FEDERAL HIGH COURT

Kai Khushroo Bezonjee Capadia

Vs

Bai Jerbai Hirjibhoy Warden

(Kania, C.J.)

30.03.1949

JUDGMENT

Kania, C.J.

1. I have read the judgment pre-pared by Mukherjea J. I agree with the reasoning and conclusion of that judgment and have nothing to add.

Fazl Ali, J.

2. I agree.

Mahajan, J.

3. I agree.

B.K. Mukherjea, J.

4. This appeal is on behalf of the plaintiff and it arises out of an action in ejectment, commenced by him, in the original side of the Bombay High Court, claiming recovery of possession of the upper and the ground floors of a house occupied respectively by defendants 2 and 3 as sub-lessees under defendant 1, the original lessee under the plaintiff.

5. The material facts, which are not in controversy, may be shortly stated as follows: The plaintiff appellant is admittedly the owner of a residential premises known as "Capadia House" situated at Gowalia Tank Road in the city of Bombay. By an indenture of lease dated 12th August 1932, the entire premises were let out by the plaintiff to defendant 1 for a period of five years commencing from 1st September 1932, with an option of renewal for a further period of five years the rent reserved being ₹ 625, a month. At the end of five years, the lessee exercised the option of renewal and the lease continued up to 31st August, 1942 when it came to an end by efflux of time. During the period of the lease defendant 1 created a sublease in favour of defendant 2 in September 1932 in respect of the upper floor of the demised premises at a rental of ₹ 210/- per month and on 1st May 1940 he granted a sub-lease of the ground floor to defendant 3 at a monthly rental of ₹ 172. On 21st July 1942 the plaintiff wrote a letter to defendant 1 formally

demanding vacant possession of the demised premises by the 31st of August following when the lease was due to expire, and defendant l passed this letter on to defendants 2 and 3 requesting the latter to comply with its directions. On 17th August 1942 a reminder was sent by the plaintiff to defendant 1 and in this letter it was stated inter alia that the premises were required by Government for war purposes and that the military authorities would take possession of the same on 1st September 1942. This letter was also forwarded by defendant 1 to his sub-tenants. In spite of these letters defendants 2 and 3 did not vactate the portions of "Capadia House" respectively occupied by them and the only thing that defendant 1 could do at the expiry of the lease was to give up those portions of the premises which were actually in his occupation; and he intimated to the plaintiff by a letter dated 3rd September 1942 that it was not possible for him to do anything further inasmuch as the sub-tenants were refusing to vacate the premises in spite of repeated demands and were rightly or wrongly claiming protection under the Bombay Rent Act. On 80th September defendant 2 sent a cheque for ₹ 210 to the plaintiff stating it to be the rent for the month of September in respect of the upper floor of the Capadia House which she was occupying and on 6th October following defendant 3 also remitted to the plaintiff a cheque for ₹ 172 as the rent for the ground floor of the premises due for the same month. Both these cheques were returned by the plaintiff and defendants 2 and 8 were definitely told that they were trespassers pure and simple and had no right to pay rents or demand recognition as tenants from the plaintiff. On 2nd November 1942 defendant 2 again sent to the plaintiff two cheques for ₹ 210 each as rent for the months of September and October 1942 and two cheques for ₹ 172 each were sent by defendant 3 on 9th November following. These cheques were received by the plaintiff, apparently without any protest, and they were put into his banking account on 23rd November 1942, no receipts being given at that time to either of these defendants. It appears that the house in question was subject to mortgage executed by the plaintiff in favour of two persons, namely, Sakina Bai and Ismail on 7th April 1941, and in exercise of the powers reserved to them by the mortgage instrument, the mortgagees appointed a Receiver of the rents and profits of the mortgaged property on 20th November 1942. It may be noted that cheques mentioned above were sent by the plaintiff to his banking account immediately after the Receiver was appointed. On 3rd December 1942 defendant 2 sent a further cheque for ₹ 210 to the plaintiff as the rent payable by her for the month of November 1942 and this cheque was sent by the plaintiff to his bank on or about 5th January 1943. On that date the plaintiff addressed two letters to the two defendants which were worded in identical manner and stated inter alia that these cheques had been accepted by him as part deposits towards his claim for compensation for illegal use and occupation of the premises by defendants 2 and 3 since 1st September 1942, and that they were accepted without prejudice to the plaintiff's rights and contentions under the Rent Act. The claim for ejectment, it was asserted, which the plaintiff had made previously, would not be affected in the least by receipt of these monies. Stamped receipts acknowledging receipt of these amounts were sent to the two defendants along with the letters. Prom the month of December 1942, up to 1st September 1943 rents paid by defendants 2 and 3 for the portions of the house in their occupation were accepted by the Receiver appointed by the mortgagees as mentioned above, and in the receipts granted by the Receiver it was stated that they were given without prejudice to the rights of the plaintiff or the occupiers of the premises who paid these rents. The Receiver gave up possession of the property on and from 1st September 1943 and since then defendants 2 and 3 continued to pay the amounts payable as rents to the plaintiff, every month and the plaintiff

granted receipts in the same form in which they were granted by the Receiver. This state of affairs continued right up to the institution of the present suit which was filed by the plaintiff on 7th December 1945 claiming recovery of possession of the premises in question after evicting defendants 2 and 3 who, it was alleged, were trespassers out and out and whose interest, if any, had come to an end as soon as the lease in favour of defendant 1 expired. Defendant 1 was impleaded as a party defendant to this suit though no relief was claimed against him.

