

(1969) 09 CAL CK 0027

In the Calcutta High Court

Case No : Appeal from Original Decree No. 120 of 1954

Ashutosh Roy, Receiver to the Estate of Bejoy Kumar Addy
and Others

APPELLANT

Vs

Subodh Gopal Basu and Others

RESPONDENT

Date of Decision : 09-09-1969

Acts Referred:

Evidence Act, 1872 — Section 13

Citation : 74 CWN 478

Hon'ble Judges : S.N. Bagchi, J; Amaresh Roy, J

Bench : Division Bench

Advocate : N.C. Chakraborty and Sailendra Nath Roy, for the Appellant; P.N. Mitter and Joygopal Ghose and (Mrs.) Mukti Maitra for Deputy Registrar, for the Respondent

Final Decision : Allowed

Judgement

S.N. Bagchi, J.—This is an appeal at the instance of the Receiver to the Estate of Bejoy Kumar Addya and other defendants in Title Suit No. 4 of 1952 of the 7th Court of the Subordinate Judge at Alipore against the judgment and decree passed by the learned Subordinate Judge, whereby the learned Subordinate Judge declared the plaintiff-respondent, Subodh Gopal Bose's 1/6ths share in the land of the premises No. 10, Govinda Addya Road and premises No. 1, Mahesh Datta Lane, comprised in a plot measuring more or less 3 bighas 5 cottahs, situated in Mouza Chetla appertaining to Touzi No. 6 of the 24-Parganas Collectorate, a Touzi which was auction-purchased by the said Subodh Gopal Bose in a revenue sale, and ordered recovery of joint possession of the suit land with the defendants/appellants. The 16 annas of the Touzi No. 6 of the 24-Parganas Collectorate was sold on 6.1.1936 for arrears of its revenue under the Act XI of 1859 at a public auction at the 24-Parganas Collectorate and was purchased by the plaintiff Subodh Gopal Bose.

2. Subodh Gopal's case before the learned Subordinate Judge at the trial was

that the land in suit belongs to Mouza Chetla, comprising Touzi Nos. 1 to 6 and 8 to 16. One-sixth of the land which premises No. 10 Govinda Addya Road and 1 Mahesh Datta Lane is appertaining to Touzi No. 6. Subodh Gopal auction-purchased Touzi No. 6 on 6th day of January 1936 under Act XI of 1859. The Addyas i.e. the defendants-appellants have been in possession of the land as described in the Schedule to the plaint, without taking any settlement whatsoever from any one of the previous Touzi owners, either the defaulting proprietors or their predecessors-in-interest. So, the Addyas are nothing but trespassers. Accordingly, Subodh Gopal is entitled to have his title to the extent of his 1/6th share declared to the land described in the Schedule to the plaint and to get recovery of joint possession of the same with the defendants-Addyas.

3. The defendants Addyas while contesting the suit contended inter alia, that the land described in the Schedule to the plaint along with other lands comprising premises Nos. 9 and 10 Govinda Addya Road and 1, Mahesh Dutta Lane, was purchased by the Addyas under different sale deeds and that the Govinda Addya Road premises carries with it a tenancy with a jama of Rs. 10.6.8 gandas while premises No. 1 Mahesh Dutta Lane carries with it a jama of Rs. 2.2.2 1/2 gandas. The defendants Addyas being tenants in respect of the premises described in Schedule to the plaint i.e. 10, Govinda Addya Road and 1, Mahesh Dutta Lane, are not trespassers.

4. The parties went to trial on one and only one issue in supersession of other issues framed before trial. The only issue that was tried before by the learned Subordinate Judge was as follows: "Are the defendants tenants mere trespassers in respect of the land in suit?"

After considering documentary evidence as well as oral evidence, the learned Subordinate Judge at paragraph 17 of his judgment observed: "Having regard to the foregoing considerations, I find the only issue in favour of Subodh Gopal and hold that the Addyas have no tenancy rights and are mere trespassers."

