PATNA HIGH COURT

Bastacolla Colliery Co. Ltd

Vs

Bandhu Beldar

A.F.A.D. Nos. 785 and 786 of 1953

(V. Ramaswami, C.J., R.K. Choudhary and K. Sahai, JJ.)

23.03.1960

JUDGMENT

K. Sahai, J.

1. These two appeals by the plaintiff, a company called Bastacolla Colliery Co. Ltd., arise out of two suits for ejectment of the principal defendants from certain lands situated in village Bastacolla and for issue of directions to those defendants to remove all structures and materials from the lands in suits within the time fixed by the Court. The appeals have been placed for disposal before this Bench owing to a conflict of decisions in this Court on two of the points involved in them. They have been heard together, and both are being disposed of by this judgment.

2. It is not disputed that New Beerbhum Coal Company Limited previously held the underground coal-mining rights and surface rights in the lands of the whole of village Bastacolla, with the exception of some culturable lands, as permanent lessees, nor is it disputed that the plaintiff company has acquired them from the New Beerbhum Coal Co. Ltd. It further appears that Ganpat Beldar (deceased), the husband of defendant No. 1 in Title Suit No. 150/14 of 1950/52, who has also since died, and Bandhu Beldar, the only principal defendant in Title Suit No. 151/17 of 1950/52, executed kabuliyats in the year 1920 in respect of the lands in dispute in the two suits in favour of the New Beerbhum Coal Co. Ltd.; but the company did not execute any patta in their Favor.

3. Shortly stated, the plaintiff's case in both the suits is that Ganpat and Bandhu verbally took lease of the lands in dispute for residential purposes in 1920, and that subsequent execution of kabuliyats by them did not legally create any permanent lease in their favor in the absence of pattas. Their names were later wrongly recorded in the survey khatian as raiyati kaimi tenants in respect of the lands in dispute in the two suits. The principal defendants (who will henceforth be referred to as the defendants) are, in fact, tenants holding leases from month to month. The plaintiff gave them due notices to quit; but they have not vacated the lands.

4. The defense of the defendants in both the suits may be briefly put. They allege that they took oral settlement of the lands in question for agricultural purposes, and have been in possession for

about forty years, that they subsequently executed kabuliyats in favor of New Beerbhum Coal Co. Ltd., without reading and knowing their contents on account of fraud practised upon them and misrepresentations made to them by the employees of that company, that the survey entries were correctly made, that, in any case, they have acquired permanent tenancy rights by adverse possession, and that they have made permanent structures on the lands within the knowledge, and with the consent, of the plaintiff and its predecessor-in-interest. It is also alleged by them that they have been paying rent for the lands in dispute all along.

5. The Munsif, who heard the suits, decreed them. The appeals by the defendants, however, succeeded, and the Subordinate Judge of Dhanbad has dismissed the two suits. His findings are (1) that there was no oral settlement with the defendants about forty years ago, as alleged by them, (2) that no case of estoppel against the plaintiff had been made out by reason of the defendants having put up structures upon the lands in question, (3) that the kabuliyats executed by them in 1920 created valid and permanent leases in their favour, even though pattas were not executed by the lessor, (4) that the tenancies were created for residential purposes, (5) that, even if the kabuliyats did not create valid leases, the evidence on the record and the circumstances show that "the tenancies were permanent and heritable ones", and (6) that, even if that was not so, the defendants had "acquired limited rights by virtue of adverse possession for the statutory period". He has not indicated the nature of the limited rights which were, according to him, acquired by adverse possession.

6. Findings Nos. 1, 2 and 4, as I have numbered them, have not been challenged before us. No question has also been raised as to the due service of notice to quit, as alleged by the plaintiff. Mr. De, appearing for the plaintiff-appellant, has challenged findings Nos. 3, 5 and 6. The points which he has urged may be summarized as follows :

1. That a kabuliyat executed by a lessee cannot legally create a valid tenancy in the absence of a patta, and the defendants did not, therefore, acquire any right by executing the kabuliyats.

2. That a person, who enters into possession of land under an invalid lease, is a trespasser and, his possession being wrongful from the moment of entry, limitation begins to run against the landlord from that moment. If, however, the lessee pays rent and the lessor accepts it, a relationship of landlord and tenant comes into existence. The lessee's possession cannot, in that case, be held to be adverse to the lessor, and, consequently, the lessee cannot prescribe even for a limited right. The nature and duration of the tenancy must be determined by reference to Section 106 of the Transfer of Property Act in any case to which that Act applies. As the tenancy has, in this case, been held to be for residential purposes, it is the Transfer of Property Act which applies.

3. That finding No. 5, as given above, is not really a finding of fact, and it is vitiated because the Subordinate Judge has arrived at it on an erroneous view of the law.

7. Mr. Chatterji, who has appeared on behalf of the defendants-respondents, has not argued that the kabuliyats were executed by Ganpat and Bandhu as a result of fraud but has proceeded upon the assumption that they are genuine documents. He has, however, raised a further point, and has contended that the defendants are, at least, entitled to compensation for the structures which they have built upon the disputed lands. Mr. De has, on the other hand, argued that all that the

defendants are entitled to is to remove their structures and materials within a time to be fixed by the Court.

8. I proceed to consider all the above four points in the order in which I have mentioned them. I must mention at the outset, however, that it is not disputed that the Transfer of Property Act applies to this case.