6. A number of pleas were taken by defendants 2 and 3 in their written statements and many of them are not material for our present purpose. The main controversy between the parties centred round two points, viz., (1) whether defendants 2 and 3 could claim immunity from eviction by reason of their being "tenants" within the meaning of the Bombay Rent Act; and (2) whether the plaintiff having accepted rents from defendants 2 and 3, who remained in occupation of the premises after the determination of the lease by lapse of time, Section 116, Transfer of Property Act, came into operation and created a tenancy from month to month in favour of each one of the defendants which could be terminated only by proper notice to quit.

7. Bhagwati J. who heard the case decided both these points in favour of the plaintiff and decreed the suit. Two appeals were taken against this decision one by defendant 2 and the other by defendant 3 and they were consolidated and heard by a Division Bench consisting of Chagla A.C.J. and Coyajee J. The learned Judges allowed the appeals on the ground that defendants 2 and 3 acquired the status of tenants by "holding over" under the provision of Section 116, Transfer of Property Act, and so long as these new tenancies were not lawfully determined, the suit for ejectment was bound to fail. As the decision on this question alone was sufficient for disposal of the appeals, the learned Judges did not advert to or consider the other point raised by the appellants, namely, whether they enjoyed protection under the provisions of the Bombay Rent Act. It is against this judgment that the present appeal has been preferred and the sole point for our consideration is whether on the facts admitted and proved, a case of "holding over" within the meaning of Section 116, Transfer of Property Act, has been made out by defendants 2 and 3 and they could claim the status of tenants as contemplated by that section.

8. Before I advert to the arguments advanced on this point by the learned Counsel for the plaintiff appellant, it may be convenient to examine the language of Section 116, Transfer of Property Act. Section116 runs as follows:

> If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in Section 106

9. On the determination of a lease, it is the duty of the lessee to deliver up possession of the demised premises to the lessor. If the lessee or a sub-lessee under him continues in possession even after the determination of the lease, the landlord undoubtedly has the right to eject him forthwith; but if he does not, and there is neither assent nor dissent on his part to the continuance of occupation of such person, the latter becomes in the language of English law a tenant on sufferance who has no lawful title to the land but holds it merely through the laches of the

landlord. If now the landlord accepts rent from such person or otherwise expresses assent to the continuance of his possession, a new tenancy comes into existence as is contemplated by Section 116. Transfer of Property Act, and unless there is an agreement to the contrary, such tenancy would be regarded as one from year to year or from month to month in accordance with the provisions of Section 106 of the Act. As Section 116. Transfer of Property Act expressly mentions an under-lessee, defendants 2 and 3 would obviously come within the purview of the section, and it is not disputed that they did continue in possession after the lease expired by lapse of time. If, therefore, it is established on the facts of this case that the plaintiff assented to the continuance of possession of defendants 2 and 3 in respect to the demised premises by acceptance of rent or otherwise, these defendants would certainly acquire the status of tenants under Section 116, Transfer of Property Act.

10. The learned Judges of the Bombay High Court who heard the appeal are of opinion that the plaintiff in the present case must be held to have accepted rents which were paid by defendants 2 and 3 when he sent the cheques remitted by the latter to his banking account on 28rd November 1942. It is held that these monies were paid as rents by defendants 2 and 3 and they being received as rents by the plaintiff, the requirements of Section 116 were fully complied with; and it was immaterial that the plaintiff had in his earlier correspondence refused to recognise these persons as tenants or in the letter addressed to them on 5th January 1943 asserted that these monies were received as part deposits towards his claim for compensation for wrongful use and occupation of the premises in question.

11. The propriety of thi3 decision has been challenged by Mr. Daphtary who appeared in support of the appeal and his contention is that the appellate Judges of the High Court mis-directed themselves as to the elements necessary to create a tenancy by "holding over" under Section 116, Transfer of Property Act, and that their approach to the evidence has not been a proper one.

12. It is argued that the tenancy contemplated by Section 116, Transfer of Property Act, is a new tenancy which is brought into being after the expiry of the old, if and when the conditions laid down in the section are fulfilled. The essential thing in a new tenancy is that the parties must be ad idem as to its terms. If this agreement or consensus is wanting, no tenancy can possibly come into existence, and the position of the lessee, whose lease has expired, must be considered to be that of a trespasser. It is said by the learned Counsel that this is exactly what has happened in the present case. On the one hand, defendants 2 and. 3 when they remitted rents to the plaintiff did so, not for entering into a fresh agreement with the plaintiff but only to discharge what they conceived to be their existing legal obligation as statutory tenants under the provision of the Bombay Rent Restriction Order. On the other hand, the plaintiff did not accept the rents paid by defendants as rents at all, but only as compensation for wrongful use and occupation of the premises by the latter. Thus the parties were not ad idem upon the basis of which a new tenancy could be founded.

13. This argument, though plausible at first sight, does not appear to me to be sound. It is perfectly right that the tenancy which is created by the "holding over" of a lessee or under-lessee is new tenancy in law even though many of the terms of the old lease might be continued in it, by implication; and it cannot be disputed that to bring new tenancy into existence, there must be a bilateral act. What Section 116, 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 lessee's or sub lessee's

continuing in occupation of the property after his interest has ceased and on the other side there must be a definite assent to this continuance of possession by the landlord expressed by acceptance of rent or otherwise. It can scarcely be disputed that the 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.