Accordingly, the learned Subordinate Judge decreed the suit on contest with costs against the Addyas represented by the Receiver of the Addya Estate, who, at the time of filing of this appeal, was Asutosh Roy now replaced by the present Receiver Harish Chandra Mukherjee.

5. For the appellants Addyas now represented by the Receiver-in-office, Mr. Nirmal Chandra Chakravorty, learned Counsel, drew our attention to the old section 37 of Act XI of 1859, Bengal Land Revenue Sales Act, 1859 as well as to the new section 37, as substituted by section 4 of Act VII of 1950, the Bengal Land Revenue Sales (West Bengal Amendment) Act, 1950 as well as to section 7 sub-section 1 of the said Act VII of 1950. The old section 37 of Act XI of 1859 says that the purchaser of an entire permanently settled estate sold for its own arrears of revenue shall acquire the estate free from all encumbrances, which may have been imposed upon it after the time of settlement; and that he shall be entitled to avoid and annul all under-tenures and forthwith to eject all under-

tenants, with the four exceptions:-

First.-Istimarari or mukarari-tenures which have been at a fixed rent from the time of the permanent settlement.

Secondly.-Tenures existing at the time of settlement, which have not been held at a fixed rent:

Provided always that the rents of such tenures shall be liable to enhancement under any law for the time being in force for the enhancement of the rent of such tenures.

Thirdly.-Talukdari and other similar tenures created since the time of settlement and held immediately of the proprietors of estates, and farms for terms of years so held when such tenures and farms have been duly registered under the provisions of this Act.

Fourthly.-Leases of lands whereon dwelling-houses, manufacturies, or other permanent buildings have been erected, or whereon gardens, plantations, tanks, wells, canals, places of worship, or burning or burying-grounds have been made, or wherein mines have been sunk.

6. This old section 37 of the Act XI of 1859 as Mr. Chakravorty, learned Counsel, pointed out, was substituted by section 4 of West Bengal Act VII, 1950 and the said substituted new section 37 reads as follows:-

37. (1) The purchaser of an entire estate in the permanently settled districts of West Bengal sold under this Act for the recovery of arrears due on account of the same, shall acquire the estate free from all encumbrances which may have been imposed after the time of settlement and shall be entitled to avoid and annul all tenures, holdings and leases with the following exceptions:- (a) tenures and holdings which have been held from the time of the permanent settlement either free of rent or at a fixed rent or fixed rate of rent, and (b)(i) tenures and holdings not included in exception (a) above made, and

(ii) other leases of land whether or not for purposes connected with agriculture or horticultures, existing at the date of issue of the notification for sale of the estate under this Act: Provided that notwithstanding anything contained in any law for the time being in force or in any lease or contract no person shall be entitled to hold under such a purchaser as is aforesaid any tenure, holding or lease coming within exception (b) above made, free of rent or at a low rent or at a rent or rate of rent fixed in perpetuity or for any specified period unless the right so to hold has been expressly recognised under any law for the time being in force by any competent civil or revenue court; and the purchaser shall be entitled to proceed in the manner prescribed by any law for the time being in force for the determination of a fair and equitable rent of such tenure, holding or lease.

(2) For the purposes of this section- (a)(i) "tenure" includes a tenure as defined

in the Bengal Tenancy Act, 1885, and (ii) "holding" includes a holding as defined in the Bengal Tenancy Act, 1885; (b) any rent which is lower than what has been entered in any record of rights prepared and finally published under Chapter X of the Bengal Tenancy Act, 1885, before the commencement of the Bengal Land-Revenue Sales (West Bengal Amendment) Act, 1950, shall be presumed to be a low rent; (c) section 75A of the Bengal Tenancy Act, 1885, shall not have any application.