9. On the question whether a kabuliyat can create a valid lease in the absence of a patta, the Subordinate Judge has obviously misunderstood the argument advanced on behalf of the plaintiff. He appears to have thought that the argument was based upon the third paragraph of Section 107 which was inserted by Act 20 of 1929 and which provides that each instrument which creates a lease of immoveable property must be executed by both the lessor and the lessee. As the kabuliyats in question were executed in 1920, he rightly said that that provision had no application to them.
But the contention on behalf of the plaintiff, correctly understood, is that, before the amendment of 1929, a valid lease could be created by a patta executed by the lessor and not by a kabuliyat executed by the lessee. Mr. De has relied, in support of this contention, on a Full Bench decision of this Court in *Ramkrishna Jha v. Jainandan Jha*[1], The defendants in that case had executed a registered kabuliyat, and the amlas of the plaintiff-landlord had executed an unregistered document called amalnama, which could be treated as a patta. Their Lordships construed Sections 105 and 107 of the Transfer of Property Act, as it stood before the amendment of 1929, and came to the conclusion that the kabuliyat could not create a valid lease as the creation of such a lease required a registered instrument by the lessor, who alone could transfer a right to enjoy a property within the meaning of Section 105. They held the amalnama to be inadmissible as it was unregistered. It is manifest that the principle laid down in that case is fully applicable to this case, and, in fact, Mr. Chatterji has conceded that he cannot support the learned Subordinate Judge's conclusion that the kabuliyats in question in this case created valid leases.

10. In view of the concession made by Mr. Chatterji, it is unnecessary for me to discuss the point any further. The learned Subordinate Judge has clearly erred, and I hold that the kabuliyats in question did not create valid leases in the absence of pattas.

11. In so far as the second point raised by Mr. De is concerned, two principles which are well-settled are (1) that the possession of a lessee, who enters into possession on the basis of an invalid lease, becomes wrongful, and he must be treated to be a trespasser from the time of his entry; and (2) that possession of a limited interest may be just as much adverse for the purpose of barring a suit relating to that interest as the possession of a complete interest may be adverse for the purpose of barring a suit for recovery of the property, or in other words, a person in possession of land may prescribe for a limited interest like that of permanent tenancy. Both Mr. De and Mr. Chatterji accept these principles. Mr. De has, however argued that payment of rent by the lessee and its acceptance by the lessor make a difference because the relationship of landlord and tenant comes into existence, and the lessee's possession ceases to be
adverse for any purpose. Mr. Chatterji has admitted that, if a person is found to be a tenant of some kind, he cannot seek to enlarge his rights by prescription; but he has argued that mere payment and acceptance of rent cannot prevent the acquisition of the right of permanent tenancy by adverse possession when it appears from the invalid document executed for the creation of the lease that the parties intended to create a permanent lease, or when it is clear that the lessee was

all along claiming the right of permanent tenancy. It seems to me that the true principles are as follows :

12. The possession of a lessee becomes wrongful from the time of his entry on the basis of a void or invalid lease; but, if he pays rent, which is accepted by the lessor, his possession ceases to be adverse to the lessor, and a relationship of landlord and tenant comes into existence. In other words, he no longer remains a trespasser but becomes a tenant. The question then arises what the duration of his tenancy would be.

13. The reason why a kabuliyat could not create a valid lease in the absence of a patta before the amendment of 1929 was that the lessor, who had the right to create the lease, did not execute a registered instrument, transferring a leasehold interest. Being a unilateral document, it could not be assumed to embody a contract between the parties (see observations of Wort, J. in Ramkrishna Jha's case at pages 690 and 691 of the report (ILR 14 Pat)). If it could be so construed, the lessor would have had to be held to be a party to it, and the lease would have had to be held to be valid. Neither law nor equity can hold a lessor bound as in a contract existed where no contract is, in fact, established. It is, therefore, impossible to look into a kabuliyat for the purpose of ascertaining any contract or the intention of the lessor as to the duration of the lease.

14. Section 106 of the Transfer of Property Act lays down that a lease of immoveable property for agricultural or manufacturing purposes is to be deemed to be a lease from year to year; and a lease for any other purposes is to be deemed to be a lease from month to month which can be terminated by the lessor or the lessee by fifteen days' notice expiring with the end of the month of tenancy. The duration of a tenancy which comes into existence by payment and acceptance of rent must be determined on the basis of the provisions of that section where no contract, local law or usage to the contrary is proved. In the case of *Ram Kumar Das v. Jagdish Chandra Deo*[2], the kabuliyat showed that the duration of the lease was to be ten years; but it was conceded that it did not create a valid lease. Referring to Section 106 of the Transfer of Property Act, Mukherjea, J., who delivered the judgment of the Supreme Court, said :

> "The section lays down a rule of construction which is to be applied when there is no period agreed upon between the parties. In such cases the duration has to be determined by reference to the object or purpose for which the tenancy is created. The rule of construction embodied in this section applies not only to express leases of uncertain duration but also to leases implied by law which may be inferred from possession arid acceptance of rent and other circumstances."

15. There are, however, some cases in which a lessee can acquire the right of a permanent tenant by prescription in spite of payment and acceptance of rent. Those are cases where the lessee pays rent on the basis of a notorious claim of permanent tenancy to the knowledge of the owner. The acceptance of rent by the owner on the basis of the lessee's claim as a permanent tenant will not prevent the acquisition of such a right by the lessee. If the lessee tenders the rent on the basis of permanent tenancy and the owner refuses to accept it on that basis, the parties are at arm's length, and no relationship of landlord and tenant can come into existence between them. Hence, the lessee's possession is adverse to the lessor, and he may acquire a limited right of permanent tenancy by being in adverse possession for the statutory

period.

16. I will now discuss the authorities cited at the Bar on the point of the effect of payment and acceptance of rent. The earliest case, which has been brought to our notice, is that of *Attorney-General v. Davey*[3], Mr. Chatterji has referred to that case for the purpose of showing that the Court of Appeal refused to accept an argument that entry under a void lease gave rise to a lease from year to year on account of acceptance of rent. There was, however, no discussion of the point in that case. Their Lordships did not accept the argument only because no authority was cited in support of it.