14. With regard to the first part of the argument of the learned Counsel for the appellant, it may be pointed out that in cases of tenancies relating to dwelling houses to which the Rent Restriction Acts apply, the tenant may enjoy a statutory immunity from eviction even after the lease has expired. The landlord cannot eject him except on specified grounds mentioned in the Acts themselves. In such circumstances, acceptance of rent by the landlord from a statutory tenant, whose lease has already expired, could not be regarded as evidence of a new agreement of tenancy and it would not be open to such a tenant to urge, by way of defence, in a suit for ejectment brought against him, under the provisions of Rent Restriction Act that by acceptance of rent a fresh tenancy was created which had to be determined by a fresh notice to quit. As authorities for this proposition, reference may be made among ors. to the decisions of the English Court3 in *Davies v. Bristow*[1] and *Morrison v. Jacobs*[2]

15. In the case before us, however, Mr. Daphtary cannot and does not say that defendants 2 and 3 were statutory tenants and the present suit is also not one for ejecting such tenants under the special provisions of any Rent Act. What Mr. Dephtary wants to say is that defendants 2 and 3 asserted, though wrongfully, that they were statutory tenants and purported to pay rents in that capacity. There was, therefore, no offer of fresh tenancy implied in their payment of rent which could be said to have been accepted by the plaintiff. I do not think that this contention is right. From the letters that were exchanged between the parties, it would appear that on 17th August 1947 the plaintiff intimated to defendant l that the entire premises had been hired by Government for military purposes and that the sub tenants must vacate the portions in their occupation before 1st September following when the military authorities were due to take possession of the house. On 21st August 1942 the solicitor for defendant 2 wrote to the plaintiff a letter, requesting him to send a copy of the document relating to the hiring of the bungalow by the Government or else to arrange for inspection of the same immediately, so that his client might ascertain the exact position and approach the Government, if necessary, in connection with the matter. The plaintiff refused to accede to this request and on 29th August 1942 wrote to defendant 2's solicitor stating inter alia that there was no privity of contract between him and defendant 2 and that the latter was labouring under false impressions regarding her position. In reply to this letter the solicitor wrote to the plaintiff that his client maintained that she was entitled to occupy the premises and she would do it. On 30th September following defendant 2 sent a cheque for ₹ 210 to the plaintiff as rent for the month of September 1942. In the letter accompanying the cheque nothing was said which might suggest that she was paying the rent in discharge of her obligation as a statutory tenant under the provisions of the Rent Restriction Act. This cheque, as has been said before, was returned by the plaintiff with the remark that defendant 2 was a trespasser pure and simple and could not claim the status of a tenant. In answer to this defendant 2's solicitor did write to the plaintiff on 7th October 1942 that his client was not a trespasser but a tenant within the meaning of the Rent Restriction Order of 1942. The refused cheque was sent back to the plaintiff along with this letter and the plaintiff refused it once more saying that he adhered to the statement already made by him in his previous correspondence. On the very same day defendant 2's

solicitor addressed a letter to the plaintiff, the material portion of which runs as follows:

> Your client's adherence to what is but a capricious conjecture of his own regarding the legal position will not affect our client's rights. Our client has always been ready and willing to pay the rent of the premises to your client after the expiry of Mr. D.E. Joshi's lease.

16. As has been stated already on 2nd November 1942, two cheques for ₹ 210 each were sent by defendant 2'S. solicitor to the plaintiff. In the covering letter it was simply stated that the, amounts were sent as rents due for the months of September and October 1942. There is nothing here also to indicate that the payments were made in performance of her statutory obligation under the Rent Restriction Act.

17. So far as defendant 3 is concerned, there was no clear assertion by him or on his behalf either when he sent the cheques to the plaintiff or at any time before or after that he was occupying the premises as a statutory tenant and that it was to fulfil his obligations as such tenant that the payment of rent was made. On the other hand, the specific case set up by him was that the plaintiff had entered into negotiations with him prior to the expiry of the lease and agreed to accept him as a tenant in respect of the ground floor of the premises at ₹ 200 a month. The plaintiff, it is said, subsequently turned round and demanded ₹ 400 as rent per month and that is why defendant 3 thereafter did send and continue to send only ₹ 172 as rent every month.

18. Prom the evidence adduced in this case it is just probable that when the plaintiff was refusing to accept rents from defendants 2 and 3 and threatening to eject them as trespassers, the latter were advised by their legal advisers to claim protection under the Rent Restriction Act. This seems to be the idea entertained by defendant l when he wrote to the plaintiff on 3rd September 1942. The claim, however, was never put forward specifically by defendant 3 and so far as defendant 2 is concerned, the statements of her solicitor, as referred to above, were nothing else but a lawyer's protest against the continued assertion of the plaintiff that defendant 2 was a trespasser out and out whose possession of the premises was entirely unlawful. In my opinion, the mere fact that additional protection was sought for under a particular statute with or without just grounds could not by itself stand in the way of any. body's claiming a tenancy right if such tenancy was established by proper evidence. The real point for consideration is what was the offer implicit in the payment of rents made by defendants 2 and 3. In my opinion, what these defendants wanted was to continue on the same terms as before with this difference that instead of being sub-lessees under defendant 1, they would occupy the position of lessees directly under the plaintiff. This is the specific case made by defendants 2 and 3 in their written statements and it is fully borne out by the letters which they and their solicitors addressed to the plaintiff when the cheques in payment of rent were sent to him. The rents were paid as rents for the new tenancies which these defendants wanted to have under the plaintiff. But as the plaintiff had refused to accept rents on a previous occasion and was likely to refuse them again, a claim for protection under the Bent Act was thought of only as a second string to the bow which they might fall back upon, in case the plaintiff did not recognise them as tenants or accept rents from them. This is the case which the defendants seem to have made consistently throughout and this is exactly what has been pleaded in their written statements in the present case. In my opinion,

the first part of Mr. Daphtary's contention must fail.

