve the evidence of Suresh Chandra Chatterjee. His evidence is that sometime in 1949 he was asked by the Defendant, Tincowrie Dutta's father in the presence of Tincowrie Dutta to adjust the deposit of Rs. 1,200 against the rent for May and June, 1952 (see his answer to qq. 64, 65 and 19). Due to lapse of time he is confused about the dates and details of the conversation but the contemporaneous conduct of the parties corroborates his evidence. The parties proceeded on the footing that the term of the lease would expire in June, 1952 and that in accordance with the covenant in the lease the deposit of Rs. 1,200 would be adjusted against the rent for May and June, 1952.

70. The evidence as a whole shows that by the payment and acceptance of rent and the continuance of possession by the lessees after June, 1949 the parties did not intend to create a new tenancy or a tenancy by holding over as contemplated by Section 116 of the Transfer of Property Act. On the contrary they proceeded on the basis that the term of the lease dated July 5, 1937 would expire at the end of June, 1952 and that until then, the lessees were entitled to continue in possession of the property by virtue of the lease itself. This view may be wrong and technically incorrect but it is dear that they proceeded upon this view.

71. In spite of payment and acceptance of rent for occupation of the property after the determination of the lease it may be shown that the parties did not intend that there should be a new tenancy. See *Thompson (General Furnishers) Ltd. v. Phillips*[32], *Karnani Industrial Bank Ltd. v. Province of Bengal and Ors., AIR 1951 SC 285 : AIR SCR 560* (supra).

In *Clarke v. Grant and Anr*[33]., Lord Goddard, C.J. observed:

> "If a proper notice to quit has been given in respect of a periodic tenancy, such a yearly tenancy, the effect of the notice is to bring the tenancy to an end just as effectually as if there has been a term which has expired. Therefore, the tenancy having been brought to an end by a notice to quit, a payment of rent after the termination, of the tenancy would only operate in favour of the tenant if it could be shown that the parties intended that there

should be a new tenancy."

72. Thus payment and acceptance of rent by a tenant whose contractual tenancy has expired but who is entitled to retain possession of the premises by virtue of the protection given to him by the Rent Control and Tenancy Acts is of itself not sufficient evidence to show that the parties intend to create a new tenancy, see ***Davies v. Bristow, (1920) 3 KB 428***; ***Morrison v. Jacobs, (1945) 2 AER 430*** and ***Monindra Nath De v. Man Singh, AIR 1951 Cal. 342 : 85 CLJ 339***. In ***Marcroft Wagons Ltd. v. Smith, (1951) 2 KB 496***. the daughter of a deceased statutory tenant was permitted to remain in the premises and weekly payments by the daughter were accepted by the landlord. The daughter was not a statutory tenant and yet the Court held that no tenancy had been created by the acceptance of the weekly payments. Denning L.J. observed at 506:

> "If the acceptance of rent can be explained on some other footing than that a contractual; tenancy existed as, for instance, by reason of an existing or possible statutory right to remain, then a new tenancy should not be inferred."

73. In the instant case rent was paid and accepted on the footing that the lessees had an antecedent right under the original lease to remain as tenants until the expiry of June, 1952. The parties did not intend to create a new tenancy. They intended to continue the supposed existing tenancy. In the circumstances, no new tenancy was created. The lessees did not hold over as monthly tenants under Section 116 of the Transfer of Property Act. The term of the original lease had in fact expired by the end of June, 1949. The lessees therefore held the property as licensees during the period from July, 1949 up to June, 1952. The Defendants retaining possession of the property after expiry of the term of the lease, dated July 5, 1937, can therefore be fairly said to be holding the property under the registered lease, dated July 5, 1937, and not under a new contract of tenancy. Consequently in view of Section 2(5)(b) of the Calcutta Thika Tenancy Act, 1949, they are not thika tenants. It may be noted that the case that the Defendants were thika tenants was made for the first time in the written statement in the suit (see Tincowrie Dutta's answer to q. 84).

74. On both the grounds mentioned above the tenancy in question, is not a thika tenancy. Consequently the High Court has. jurisdiction to try the suit.

[32](1945) 2 AER 49
[33](1949) 1 AER 768 at 769

75. I agree with the order made by my learend brother.