17. Mr. De has drawn our attention to a later decision (1879) of the House of Lords in (President and Governors) *Magdalen Hospital v. (Alfred) Knotts*[4], It was held in that case that the right of the lessor to recover the property from the lessee, who entered into possession on the basis of a lease, which was absolutely void, was barred by limitation. The Lord Chancellor (Earl Cairns) has, however, stated in the course of his judgment at page 334 of the report, that, the respondents

> "not having paid rent to the appellants, or in any other way entered into the relation of tenants, there is nothing to prevent the full operation of the 2nd section of the Statute of Limitations, and the right of the Appellants to recover the land is, in my opinion, effectually barred."

Lord Selborne agreed with the Lord Chancellor in a short judgment, in the course of which he observed :

> "If any rent had been reserved and received, however small, the legal relation of a tenancy from year to year would have been created, and the Statute of Limitation could not have run."

Lord Gordon made a similar observation, and stated that the appellants' right to recover was effectually barred because the respondents had "not paid rent to the Appellants, or in any other way entered into the relation of tenants." It is manifest, therefore, that their Lordships were all of the opinion that the lessors' right to recover would not have been barred by limitation if a relationship of landlord and tenant had come into existence between them and the lessees by acceptance of rent or otherwise.

18. The facts in the case of *Beni Pershad Koeri v. Dudhnath Roy*[5], are that Maharajah Jai Perkash of Dumraon granted a village to his nephew, Lal Barmeswar Baksh, for
maintenance. It was only for his life; but he executed a patta, purporting to grant a permanent lease of the village to one Ram Golam who obtained possession. Ram Golam remained in possession even after the death of Barmeswar. The heirs of the Maharajah continued to receive and accept rent from Ram Golam at the rate stipulated between him and Barmeswar. Ram Golam stated in 1879 in the plaint of a rent suit against a tenant that he held the village in perpetual istemrari mokarrari. The then Maharajah of Dumraon was made a defendant in the suit on his own prayer. No evidence was given as to what happened later in that rent suit. Their Lordships of the Judicial Committee held that the acceptance of rent could not have the effect of confirming the patta executed by Barmeswar in its entirety. While repelling an argument that Ram Golam's

possession became adverse to the Maharajah from the moment that he took notice of the assertion made by Ram Golam in the rent suit of 1879 that he was a permanent lessee and got himself impleaded as a defendant, their Lordships said that the possession of a tenant for life could not become adverse by reason of a notice from him that he claimed to be holding a perpetual or hereditary tenure. This decision shows, firstly, that the duration of a lease as given in a document which is not binding upon the landlord cannot be held to be confirmed by acceptance of rent; and, secondly, that an assertion of permanent tenancy by a person when he is holding as a tenant of some kind does not make his possession adverse to the landlord.

19. In *Narsya Udpa v. Venkataramana Bhatta*[6], a Bench of the Madras High Court held that the possession of the defendant was without any valid title at all and was, therefore, adverse to the idol of the temple in question. They rejected an argument that a tenancy from year to year came into existence because the defendant paid rent during the continuance of his possession. With great respect, I am unable to accept this decision as correct. The point does not appear to me to have been fully considered. Their Lordships have expressed disagreement with the observations of Lord Selborne in (1879) 4 AC 324 about the effect of payment of rent and creation of the relationship of landlord and tenant upon limitation, and have stated that there is nothing in the judgments of the Lord Chancellor and Lord Gordon to show that they agreed with Lord Selborne. As I have already shown, however, the Lord Chancellor and Lord Gordon have also expressed views similar to those of Lord Selborne on this point.

20. The defendants in *Ram Lochan Baid v. Kumar Kamakhya Narain Singh*[7], continued to be in possession upon payment of rent to the landlord after determination of the lease in favor of their predecessor. A Bench of this Court held that, although a tenancy by sufferance would not make the possession of the holder rightful so as to prevent limitation from running, the tenancy by sufference would be converted into a tenancy from year to year if the person entitled to resume the tenancy does anything to indicate his assent to the continuance of the tenancy by acceptance of rent or otherwise. In that case, limitation would not run against the land-lord. Their Lordships further held that subsequent non-payment of rent would make no difference. This case thus supports the view that payment and acceptance of rent will prevent limitation from running against the landlord.

21. The Judicial Committee has held in *Nainapillai Marakayar v. Ramanathan Chettair*[8], that the onus is upon a tenant to prove that he has acquired the permanent right of occupancy. This is not challenged by Mr. Chatterji. Following the decision in *Madhavrao Waman v. Raghunath Venkatesh*[9], Sir John Edge has stated :

> "No tenant of lands in India can obtain any right to a permanent tenancy by prescription in them against his landlord from whom he holds the lands."

As pointed out in *Dukhu Mahtha v. Nandlal Tewari*[10], however, the rule laid down in the decision will not apply to a case where the defendant is in possession as a trespasser. It may also be mentioned that the rule will not apply in a case where the tenant claims from the very inception to be in possession as a permanent tenant to the knowledge of the landlord. If once a tenancy of some kind comes into existence either under an express lease or under a lease implied by law, the tenant cannot convert his tenancy into a permanent one by doing any act adverse to the landlord.

22. A Bench of this Court held in *Hari Gir v. Kamakhya Narayan*[11], that, where the possession of a tenant on the expiry of the term of his lease becomes wrongful, limitation begins to run against the landlord from that time unless there is evidence from which a fresh tenancy can be inferred. If I may say so with respect, this principle is perfectly correct. The landlord's action was held to be barred in that case as it was not proved that the defendant had paid rent to him or that a fresh tenancy had come into existence in any other way.