19. The question now is whether the rents were accepted as such by the plaintiff when he sent the cheques of defendants 2 and 3 to his banking account on 23rd November 1942 ? Mr. Daphtary argues that the plaintiff did not accept the cheques as payment of rents by defendants 2 and 3 and he did not recognise them as tenants at all. The position taken by the plaintiff throughout has been that the defendants were trespassers and he accepted the monies only as damages for use and occupation to which he was entitled under law. It is necessary to see how the evidence on this point stands. It would appear from the correspondence on record that ever since the termination of the lease of defendant 1 defendants 2 and 3 were sending monies to the plaintiff as and by way of rents for the portions of the house in their use and occupation There is no ambiguity whatsoever in the conduct of these defendants and non-certainty as to the character in which these payments were offered to be made. The cheques sent by defendants 2 and 3 on 30th September and 6th October 1942 respectively were returned by the plaintiff and there is no doubt that at that time he had no intention of treating these defendants as tenants or accepting any rents from them. There was obviously a change when the second set of cheques were sent to the plaintiff in November 1942. This time they were not returned to the defendants and the plaintiff kept them in his hands for some time and then sent them on to his bankers. Curiously enough this synchronizes with the appointment of a Receiver by the mortgagees who was to take possession of the house on 20th November 1942. It may be that it was this circumstance which brought about a change in the mind of the plaintiff. But whatever the motive might have been, the fact re. mains that the plaintiff cashed these cheques and appropriated the monies which were paid by the defendants as and by way of rents and rents only, The protest or the explanation of the plaintiff came only on 5th of January 1943 when the plaintiff intimated to defendants 2 and 3 that the monies sent by them were received as compensation for use and occupation without affecting in any way his rights to eject them as trespassers. The question is whether on these facts the plaintiff can be said to have accepted the rents as such. In my opinion, the answer to this question must be in the affirmative.

19a. In the first place, the facts clearly show that when the cheques were cashed, it was done without any reservation or condition whatsoever. The protest was not a contemporaneous but a much subsequent event and if the agreement was already complete by acceptance of rent on 23rd November 1942, the subsequent conduct of one of the parties cannot alter its legal consequences. In the second place, it seems to me that when money was paid as rent, it did not lie in the mouth of the plaintiff to say that he would receive the money but not as rent. It is a settled principle of law that when money is paid by a debtor with an express intimation that it is to be applied to the discharge of a particular debt, the creditor may not accept the money at all; but if he receives and appropriates it, he cannot be allowed to say that he took it wrongfully on some other account. The ordinary legal consequence of accepting payment as indicated by the debtor would follow in such cases, however much the creditor might attempt to repudiate them. This being the position it must be held on the facts of this case that money was not only paid as rent by defendants 2 and 3 but was received as rent by the plaintiff and consequently a monthly tenancy under the provision of Section 116, Transfer of Property Act, did come into existence. So long as this monthly tenancy is not determined in a manner recognised by law, the plaintiff's suit for ejectment must fail.

20 The result is that the appeal fails and is dismissed with costs.

Patanjali Sastri, J.

21. I regret I am unable to agree with the conclusion arrived at by my learned colleagues in this ease.

22. The appellant is the owner of a house known as "Capadia House" situated in Gowalia Tank Road, Bombay. By an indenture of lease dated 12th August 1932, the appellant let the house to defendant l (hereinafter referred to as the lessee), for a term of five years commencing from 1st September 1932 with an option for renewal for a further period of five years. The lessee exercised the option and the renewed lease expired by efflux of time on 31st August 1942. During the term of the lease the lessee sublet a portion of the house to respondent 1 (defendant 2) at a monthly rent of ₹ 210 and another portion to respondent 2 (defendant 3) at a monthly rent of ₹ 172, being himself in possession of the rest of the house. On the termination of the lease, the lessee delivered vacant possession of the portion in his Occupation, but the respondents in spite of demand refused to vacate the portion respectively sublet to them, but sent cheques every month in purported payment of the rents respectively due from them. Although appellant at first returned the cheques sent for the months of September and October refusing to recognise respondents as tenants, he paid those cheques into his banking account when they were again sent to him in November. A cheque sent by respondent 1 in December for the rent of November was similarly dealt with. On 5th January 1943 the appellant wrote to the respondents acknowledging the receipt of those cheques but accepting them without prejudice to his rights and contention under the Rent Act and refusing to recognise the respondents as tenants. Meanwhile, on 20th November 1942 certain creditors to whom the appellant appears to have mortgaged the house, appointed a Receiver for the collection of rents in exercise of the powers reserved under the mortgage, and cheques for the rents of subsequent months till September 1943 were sent to the Receiver and were accepted by him without prejudice to the rights of the appellant as well as of the respondents. The mortgage having been paid off in September 1943, the cheques for the following months were sent by the respondents to the appellant himself who was accepting them without prejudice to his rights and contentions until the institution of the present suit in December 1945.

23. In the plaint the appellant set forth the facts referred to above and the gist of the correspondence between the parties, and alleged that there was no privity of contract between himself and the respondents, that they continued in wrongful occupation of the premises after the expiry of the lease and that he never recognised them, as his tenants. He denied that the respondents were entitled to the protection of the Bombay Rent Restriction Order as alleged by them and claimed recovery of possession of the premises and compensation for use and occupation thereof from 1st December 1945 till delivery of possession. The main pleas raised by the respondents in defence to the suit were that, the appellant having accepted monthly rents for the premises after the termination of the lease, a tenancy from month to month was created under Section 116, Transfer of Property Act, 1882, and such tenancy not having been terminated by a notice to quit, the appellant was not entitled to recover possession of the premises, and, secondly, that the respondents were entitled to the protection of the Bombay Rent Restriction Order and could not be evicted without compliance with the requirements of that order.