7. Relying on the new section 37, sub-section (1) clause (b)(ii), being the substituted section in place of the old section 37 of Act XI of 1859, Mr. Chakravarty, the learned Counsel, submitted that at the date of issue of notification for sale of Touzi No. 6 of 24-Parganas Collectorate, the defendant-appellants had been holding the two premises now in dispute in tenancy right and that the suit filed by the plaintiff-respondent for ejectment of the defendant-appellants from the disputed property, in pursuance of old section 37 of Act XI of 1859, could not have been validly instituted against the defendants, in view of the provisions of the new section 37, sub-section (1), clause (b)(ii), as introduced, in substitution for the old section 37 of Act XI, 1859, by section 4 of West Bengal Act VII of 1950, The Bengal Land Revenue Sales (West Bengal Amendment) Act, 1950, and that the learned Subordinate Judge was in error in not recording an abatement of the suit, in terms of section 7, sub-section (1), clause (a) of Act VII, 1950. To substantiate his proposition, Mr. Chakravarty, the learned Counsel, submitted that in the disputed lands the defendants had been in occupation in Mourashi Mokarari tenancy right from before the date of issue of notification for sale of Touzi No. 6 under Act XI, 1859, and that the learned Subordinate Judge should have held on the averments in the plaint that in the disputed lands, described in schedule to the plaint, the defendants-appellants Addyas nad tenancy rights failing at least within the ambit of clause (b)(ii) of sub-section (1) of section 37, introduced by section 4 of Act VII, 1950 and should have ordered abatement of the suit for ejectment of the defendant-appellants from the disputed lands in which, they had their tenancy rights coming within the purview of clause (b)(ii) of sub-section (1) of the new section 37 of Act XI of 1859, introduced by section 4 of Act VII of 1950. Mr. Chakravarty the learned Counsel, contended also that on the averments in the plaint, filed by Subodh Gopal Basu, the suit was one constituted as under old section 37 of Act XI of 1859, containing clear admission in the plaint of avoidance and annulment of the defendant-appellants Addyas" tenancy interest in the disputed lands, in pursuance of the provisions of the old section 37 of Act XI, 1859, and that in view of the provisions of the new section 37 of Act XI of 1859, as substituted by section 4 of Act VII of 1950, the suit, as constituted at the time of its institution, could not have been instituted in view of the existence of the defendant-appellants-Addyas" tenancy right in the disputed lands, existing from before and at the date of issue of the notification for sale of Touzi No. 6 under Act XI of 1859, covered at least by sub-section (1), clause (b)(ii) of the new section 37, as introduced by section 4 of Act VII, 1950.