23. The case of *Goberdhan Gorain v. Shibakali*[12], which Mr. Chatterji has relied upon, does not appear to me to be in point. The effect of payment and acceptance of rent in case of entry on the basis of an invalid lease was not considered in it.

24. In *Rabindra Chandra Ghosh v. Gauri Singh*[13], Jobraj Khan, a life holder of a village, granted a mukarrari lease to the predecessor-in-interest of the defendants. After determination of the life interest of Jobraj Khan, the defendants continued to pay rent to the plaintiff, who was the proprietor of the estate to which the village reverted after the death of Jobraj Khan. About forty years later, the plaintiff instituted the suit for recovery of possession of the village. Limitation was pleaded on behalf of the defendants, but their Lordships negatived that plea. Following the Privy Council decision in ILR 27 Cal 156 (PC), their Lordships held that acceptance of rent by plaintiff did not have the effect of confirming all the terms of the mukarrari lease created in favor of the defendants' predecessor. Fazl Ali, J., with whom Dhavle, J. agreed, pointed out that the defendants had never asserted that they had a permanent interest. He observed :

> "Thus the effect in law of the payment of rent by the defendants to the plaintiff and its acceptance by the latter was that a new tenancy was created which was similar in all other respects to the original tenancy of the defendants under
> Jobraj Khan except as to the duration of time and the defendants became tenants from year to year under him." This decision has been followed by another Bench of this Court in *Rama Bahadur Kamakshya Narain Singh v. Harkhu Singh*[14], Agarwala, C. J., with whom Meredith, J. agreed stated on the authority of Rabindra Chandra Ghosh's case :
> "It is now settled, however, that when a person enters into possession of land under a void lease, he is not a trespasser, but a tenant-at-will under the terms of the lease in all other respects except the duration of time, and that when he pays or agrees to pay the rent therein expressed to be reserved, he becomes a tenant from year to year upon the terms of the void lease so far as they are applicable to, and not inconsistent with, the yearly tenancy." With great respect, I do not think that his Lordship is right in describing a person who enters into possession on the basis of a void lease as a tenant-at-will. It is well settled that such a person is a trespasser, and he becomes a tenant only if he pays rent which is accepted by the landlord or if the relationship of landlord and tenant is established in any other way. The duration of the lease must be determined, as I have already said, on reference to Section 106 of the Transfer of Property Act.

25. Another decision of a Bench of this Court, which has been brought to our notice, is that in *Shiva Shankar Bharthi v. Beni Ram*[15], All that has been laid down in that case is that a person,

who enters into possession on the basis of an invalid lease, is a trespasser, and, if he keeps asserting the rights of a tenant over the land for more than twelve years, he acquires a limited interest in the land by adverse possession. There is nothing in the report to show that there was any payment or acceptance of rent, nor that the interest acquired was that of a permanent tenant. Hence, that case is not applicable to the facts of the present case.

26. Mr. Chatterji has relied upon *Hari Prosad v. Abdul Haq*[16], This case is not helpful on the question of the effect of payment and acceptance of rent; but I may mention that, following (1879) 4 AC 324, Sinha, J. has observed that a person who enters into possession on the basis of a void lease is a trespasser, and, if the lessor, who has a right to enter on the land from the moment of the lessee's entry, does not enforce his right within the period of limitation, his right to recover is barred.

27. Mr. De has strongly relied upon ILR 30 Pat 997 , Ramaswami, J. (as he then was), who has delivered the judgment of the Bench has stated :

> "But a person coming into possession of land under a lease which is void or invalid as against the person seeking to eject him is really a trespasser, and there is no reason why he should not acquire by prescription the right of a permanent tenant after the expiration of the period prescribed by Article 144 of the Limitation Act."

It is important to note that his Lordship has pointed out that the defendants of that case "had been in continuous possession without paying any 'khorf' or rent to the
plaintiff." Indeed, he distinguished the Privy Council decisions in 50 Ind App 255 and
51 Ind App 83 on the ground that it was neither admitted nor established in the case before him that there was any relationship of landlord and tenant between the parties. This case thus supports the view that, unless the relationship of landlord and tenant is established between the parties, a person who comes into possession of the land as a trespasser under a void or invalid lease may acquire the limited right of a permanent tenant by being in possession for the statutory period.

28. Reference may now be made to the decisions in which the tenants were held to have acquired the right of permanent tenants by prescription. The first case which Mr. Chatterji has relied upon is the decision of a Bench of the Bombay High Court in *Thakore Fatesingji Dipsangji v. Bamanji Ardeshir Dalai*[17], There are some general observations in this decision to the effect that payment and acceptance of rent would not be a good answer to a claim of adverse possession by the lessee who enters on the basis of a void lease. It may be pointed out, however, that Batty, J. has said at page 534 of the report that in (1879) 4 AC 324, Lord Selborne was alone in observing that limitation would not have run if rent, however small, had been received. As I have already shown, I may say with respect that this statement is not correct. However, the decision that the right of the proprietor to recover the lands in suit was barred by limitation was rested in that case on the ground that the defendant's claim as a permanent tenant was notorious. It was argued that the possession of a tenant would not become adverse merely because he thought that he had a permanent lease. Batty, J. accepted this argument and said :

> "And I think a bare knowledge of the owner that a tenant proposes to rely on the assertion of a certain title would not in itself render the tenant's possession adverse. The owner in

such case might well await actual resistance to or infringement of the rights claimed by him and till then would be under no necessity of taking action. But I also think if the tenant not only openly asserts to the knowledge of the owner an adverse interest, but proceeds to enjoy benefits claimable only on the basis of that interest, his possession at once become adverse and limitation begins to run against the owner from that time."