24. Bhagavati J., who tried the suit rejected both these contentions. He held that the acceptance

of rent by the lessor referred to in Section 116 should be regarded not as a unilateral act of election on the part of the lessor to treat the lessee as either a trespasser or tenant but as implying an agreement to create a new tenancy after the determination of the old lease. From this point of view the learned Judge held that the acceptance by the appellant of the respondents' cheques as compensation for use and occupation and without prejudice to his rights and contentions could not be deemed to be acceptance of rent within the meaning of Section 116. He accordingly decreed the suit.

25. On appeal a Division Bench of the Court (Chagla Ag. C.J. and Coyaji J.) disagreed with the view of the trial Judge as to the true' effect of the lessor's acceptance of rent under Section 116. Distinguishing the decision in *Navnitlal Chunilal v. Babu Rao*[3] a case decided under Section 113, they were of opinion that, while the Court could under that section take into consideration not only the payment and acceptance of rent but also "all the facts and surrounding circumstances," under Section 116 a "statutory contract between the landlord and the person holding over comes into existence as soon as the landlord accepts rent." and that no other question with regard to the intention of the landlord for accepting rent can arise under Section 116.

On this view, they held that a tenancy from month to month was established on the facts of the case and, no notice to quit having admittedly been given by the appellant, his suit must fail. The learned Judges did not consider it necessary to hear arguments as to whether the respondents were entitled to protection under the Bombay Rent Restriction Order. From that decision the appellant has preferred this appeal, and the question is whether the payment and acceptance of rent in the circumstances of this ease raises an implication of a monthly tenancy under Section 116, Transfer of Property Act.

26. In view of the divergent opinions expressed in the Court below as to the true meaning and requirements of Section 116, it is necessary to examine carefully its terms and implications and to see whether it is merely a statutory enunciation of the common law rule or whether it marks any departure in principle as respects the legal effect of the receipt of rent from a lessee holding over. Under the common law the position is well established and is thus stated in Woodfall's "Law of Landlord and Tenant"

Where a tenant for a term of years holds over after the expiration of his lease he becomes a tenant on sufferance, but when he pays or expressly agrees to pay any subsequent rent at the previous rate a new tenancy from year to year is thereby created upon the same terms and conditions as those contained in the expired lease so far as the same are applicable to and not inconsistent with an yearly tenancy. This appears to be a matter of evidence rather than of law.... The landlord may show that he accepted the rent from time to time under a mistake...or the tenant may show any facts leading to an opposite conclusion as that the continued occupation was only provisional and in anticipation of a new lease on new terms. Dealing with the closely analogous case of waiver of a notice to quit previously given (of Section 113, Transfer of Property Act) For says in his "General Law of Landlord and Tenant": A mutual agreement to this effect may be implied from acts amounting to an offer and acceptance of a new tenancy. It is thus clear that under the common law when a lessee holds over after the determination of the lease either by efflux of time or by a notice to quit and rent is paid and received, there arises by implication a fresh contract of tenancy based, just like any other contract on the consensus ad idem of the parties. Is the position different under Section 116, Transfer of Property Act ?

27. Before considering that question it will be convenient to dispose of a subsidiary point arising on the language of the section which reads thus:

> If a lessee or under-lessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or under-lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased, as specified in Section 106.

28. It is argued by the Advocate.General of Bombay that "property" here means the whole property which is the subject of the lease and, therefore the section has no application where only a portion or portions of the property have been sub-leased by the lessee. I am unable to agree. Section 108(j) recognises the right of a lessee to sub lease the whole or any part of his interest in the property leased, and where the lessor finds, on the expiry of the term, a number of under-lessees continuing in occupation and accepts rents from one or more of them, there is no obvious reason why Section 116, which expressly includes under-lessees also within its scope, should not have application. There is no warrant, in my opinion, to limit the operation of the section in the manner suggested.

29. Turning now to the main point, it will be seen that the section postulates the leasee remaining in possession after the determination of the lease which is conduct indicative, in ordinary circumstances, of his desire to continue as a tenant under the lessor and implies a tacit offer to take a new tenancy from the expiration of the old on the same terms so far as they are applicable to the new situation, and, when the lessor assents to the lessee so continuing in possession, he tacitly accepts the latter's offer and a fresh tenancy results by the implied agreement of the parties, When, further, the lessee in that situation tenders rent and the lessor accepts it, their conduct raises more readily and clearly the implication of an agreement between the parties to create a fresh tenancy. As Woodfall remarks "actual payment of rent is not always essential, although that is perhaps the clearest proof." That is why, I conceive, acceptance of rent is specifically mentioned in the section but, apart from its probative value, it has no special legal efficacy or significance. What creates the new relationship of landlord and tenant after the determination of the previous lease is not the acceptance of rent by itself, but the "assent" of the lessor which may be proved by such acceptance or "otherwise," the assent of the lessee to the fresh arrangement being already there implicit in his continuing in possession or tendering of rent. In other words, the conduct of the par. ties, in such circumstances, implies an offer by the person holding over to take a new tenancy on the terms of the old and acceptance of that offer by the owner. That the section is based on an implied or presumed contractual, and not a statutory, relationship is also made clear by the reference to "an agreement to the contrary" excluding the operation of the rule, for if it were the intention of the Legislature to bring into existence an arrangement by force of the statute and independently of the consensus of the parties as under the recent rent control legislation, one would expect that it would not be made liable to be displaced by an agreement between the parties. In my opinion, the principle underlying Section 116 is implied contract, and the test of renewal is the consensus between the lessor and the lessee or under-lessee holding over and not an option exercisable by the lessor alone.