8. Mr. Mitter, the learned Counsel for the respondent, Subodh Gopal Basu, submitted in reply that the averments in the plaint would not show that the suit was one constituted under old section 37 of Act XI, 1859, for avoidance and annulment of any under-tenures and for ejectment of any under-tenants in occupation of the land in dispute. Mr. Mitter contended that the averments in the plaint would show that after Subodh Gopal Basu had auction-purchased the Touzi No. 6 at the revenue sale and took possession of the Touzi through the Collectorate of 24-Parganas, he found the defendants-appellants Addyas in occupation of the disputed lands without taking any bundabast and that as such, they were mere trespassers without any right to retain possession in the disputed lands, and that on the footing that the defendant-appellants were trespassers in occupation of the disputed lands, the plaintiff sued them for their eviction from the disputed land upon declaration of his title to the disputed land as appertaining to his undivided 1/6th share in the Touzi No. 6 auction-purchased by him at the revenue sale. So, according to Mr. Mitter, the learned Counsel for the respondent, the averments in the plaint did not constitute a suit for avoiding and annulling any under-tenure and for ejecting any under-tenant from the suit lands within the meaning of the expression "and shall be entitled to avoid and annul all under-tenures, and forthwith to eject all under-tenants....." as occurring in old section 37 of Act XI of 1859. As the averments in the plaint, Mr. Mitter, the learned Counsel for the respondent, contended, did not bring the suit as constituted within the scope of the old section 37 of Act 11 of 1859, Section 7 of West Bengal Act VII of 1950 had no manner of application to such a suit. He urged that if the defendant-appellants Addyas could establish that at the date of issue of notification for sale of Touzi No. 6, the defendant-appellants Addyas had been occupying the land in dispute in a tenancy right covered by any of the provisions of the new sub-section (1) of section 37 of Act XI, 1859, the learned Subordinate Judge would not have been justified in decreeing the plaintiff-respondent's suit. Mr. Mitter further contended that when upon the pleadings, the issue was joined and evidence was led, the suit was to be tried and decided, upon a judgment, either by decreeing or dismissing the suit. If upon the pleadings issues and evidence, the learned Subordinate Judge would have found in the disputed land existence of any tenancy right in the defendant-appellants Addya in the suit land which they had sought to establish before the Court of the learned Subordinate Judge, the learned Subordinate Judge would not have been justified in decreeing the suit. In a situation like this, when parties had joined issues on the pleadings, and adduced evidence, plaintiff claiming right to recover possession from the defendant-appellants alleging them, to be trespassers, and the defendant-appellant's claiming their rights to retain possession as tenants, under the plaintiff, the Court trying the issue on the evidence, in spite of the provisions of section 7 of Act VII, 1950 had no jurisdiction to record an order abatement of the suit even though the suit was one, constituted for avoiding and annulling of any under-tenure, and for ejecting of any under-tenant from the land in suit, as old section 37 of Act XI of 1859 provides for.

9. In (1) Subodh Gopal v. Nilabja Barani Debi, reported in 59 CWN 1056, Chief Justice Chakravartti at page 1062 of the report observed: "Indeed, it seems to me that if the suit which falls to be considered is found to be a suit which, in form, is outside the mischief of section 7, but the defendant contends that his status is such that section 7 is attracted, the Court will undoubtedly have to go into the matter, and if at the end of the hearing, the defendant's contention is found to be well-founded, the order made will be not that the suit has abated, but that the suit is dismissed."

10. In (1) Subodh Gopal v. Nilabja Barani Debi (59 CWN 1056) facts were also similar to those in this appeal, with this exception that in that case, evidence had not been led and the Court before which the suit was pending, had no occasion to render any judgment. In that case Subodh Gopal purchased Touzi No. 6 of 24-Parganas Collectorate at a revenue sale held on 6th January, 1936. On 5th January, 1948, he instituted a suit against Nilabja Barani Debi on the allegations that having had purchased the Touzi, he acquired the right conferred by old section 37 of the Bengal Land-Revenue Sales Act wherefor he was entitled to evict Nilabja Barani Debi from a certain area of land which she was occupying. Soon after the Amending Act (West Bengal Act VII of 1950) had come into force, Nilabja Barani Debi made an application before the learned Subordinate Judge for an order that the plaintiff's suit had abated. The learned Judge on hearing the parties gave effect to that contention. In giving effect to the contention of Nilabja Barani Debi by recording the abatement of suit u/s 7 of Act VII of 1950, the learned Judge had not examined the plaint from the point of view His Lordship Chief Justice Chakravartti indicated in the judgment (59 CWN 1956). "The learned Judge" as His Lordship Chief Justice Chakravartti observed "came only near examining the plaint but ultimately withdrew himself because of his basic notion that all suits brought under old s. 37 were liable to abate u/s. 7 of the Amending Act". On that basis of faulty notion, as the learned Chief Justice observed, without meticulously examining the plaint and the plaint only to find if the suit, as constituted came within the purview of old section 37 of Act XI of 1859, the learned Subordinate Judge recorded abatement of the suit u/s 7 of Act VII of 1950. So, in laying down the law relating to the true and the only correct method of applying section 7 of Act VII of 1950 in a suit constituted, as it were, under old section 37 of Act XI of 1859, His Lordship Chief Justice Chakravartti, made the most pertinent observations at page 1062 of 59 CWN as quoted above. If the learned Subordinate Judge, in the case reported in 59 CWN 1056, on the issues joined and evidence adduced on the issues, would have rendered a judgment he was to have either decreed or dismissed the suit, as the case may be, but would have no jurisdiction to record an abatement of the suit u/s 7 of Act VII of 1950 in view of the observations of Chief Justice Chakravartti, as quoted above.