The view which is supported by this decision is that, if the tenant notoriously claims and asserts that he is a permanent tenant and enjoys benefits consistent only with such interest to the knowledge of the owner, mere payment and acceptance of rent will not prevent time running against the owner in so far as the limited right of permanent tenancy is concerned.

29. The same principle has been laid down in *Parameswaram Mumbannoo v. Krishnan Tengal*[18], which has also been relied upon by Mr. Chatterji. The plaintiffs' devasom instituted a suit for ejectment of some of the defendants who pleaded that they were permanent tenants at a fixed rent. The lease on which the devasom based its claim was not found proved but a decree was granted in its favour for the rent admitted by the defendants to be due from them as permanent tenants. Rent at the same rate was paid in subsequent years also. Their Lordships held that the payments
could only be construed as payments by the defendants of rent on the basis that they were permanent tenants, and, therefore, the plaintiffs' suit was barred by limitation. This case thus shows that, if a tenant pays rent on the assertion that he is a permanent tenant and the landlord accepts it on that basis, the tenant will in due course acquire the limited right of a permanent tenant by adverse possession.

30. Mr. Chatterji has next relied upon *Ram Rachhya Singh v. Kamakhya Narayan Singh*[19], Jwala Prasad, A. C. J. has observed in that case that the plaintiff claimed that the defendants were tenants from year to year, that the defendants claimed to be perpetual tenure-holders, that rent was thus payable to the landlord according to both sides, and that mere payment of rent could not, therefore, establish the case of either party. These observations have to be understood with reference to the facts of that case. It went up in appeal, and the decision of the Privy Council is reported in *Kamakhya Narain Singh v. Ram Raksha Singh*[20], The relevant facts of that case were briefly as follows : The plaintiffs predecessor, the then proprietor of Ramgarh Raj, gave two villages in "mukarrari istemarari" lease to Syed Mazaffar Hussain and Syed Mahmad Hossain in 1865. Syed Mahammad Hossein executed a deed in 1875, staring that he had no interest in the lease. Syed Muzaffar Hossain assigned his interest in the lease to one Sahai Singh in 1879. The interest was described in the deed of assignment as perpetual mukarrari istemrari tenure. Sahai Singh continued to be in possession and died in 1915. Since then, his successors-in-title, the defendants, were in possession. The usufructuary mortgagee of the villages had earlier sued Syed Muzaffar Hussein for rent and obtained decrees, which were paid by Sahai Singh. A dispute arose in which the plaintiffs predecessor claimed that the lease conveyed a life interest only, and the defendants' predecessors claimed that it conveyed a permanent interest. It was decided in 1903 that only a life interest was created by the "mukarrari istemarari" lease. Admittedly, Sahi Singh did not pay any rent to the plaintiff or his predecessors; but he offered in 1903 to pay rent to the plaintiff's predecessors on condition that receipt was issued in his name and was not marfatdari receipt in the name of Syed Mazaffar Hossein through him. The plaintiff's predecessors refused to accept the rent on that condition. The suit for recovery of possession was

instituted in 1920. On these facts, Sir Lancelot Sanderson, who delivered the judgment of the Judicial Committee, stated:

> "So far from being in agreement as to a tenancy, the parties were at arm's length, and, in their Lordships' opinion, after the termination of the lease for lives, there was no recognition by the plaintiff or his predecessor in title so as to constitute the defendants or their predecessors in title tenants, as alleged by the plaintiff. In fact, the evidence shows that the then proprietor of the Raj refused to recognise the defendants' predecessors as his tenants.
> "In these circumstances their Lordships are of opinion that the plaintiff failed to prove that the relationship of landlord and tenant, on which he relied was in existence within twelve years prior to the institution of his suit, and that, therefore, the plaintiffs suit for possession was barred by the Limitation Act, and this appeal should be dismissed." This decision is a clear authority for the proposition that, unless the relationship of landlord and tenant is established,
> limitation will not be prevented from running against a landlord, who allows a
> person to be wrongfully in possession of his land. It is also manifest that such a relationship does not come into existence when a tenant is willing to pay rent only on the condition that he is recognized as a permanent tenant and the landlord refuses to accept it on that condition.

31. Another case, which Mr. Chatterji has relied upon is that of *Perianan Chetty v. Govinda Rao*[21], I must say with respect that their Lordships have rightly refused in that case to accept a general proposition that "it is impossible so long as any rent is paid or received for a title to a permanent lease to be acquired by adverse possession in India." It is abundantly clear that, as I have shown above, the limited right of permanent tenancy can be acquired by adverse possession in certain circumstances even in spite of payment and acceptance of rent. The defendants in that case entered into possession on the basis of an invalid grant and openly asserted their right to a permanent tenancy. Knowing of such assertion, the other party allowed them to remain in possession for at least sixteen years. It was in these circumstances that their Lordships held that the defendants' possession was adverse so far as the right of permanent tenancy was concerned.

32. The decision of a Bench of this Court in *Rani Bhuneshwari Koer v. Secretary of State*[22], lays down a similar proposition. That was a case in which the Secretary of State came into possession of the land as a trespasser with an open claim to permanent possession, and the plaintiff and her predecessors accepted rent from him in spite of being aware for many years of his claim to hold in perpetuity. Their Lordships held that the plaintiff was estopped from denying the perpetual nature of the defendant's tenancy; but, with respect, I may say that the decision could be properly rested on the ground of limitation rather than that of estoppel. This decision was followed in *Kala Devi v. Khelu Rai*[23], In that case also, plaintiffs' right to recover was held to be barred, even though rent was being paid and accepted, because there was an open assertion of a permanent tenancy right by the defendants. It is not clear from the report that the assertion was known to the plaintiffs; but the fact that it was open indicates that it must have been known to them.