30. Mr. Setalyad on behalf of the respondents brought to our notice a decision of the Bombay

High Court, *Meghji Vallabhdas v. Dayaljilal & Co*[4]. where Fawcett J. held that the assent of the lessor and not that of the lessee was material for the purposes of Section 116. The decision appears to be based on a too literal construction of the language employed and does not give effect to the true meaning of the section.

31. I am accordingly of opinion that the learned appellate Judges in the Court below approached the question from a wrong angle in that they regarded the cashing of the cheques sent by the respondents for September and October rents as conclusive evidence of a "statutory con-tract" of tenancy under Section 116 and failed to consider whether, in all the circumstances of the case, it could reasonably be inferred that the appellant and the respondents, between whom there had been neither privity of contract nor privity of estate, were ad idem as to the creation as between themselves of the relationship of landlord and tenant on a contractual basis.

32. As has been already observed, the respondents were resisting the appellant's repeated demand for delivery of vacant possession and they appear to have done so on the strength of the Rent Restriction Order in force in the City of Bombay. The lessee in his letter dated 3-9. 1942 to the appellant's solicitors stated that "it appears that the sub-tenants rightly or wrongly wish to take advantage of the Rent Act" and added that, so far as he was concerned, he would be very happy if the respondents vacated the premises. On 7th September 1942 respondent l's solicitors wrote to the appellant stating that "our client maintains that she is entitled to continue to occupy the premises and she will do so." This was followed by their letter of 30th September 1942 to the appellant's solicitors enclosing a cheque for ₹ 210, dated 1st October 1942 being "the amount of rent payable to your client for the month of September". This cheque was returned by the appellant's solicitors by their letter of the 6th October wherein they added that:

> your client is not our client's tenant at all and there is absolutely no privity of contract between our client and your client, and that "your client is a mere trespasser." In reply, respondent l's solicitors by their letter dated 7th October 1942 claimed that respondent 1 was a tenant on the premises and comes under the definition of that word under the provisions of the Bombay Kent Restriction Order, 1942, and as such our client had a right to continue in occupation of the said premises, any they sent the cheque for September rent once again with a request for a "duly receipted bill therefor." The cheque was again returned by the appellant's solicitors with their letter of even date wherein they stated that the appellant adhered to the position he had already taken up, to which respondent l's solicitors retorted that the appellant's adherence to what is but a capricious conjecture of his own regarding the legal position will not affect our client's rights.

33. Though the appellant had thus refused to accept the cheque Bent for September rent, respondent l's solicitors again wrote to the appellant's solicitors on 2nd November 1942 reiterating that their client was "entitled to continue in occupation of the premises," and sent enclosed with their letter not only the cheque previously returned by the appellant but also another cheque for ₹ 210 being the rent for October and asked for "duly receipted bills for September and October." When the appellant's solicitor returned these cheques also, stating that they had no instructions to accept them, respondent l's solicitors sent them to the appellant direct.

34. In the meantime respondent 2's solicitors by their letter dated 8th September 1942 addressed to the appellant's solicitors put forward an agreement to let respondent 2 continue in possession on payment of ₹ 200, p. m. from 1st September 1942. The appellant's solicitors, however, denied any such agreement by their letter of even date. Respondent 2's solicitors wrote back on 11th September 1942 saying that the denial was false to the appellant's knowledge "as will be proved at the proper time and place" and that the appellant was trying "to exact exorbitant rent from our client on false excuses". They added that "even the rent of ₹ 200 per month agreed to by our client with a view to avoid trouble is higher than the standard rent." It may be noted that "standard rent" is the rent payable under the Rent Restriction Act. On 6th October 1942 respondent 2, without any further reference to the alleged tenancy agreement at a monthly rent of ₹ 200, sent a cheque dated 1st October 1942 for ₹ 172 only which was the rent he was paying as under-tenant to the leasee before the expiration of the lease. This was returned on 10th October 1942 by the appellant who made it clear that there was no privity of contract between himself and respondent 2 and that the latter was no more than "a trespasser on the property since 1st September 1942." Respondent 2, however, sent the cheque again to the appellant on 9th November 1942 together with another cheque for ₹ 172 as rent for the month of October. Though in this correspondence respondent 2 did not in express terms assert a right to continue in occupation under the Rent Restriction Acts, there can be little doubt that he was acting in concert with respondent l in resisting the appellant's demand for delivery of possession by invoking the protection of those statutes, as appear not only from the lessee's letter to the appellant of 3rd September 1942 already referred to, but also from his affidavit filed on 14th February 1946 in reply to the summons for summary judgment in the suit wherein he stated, referring to the correspondence set out above:

> I said that I would pay him ₹ 200 per month for the ground floor although I was not bound to do under the Bent Act and he agreed to the same.
>
> The reference to the "standard rent" in his solicitor's letter of 11th September 1942 also points in the same "direction".