11. We most respectfully agree with, and accept the celebrated Chief Justice's observations, as quoted above. Even if the constitution of the present suit is outside the mischief of section 7 of Act VII of 1950, upon the pleadings, as in the

present case, issues had been joined, evidence had been adduced and the learned Subordinate Judge trying the suit either rightly or wrongly decreed the suit, finding that the defendant-appellants Addya had no protected tenancy interest in the disputed land. So, in our view, there is no necessity for examining the plaint and the plaint only in a case like this, following the decision reported in 59 CWN quoted above. We are to examine the plaint, the written statement, the issue and to consider the evidence. We are to decide, if upon the pleadings, issue and evidence adduced, the learned Subordinate Judge, in the present case, came to a right conclusion as to the non-existence of a tenancy right in the disputed lands of the defendant-appellants Addya that may be protected as falling at least within new section 37, sub-section (1), clause (b)(ii) of Act XI of 1859, as introduced by section 4 of West Bengal Act VII of 1950.

12. There is no dispute that the Plaintiff, Subodh Gopal, is the certified purchaser of Touzi No. 6 of 24-Farga-nas Collectorate, sold in auction for arrears of its own revenue (Vide. Sale Certificate, Ext. 1). The last date of payment of revenue of the said touzi was 29th day of September, 1935 u/s 3 of Act XI of 1859. Thereafter, as section 6 of Act XI of 1859 provides notification for sale of the touzi was issued fixing the date of sale and the sale had been held on 6th of January, 1936 (vide. Ext. 1).

13. In the plaint paragraph "2", the plaintiff asserts that except the interest protected by old section 37 of Act XI of 1859, the plaintiff acquired right to avoid and annul all under-tenures and to eject all under-tenants. In paragraph 3 of the plaint, the plaintiff asserts that with a view to avoid and annul all Madhya swattas and other avoidable and annulable swattas (interest) he did avoid and annul all Madhya swattas and other avoidable and annulable Swattas by general notices, oral notice and public notice, by beat of drums between 7.6.36 to 17.6.36. On 23.11.36, by post a notice was addressed to the defendants. In various suits the defendants' Swatta i.e. interest had been avoided and annulled. The expressions used in Bengali in paragraph 3 of the plaint are "Bibadiganer Swatta" and "Annannya" avoidable and annulable Swatta. In paragraph 5 of the plaint, the plaintiff asserts that the disputed No. 10, Govinda Addya Road and 1, Mahesh Dutta Lane, being 3 bighas 5 cottahs have been in khas possession of defendants Addyas as well as through tenants without any bundobust i.e. without taking any settlement. In paragraph 6 of the plaint, the plaintiff asserts that as the plaintiff auction purchased the touzi for arrears of its own revenue the swatta in which (i.e. the interest in which) the defendants have been in occupation of the disputed land are not binding on the plaintiff according to law, and whatever swatta i.e. the interest, the defendants had in the disputed land was liable, according to law, to be avoided and annulled. The defendants Swatiadhi i.e. interests that they had in the disputed land had been avoided or annulled The plaintiff having 1/6th share in Touzi No. 6 by auction purchase at the revenue sale, is entitled to have joint possession of the disputed lands in his share in the Touzi with defendants 1 to 13 in khas, in ejmali, and through tenants. In paragraph 7 of the plaint, the plaintiff asserts that knowing of the plaintiff's