33. Mr. Chatterji has relied upon *Maharaj Singh v. Budhu Chamar*[24], In that case, the defendants' predecessor came into possession of the disputed land under an invalid lease, and, therefore, his possession was that of a trespasser from the very beginning. They remained in possession for over twenty years before the suit was instituted for recovery of possession. They admitted in the written statement that they had always been paying rent to the plaintiffs for the suit land; but they asserted that they had been in possession of that land as permanent tenants. It was argued that the defendants' possession was not adverse because they admittedly paid rent to the plaintiffs; but their Lordships did not accept that argument. They proceeded upon the basis that the admission had to be read as a whole, and, as the defendants stated in the written statement that they were in possession as permanent tenants, that had also to be accepted along with the admission of payment of rent. With great respect, I am unable to agree. The admitted fact of payment and acceptance of rent brought a relationship of landlord and tenant into existence between the parties. That being so, limitation could not run against the landlord, as the tenants' possession was not adverse. The defendants' allegation that they were in possession as permanent tenants availed them nothing because, in order to succeed, they had to allege and prove as a fact that they had been notoriously claiming to be permanent tenants, and that the landlords, being aware of their claim, did not accept the rent or accepted it on that basis. I have, therefore, relunctantly come to the conclusion that, in so far as this point is concerned, this case has been wrongly decided and must be overruled.

34. I may now refer to the cases on which Mr. Chatterji has relied in support of his argument that the kabuliyat can be looked into for ascertaining the contract between the parties, though it does not create a valid lease. The first case is that of *Verada Pillai v. Jeevarathnammal*[25], I do not think that that decision is helpful in the present case. Some petitions were filed, stating that two villages had been gifted to one Duraisani alias Alamelu and praying to the Collector that those villages should be registered in her name. The Collector registered Duraisani's name accordingly. She was found to be in possession of the villages afterwards. Their Lordships held that the petitions were not admissible to prove a gift but they could "be referred to as explaining the nature and character of the possession thenceforth held by Duraisani". Thus, the petitions were admitted in evidence in that case for a collateral purpose, and there is no reason why they should not have been admitted for that purpose. In the present case, the position is that the kabuliyats admittedly did not create valid leases because the alleged lessor did not execute them. As I have already observed, the documents being unilateral, cannot even be used as embodying any contracts between the parties. Reference may be made in this connection to the observation of Sinha, J. in *Hiralal Rewani v. Bastacolla Colliery Co. Ltd*[26]., that a kabuliyat, in the circumstances of the present case, does not contain a valid contract.

35. In *Mohammad Liaqat Alikhan v. Ajudhia Prasad*[27], Hamilton, J., who has delivered the judgment of the Bench, has observed :

> "It is settled law that a kabuliyat is not a lease at all. Being executed by the person who would be the lessee, not the lessor, if there was a lease, it is not executed by the person who can make the transfer so it is not even an invalid lease but it is no lease at all."

His Lordship then said that the kabuliyat could "be looked into to ascertain the assertion of title made by Fakir Chand when he entered upon the land...". With great respect, I am of opinion that

the term mentioned in the kabuliyat that the lessor had agreed to grant a lease, permanent or for a fixed period, cannot be treated as a contract because "it is no lease at all". The mere assertion in the kabuliyat by the alleged lessee is not of much consequence because the alleged lessor cannot be saddled with knowledge of such assertion. The tenancy by payment and acceptance of rent comes into existence afterwards, and the assertion of a claim to hold as a permanent tenant must be made openly and to the knowledge of the landlord as a continuous course of conduct from the very time of his entry into possession before it can be held that the
tenant has acquired the limited right of a permanent tenant by adverse possession or that the landlord's right to recover is barred by limitation. While, therefore the statement made by the defendants in the kabuliyats in question, in the present case relating to the duration of the lease may be taken into consideration merely as their assertion, their subsequent conduct and assertions must be looked into in order to find out whether they have discharged the onus of proving that they prescribed for permanent tenancies.

36. This brings me to the question whether the finding of the learned Subordinate Judge that the tenancies in question were permanent and heritable is a finding of fact. He has first stated that Section 106 of the Transfer of Property Act is not applicable in the facts of this case because the kabuliyats evidence the contract between the parties. This is clearly erroneous because I have already stated that the kabuliyats cannot be treated as embodying any contract. He has not referred to any evidence showing that the defendants asserted at any time that they were permanent tenants but has relied only upon two circumstances; (1) that the defendants have made permanent structures upon the lands in suits, and (2) that, in one case, the original lessee transferred a portion of the land in his possession to others who also put up structures upon their portion. These two circumstances, standing by themselves, could not enable him to come to the conclusion that the defendants were notoriously claiming the right of permanent tenancy because a person may put up a building on land which he does not hold permanently and a person may also sell an interest which is not permanent.
In fact, it appears to me that he has arrived at his conclusion because of the error of law committed by him in supposing that Section 106 of the Transfer of Property Act is not applicable in this case. This finding is, therefore, vitiated and cannot be held to be binding in second appeal.

37. It is manifest in the present case that, owing to the admitted payment and acceptance of rent, the relationship of landlord and tenant came into existence between the plaintiff and the defendant of both the suits. The defendants cannot be held to have prescribed for or acquired the limited right of permanent tenants because they have not proved that they have been in possession with a notorious claim of permanent tenancy to the knowledge of the plaintiff or its predecessor, nor have they proved that they have enjoyed benefits consistent only with a permanent interest.