35. All these cheques sent by the respondents were paid by the appellant into his banking account on 23rd November 1942, and a cheque for ₹ 210 sent by respondent on 3rd December 1942 as rent for the month of November was also similarly realised by him. In acknowledging the receipt of these cheques, however, by letters sent to each of the respondents in identical terms on 5th January 1943, he stated that he accepted the amounts without prejudice to his rights and contentions under the Kent Act or otherwise and further without prejudice to my claim against you for compensation for the use and occupation of the premises.

He added that he had been keeping bad health and was also out of Bombay and therefore could not write earlier. The rents for December 1942 and the following months till September 1943 were, as already stated, received from the respondents by the receiver, "without prejudice to the rights of Mr. Capadia as well as of" Mr. Warden or Mr. Marshall, as the case may be, and from October 1943 onwards till the date of suit the rents were received by the appellant himself "without prejudice to my rights and contentions".

36. The question is whether it can be inferred from these facts that there was consensus ad idem between the parties to a contract of tenancy from first September from 1942.

37. The learned appellate Judges in the Court below, viewing the question from the standpoint of appellant's election by conduct, based their conclusion on the fact that the appellant "deliberately and advisedly" got the cheques sent by the respondents as rent cashed through his bankers. They referred to the previous conduct of the appellant in refusing to accept the cheques and treating the respondents as trespassers as "far from helping the plaintiff, going to show that he took a different view and came to a different conclusion when he cashed the cheques."

They attached special significance to the appellant's cashing of the cheques on 23rd November 1942, after the mortgagees issued notices on 20th November 1942 to the respondents to pay the rents in arrear as well as future rents to the Receiver appointed by them as a definite decision on the part of the appellant to accept the cheques as rent, and they regarded the appellant's letters of 5th January 1943 and his acceptance of the cheques sent subsequently without prejudice to his rights and contentions as a "change of front" which could not "possibly alter the legal relationship which had come into existence in November 1942".

38. I am unable to take that view. It is true that the respondents sent their cheques as-rent but they did so in assertion of a right to continue in occupation of the premises by virtue of the provisions of the Bombay Rent Restriction Order, 1942, a circumstance which appears to have been overlooked by the learned Judges but which, in my opinion, has an important bearing on the question whether there was an implied agreement between the parties that the respondents should continue in possession as tenants from month to month. Viewing the conduct of the parties as a whole, as I think it should be viewed, without concentrating the attention on the cashing of the cheques by the appellant on 23rd November 1942, I am of opinion that there is no room here for any inference that the respondents sent their cheques with a view to bring into existence a contractual tenancy and that the appellant accepted the cheques assenting to the respondents continuing in possession on that footing. The correspondence summarised above shows that the respondents were persistently and defiantly asserting their right to continue in occupation with a liability to pay rent every month. Such conduct, to my mind, is hardly consistent with an offer of a fresh tenancy for acceptance by the lessor. The appellant, for his part, after returning the cheques and insisting on delivery of vacant possession to him for some time, but in vain, received the cheques without prejudice to his rights and contentions under the Rent Acts until the issue was settled between the parties. So far from being ad idem as to the creation of a contractual tenancy, each party was consistently repudiating the position taken up by the other and maintaining his own. In such circumstances, the payment and acceptance of rent can lead to no inference of an implied contract of tenancy between the appellant and the respondents. The facts of the case are, in my opinion, such as rebut any presumption of a monthly tenancy under Section 116, Transfer of Property Act.

39. There is not much force in the suggestion that the mortgagees' intervention by appointing a receiver for the collection of rents and calling upon the respondents to pay the rents to him suddenly induced a definite change of attitude on the part of the appellant in regard to his relationship with the respondents. Even if the amounts of the cheques cashed by the appellant on 23rd November 1942 had been collected by the Receiver, the appellant would have received credit for those sums in the mortgagee's account. There is nothing to show that the appellant was

so pinched for money that receiving a sum of about ₹ 750, the amount of those cheques, into his own hands rather than getting credit for it at the hands of his mortgagee would have induced him to recognise the respondent as his tenants and thereby bring them within the protection of the Bent Restriction Acts, so as to place it beyond his power thereafter to evict them. In fact he paid off the entire debt in a few months there-after. The true explanation of the appellant's conduct is to be found rather in the difficult situation in which he found himself placed. There was no relationship of landlord and tenant between himself and the respondents who were only under-lessees before 1st September 1942. It was nevertheless claimed that they were his tenants by virtue of the Rent Restriction Order and were entitled to its protection. He tried to get rid of them if possible without recourse to a law suit, but his repeated attempts in that behalf proved futile owing to the respondents persisting in their claim. If only he had assented to the respondents continuing in possession by acceptance of rents or otherwise, the relationship of landlord and tenant would be created and the respondents would become entitled to protection from eviction under the Rent Restriction Order, a protection which was denied to them by the trial Judge in these proceedings on the ground that they were not tenants within the meaning of the Order. On the other hand, continued refusal of the cheques sent by the respondents would entail increasing loss. The appellant was accordingly minimising the loss by receiving the sums which the respondents conceived themselves liable to pay as statutory tenants, while at the. same time he was at pains to make it clear that he did not recognise them as his tenants. For their part the respondents wanted to pay the rents regularly, for their claim to protection under the Rent Restriction Order depended or* the regular payment, or readiness and willing. ness to pay the "standard rent."