38. The only point which now remains for me to consider is whether the defendants are entitled to compensation for their structures which stand upon the lands in suits.
Section 51 of the Transfer of Property Act provides for payment of compensation in case of eviction of a person who makes improvements on a property while believing in good faith that he is absolutely entitled to it but is subsequently evicted from it by a person who has a better title. A lessee can never believe in good faith that he is absolutely entitled to the leasehold property. Hence, Section 51 has no application to the facts of this case. This is well settled by a long line of authorities, and Mr. Chatterji has conceded that this is so. There is no other provision for

payment of compensation; but Mr. Chatterji has contended that the claim of the defendants of these two cases can be founded on the doctrine of estoppel. In my judgment, this argument can be disposed of very shortly. The extent of application of this doctrine in India has been laid down in Section 115 of the Evidence Act. The essential requirement as laid down in that section is that, before a person can be bound by the doctrine, he must, by his declaration, act or omission, intentionally cause or permit the other party to believe a thing to be true and to act upon such belief. It is quite well settled that equity cannot override the provisions of a statute, and so said Lord Russell of Killowen while delivering the judgment of the Judicial Committee in *G. H. C. Ariff v. Jadunath Majumdar*[28], In that case, the defendant entered into possession under a verbal agreement with the plaintiff for the grant of a permanent lease to him, to build costly structures upon it within the knowledge of the plaintiff. The question of estoppel was raised; but it was shortly disposed of as follows :-

> ".....and ,as to estoppel there is no trace of any statement by him (referring to the plaintiff) upon which any estoppel can be grounded."

It can similarly be said in the present case that there is no statement of any kind by the plaintiff or its predecessor on which estoppel can be based.

39. It is perfectly clear that no compensation is payable in this country in a case of the present kind. Before the enactment of the Transfer of Property Act, 1882, the question arose in 1866 before a Full Bench of the Calcutta High Court in *Thakoor Chunder Paramanick v. Ramdhone Bhuttacharjee*[29], After taking into consideration the Hindu and Muhammadan laws and the usages and customs prevailing in this country, Sir Barnes Peacock, C. J., who delivered the judgment of the Bench, said :

> "..... We think it should be laid down as a general rule that, if he who makes the improvement is not a mere trespasser, but is in possession under any *bona fide* title or claim of title he is entitled either to remove the materials ..... or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil, the option of taking the building, or allowing the removal of the material remaining with the owner of the land in those cases in which the building is not taken down from the builder during the continuance of any estate he may possess."

When the Transfer of Property Act was enacted in 1882, clause (h) of Section 108, which prescribed the rights and liabilities of the lessor and the lessee, stood as follows:

> "(h) The lessee may remove, at any time during the continuance of the lease, all things which he has attached to the earth; provided he leaves the property in the state in which he received it."

This provision came up for consideration in 1900 in *Ismail Khan Mahomed v. Jaigun Bibi*[30], Their Lordships said :

> "The provision of the Transfer of Property Act relating to a tenant's right with reference to structures raised on the land held by him is that contained in clause (h) of Section 108,

which only authorizes the tenant to remove structures raised."

Referring to Thakoor Chunder Paramanick's case, 6 Suth WR 228 (FB). they observed that the same was the law as laid down in that decision in cases not governed by the Transfer of Property Act. They further said that there was no authority to support the contention that a tenant was entitled to compensation for buildings erected by him upon the land from which a decree for his ejectment was being passed.

40. The same question was considered in *Ismai Kani Rowthen v. Nazarali Sahib*[31], Bhashyam Ayyangar, J. pointed out that clause (h) of Section 108 provided only for removal of materials By the tenant "during the continuance of the lease". He also observed that, if the tenant did not remove the materials while the lease continued, the option, as laid down in Thakoor Chunder Paramanick's case, 6 Suth WR 228 : Beng LR Sup FB 595, "according to the customary or common law of the land", was with the lessor either to take the building on payment of compensation or to allow the tenant to remove its materials.

41. Mr. Chatterji has relied upon the following observations in *Nundo Kumar Naskar v. Banomali Gayan, ILR 29 Cal 871 at p. 885* (Supra):

> " ..... we think that if it had been shown that the plaintiff knew that they were expending money upon the improvement of the land, and knew also they were doing so in the belief that they had a good title, and that he nevertheless stood by and allowed them to proceed with their expenditure, he ought not to be allowed now to insist as against them on his legal right, without indemnifying them for their outlay (see *Cawdor v. Lewis, (1835) 1 Y. and C. 427*, and *Willmott v. Barber, (1880) 15 Ch D 96)(Supra)*."

These observations are, however, clearly of the nature of obiter dicta because their Lordships have said in the very next sentence that the existence of none of these facts had been proved in the case, and, therefore, the claim for compensation failed.

42. It may now be mentioned that clause (h) of Section 108 was amended by Act 20 of 1929. After the amendment, the clause stands as follows :

> "(h) The lessee may even after the determination of the lease remove, at any time whilst he is in possession of the property leased but not afterwards all things which he has attached to the earth; provided he leaves the property in the state in which he received it."

This provision leaves no room for doubt at all. It does not provide for payment of any compensation to the lessee for any structure put up by him upon the land in question; but it provides that, at any time while he is in possession, he can remove whatever he has attached to the earth. The amendment thus removes the defect pointed out by Bhashyam Ayyangar, J. in Ismai Kani Rowthan's case, ILR 27 Mad 211, that clause (h) provided for removal of materials only "during the continuance of the lease".