40. That in such circumstances no fresh tenancy could be implied or presumed under Section 116, Transfer of Property Act, from payment and receipt of rents is shown by the decision of the Privy Council in *Kamakhya Narayan Singh v. Ram Raksha Singh and Ors*[5]. In that case the heirs of a grantee of a mokurrari istimarari patta, which, was eventually construed to convey only a life-estate, were in possession claiming the tenure to* be heritable and paid rent which the landlord accepted giving, however, receipts in marfatdari form, that is, in the name of the original grantee, so as not to prejudice his contention that the grant was not a heritable one and the persons who paid the rents were not his tenants. On a question of adverse possession, it was contended that a tenancy from year to year should be implied from such payments and receipt of rent on the principle underlying Section 116, Transfer of Property Act Their Lordships summed up the position on the facts as follows:

> The landlord was receiving the rent, but protecting himself by giving receipts in the names of the original mukarraridars. In their Lordships' option the effect of this was that the rent was paid and received by the parties respectively without prejudice to their above mentioned contentions until the question of the rights in respect of the lease was settled.
>
> The position here, as I have endeavoured to show, is more or less similar. Rejecting the contention based on Section 116 their Lordships went on to observe:
>
> In their Lordships' opinion this is not a case of the lessee or under-lessee holding over within the meaning of the section, but even if the case were to be considered on the assumption that the provisions of the section were applicable, the facts of this case would

> go> to show, as already stated, that, the parties in paying and accepting rent after the expiration of the lease for lives were acting without prejudice to their respective contentions, and it would have to be held that there was an "agreement to the contrary" which would prevent the application of the provisions of the section in the present case.
>
> That is to say, where the parties after the expiry of the lease pay and receive rents without prejudice to their respective contentions, it is to be inferred that they have agreed that no assent to the holding over should be implied or presumed. The observations are no doubt obiter, but if I may respectfully say so, they accord with my views

41. Mr. Setalvad on behalf of the respondents placed strong reliance on the English cases of *Croft v. Lumley*[6]before the House of Lords and *Davenport v. The Queen*[7] before the Privy Council. In the former case the view was expressed by the majority of the Judges who were invited by the House to give their opinions that acceptance of rent by the lessor with notice of a forfeiture amounted to a waiver of the forfeiture although the rent was accepted "without prejudice" to his right of re-entry. Crompton J., however, considered it "strange" that a person should be deemed to elect against his express determination communicated to the other party at the time unless indeed his act was inconsistent with any other explanation. The House ultimately found that no forfeiture had been incurred and it thus became unnecessary to pronounce on the point though Lord Wonsleydale, said he was "much disposed to agree with Crompton J. in his observation." In the other case, their Lordships, "without finding it necessary to invoke this opinion (of the majority of the Judges in *Croft v. Lumley* [8]to its full extent", applied the principle to a case where "money is paid and received as rent under a lease. "

42. Both these cases were cases of forfeiture which under the common law does ipso facto put an end to the tenancy but makes it only voidable at the option of the lessor. When, therefore, "rent" is paid after the forfeiture has been incurred and before the lessor elects to avoid the tenancy, it is payment of rent due under the subsisting lease and, in the words of Williams J. in *Croft v. Lumley*[9] the lessor "has no right at all to take the money unless he took it as rent." That is why I apprehend if the lessor receives it, he is not allowed to say that he took it "wrongfully" and the reservation of his right of re-entry is disregarded, or, as Baron Bramwell put it in the same case:

> His act would be taken to be rightful and bind him rather than his words make his act wrong.
>
> But the position is different where the tenancy is at an end either by expiry of a notice to quit or by efflux ion of time. In such a case the continuance in possession by the former tenant would be wrongful and he would be liable to pay, not rent, but only compensation for use and occupation. If in such circumstances, the lessor received the money sent as "rent" it could not be said that he took it "wrongfully," and if he made it clear that he received it without prejudice to his right to insist that the tenancy had come to an end, there could be no question of his words making his act wrong, or of his electing to affirm the tenancies. A fresh tenancy could arise only by agreement of the parties and whether an agreement could be implied is a matter of proper inference to be drawn from the conduct of the parties in the light of the surrounding circumstances.

43. The distinction between cases of forfeiture and cases of termination of tenancy has been pointed out in *Davies v. Bristou*[10] and *Penrhos College v. Butler (1920) 3 K.B. 428(Supra)*, which has been followed in subsequent cases in England. Referring to *Croft v. Lumley (1857) 6 H.I.C. 672(supra)* and *Davenport v. The Queen (1878) 3 A.C. 115*,(Supra) Lush J. held that the principle of those cases was not applicable to the case before him. The defendant in that case who claimed to be a statutory tenant under the Increase of Rent etc. (Restriction) Act, 1919, but was held not to "come within the section which protects him from an order for recovery of possession" paid rent after the notice to quit had expired, and the landlord received it and also served a notice that he was increasing the rent. Holding that no new tenancy was created on those facts the learned Judge made the following observations which are very pertinent here:

> If the defendant was resisting the plaintiff's demand for possession in reliance upon a statutory tenancy created by the Increase of Rent Acts, he was bound to tender the sum which he did as rent, and the plaintiff was entitled to receive it. In accepting rent tendered in circumstances like these a landlord does not prejudice his position or lose the right which he would otherwise have of insisting that the term has come to an end.

44. No other point was argued before us. I would allow the appeal and restore the decree of the trial Judge.

Cases Referred.

1(1920) 3 K.B. 428
2(1945) 1 K.B. 577
3A.I.R. (32) 1945 Bom. 132
4A.I.R. (11) 1924 Bom. 322
5A.I.R. (15) 1928 P.C. 146
6 (1857) 6 H.L.C. 672
7(1878) 3 A.C. 115
8(1857) 6 H.L.C. 672
9(1857) 6 H.L.C. 672
10(1920) 3 K.B. 428