43. Mr. Chatterji, however, relies strongly upon a Bench decision of this Court in

Maina Sahu v. Balak Das[32], Relying upon two decisions of the Calcutta High Court, namely, *Badal Chandra Sadhukhan v. Debendra Nath*[33], and *Mohammad Ali Khan v. Kanailal Haldar, AIR 1935 Calcutta 625,* their Lordships held that the tenant-defendant was entitled to compensation for the building erected by him on the land from which he was to be evicted. Their Lordships have not discussed the question, nor have they referred to Section 108 (h) of the Transfer of Property Act. They have merely relied upon the two cases which I have mentioned. The decision in Badal Chandra Sadhukhan's case, 37 Cal WN 473 , is that of Mukerji, J., sitting as a single Judge. His Lordship has not referred to Section 108 (h). A permanent lease purported to have been created in that case by an unregistered document. The learned Judge observed that, though the intention of the landlord to create a permanent tenancy was clear, the law stood in the way, and it was not open to the tenants to plead an estoppel against the statute in so far as the lease was concerned. He then arrived at the conclusion that the doctrine of estoppel applied in so far as the structures were concerned, and that the defendant was entitled to compensation for them. He has not given any reason in support of this conclusion, and, with great respect, I am unable to accept it. Mukherji, J. was also a party to the Bench decision in Mohammed Ali Khan's case, AIR 1935 Calcutta 625. The view taken in the latter case, however, appears to be quite different as a distinction has been made between improvements, which were inseparable from the land, and structures which were erected upon the land and which were described as being removable. Compensation was allowed for the improvement, and, so far as the structures were concerned, it was said that the plaintiffs were "not bound to take the land burdened with them", and that the appellant was entitled to remove them, if he so liked. Their Lordships then said, however, that the tenant was entitled to an order that the plaintiffs-landlord should sell their interest to him in respect to the land on which he had erected his dwelling house, and they passed an order to that effect. Whatever may be said about the order for sale of the landlords' interest to the tenant, the decision that the tenant was not entitled to compensation for the structures does not support the view taken in Maina Sahu's case, 19 Pat LT 791 .

44. A similar question came up for consideration before another Bench of this Court in *Darbari Lal Mudi v. Raneeganj Coal Association Ltd.*[34], Their Lordships have considered Section 108 (h) of the Transfer of Property Act, and have held that the tenants are not entitled to compensation in circumstances like those of the present case for structures built by them upon the land in question. Brough, J. who delivered the judgment, Sinha, J. (as he then was) agreeing, has stated that the decision in Maina Sahu's case, 19 Pat LT 791 was given without any reference to, or discussion of, Section 108 (h), and that it could not be accepted as an authority for the proposition that equitable principles could override the provisions of that clause.
He also pointed out that the single Judge decision in Badal Chandra Sadhukhan's case was apparently made without full argument, and the Division Bench decision in Mohammad Ali Khan's case was an authority not for allowing compensation but for refusing it. He, therefore, refused to allow Maina Sahu's case.

45. The question has been further considered in this court and also in the Calcutta
High Court, in *Subodh Chand Mitter v. Bhagwandas Saha*[35], both the learned Judges delivered separate judgments; but both agreed that the correct view about compensation had been taken by this Court in Darbarilal Mudi's case. Badal Chandra Sadhukhan's case and Mohammad Ali Khan's case were not followed. Chakravartti, J. further pointed out that, in the latter case, no compensation was held payable for the structure itself.

46. The decision of this Court is that of a Division Bench in AIR 1957 Patna 331. Their Lordships followed the decision in Darbari Lal Mudi's case, AIR 1944 Patna 30, and held that, on ejectment, a tenant is entitled only to remove all the things he had attached to the earth, and not to compensation.

47. Thus, the provisions of law and the preponderance of authority are against the argument that the lessees are entitled on ejectment to compensation for the structures made by them. It must, therefore, be held that, so far as this point is concerned, the case of Maina Sahu, 19 Pat LT 791 , has been wrongly decided, and it is, accordingly, overruled. It follows that the defendants in these two cases are not entitled to any compensation but are entitled to remove their structures and materials.

48. As a result of the conclusions which I have reached on the points raised, both these appeals are allowed and the suits are decreed with costs throughout. The decrees passed by the learned Subordinate Judge on appeal are set aside, and those passed by the learned Additional Munsif of Dhanbad are restored with this modification that the defendants will have three months' time from today to remove their structures and materials from the suit lands and to deliver possession of the suit lands to the plaintiff.

Ramaswami, C. J.

49. I agree.

Choudhary, J.

50. I agree.

Appeals allowed

Cases Referred.

[1] ILR 14 Pat 672
[2] ILR 31Pat 21
[3](1859) 45 ER 53
[4](1879) 4 AC 324
[5] ILR 27 Cal 156 (PC)
[6]16 Ind Cas 53 (Mad)
[7]4 Pat LT 123
[8]51 Ind App 83
[9]50 Ind App 255
[10] AIR 1952 Pat 293
[11] ILR 3 Pat 534
[12] AIR 1932 Pat 257
[13]18 Pat LT 518
[14] MR 1949 Pat 265
[15]22 Pat LT 200
[16] AIR 1951 Pat 160
[17] ILR 27 Bom 515
[18] ILR 26 Mad 535
[19] ILR 4 Pat 139
[20] ILR 7 Pat 649

[21] AIR 1932 Mad 328
[22] AIR 1937 Pat 374
[23] AIR 1949 Pat 124
[24] ILR 30 Pat 964
[25]46 Ind App 285
[26] AIR 1957 Pat 331 at p. 333
[27] AIR 1943 All 212
[28]58 Ind App 91
[29]6 Suth WR 228: Beng LR Supp. Vol., FB 595
[30] ILR 27 Cal 570
[31] ILR 27 Mad 211
[32]19 Pat LT 791
[33]37 Cal WN 473
[34] AIR 1944 Pat 30
[35]50 Cal WN 851