auction purchase of the Touzi and having had received the notice relating to avoidance and annulment of the defendants' Swatta i.e. interest in the disputed lands in various modes and methods, the defendants illegally resisted plaintiff's right to possess his share of lands in possession of the tenants in the disputed lands by not allowing the plaintiff to realise his share of rent from the tenants and by not allowing to have joint possession with the defendants in the khas lands within the disputed lands. In paragraph 8 of the plaint, it is asserted by the plaintiff that as the defendants did not allow the plaintiff to have khas possession of the disputed lands, the plaintiff is entitled to get mesne profits from the date of avoidance and annulment of the defendants' Swatta in the manner stated in the previous paragraphs of the plaint till the plaintiff's recovery of joint possession of his share with the defendants in the disputed land. In paragraph 9 of the plaint, the plaintiff asserts that the cause of action for the suit arose on the date of purchase, being 6.1.36 and on the date of notice to the defendants, being 23.11.36. In the written statements filed on 21.12.1951 by and on behalf of Addya-defendants, through Ashutosh Roy, the then Receiver of Addyas Estate in Office, it was stated in paragraph 3 that the disputed properties were the Kheraji lands with Maurashi Makarari rights in possession and enjoyment of the defendants' estate for a long time, being in existence from time immemorial and long before the issue of the plaintiff's alleged revenue sale notification. The defendants' Maurashi Makarari tenancy right in the disputed lands was not liable to be annulled and avoided. The defendants' tenancy interest in the suit land was a protected one under the new section 37, sub-section (1) of Act VII of 1950. The plaintiff's suit was barred, and he was not entitled to any relief. In paragraph 5 of the written statement (page 31 of the Paper Book, Part I) the Receiver Ashutosh Roy, then in office, asserted that 10, Govinda Addya Road and 9, Govinda Addya Road were the properties with Maurashi Makarari right, being in possession and enjoyment in succession from the time of predecessors-in-interest from the time immemorial, of one Kalicharan Haider, having an area more or less 6 bighas of land included within the lands and jama bearing a rental of Rs. 10-6-8 gandas. After the death of the aforesaid Kalicharan Haider through his heirs and assigns, one Bepin Behari Mukherjee and one Atul Chandra Banerjee owned and possessed the same. Thereafter, the predecessor-in-interest of the Addyas defendants-Rakhaldas Addya executor to the estate of late Govinda Chandra Addya purchased by different kobalas, from the aforesaid Bepin Behari Mukherjee and Atul Chandra Banerjee, dated 23rd Kartick, 1304 B.S. and 23rd Kartick, 1305 B.S. respectively, and was in possession thereof on payment of the aforesaid Saliyana (annual rent) of Rs. 10-6-8 gandas. Thereafter Addyas defendants remained in possession of the said properties after having acquired the same on the basis of their right, title and interest. The other disputed property, mentioned in the schedule, being premises No. 1, Mahesh Dutta Lane is the property of one Bhutanath Chatterjee coming from his predecessor-in-interest in succession from long before the permanent settlement or from long before the creation of Touzi No. 6 possessed and enjoyed by him, with the property measuring an area of 17 cottahs 11 chittaks more or less, within and

included in the lands and jamas held in permanent Maurashi Makarari right, bearing a saliana (annual rent) of Rs. 2-2-2 1/2 gandas. Thereafter Rakhal Das Addya, executor to the estate of late Govinda Chandra Addya, predecessor-in-interest of the Addyas defendants, having purchased the aforesaid Maurashi Makarari lands and jamas by a kobala dated 19th Agrahayana, 1305 B.S. from Haridas Chatterjee, son of the aforesaid Bhutnath Chatterjee had been in enjoyment and possession on payment of the aforesaid annual rent. Thereafter, the present Addya defendants have been in possession and enjoyment of the said property by acquiring the same by inheritance. The aforesaid two lands and jamas of the Addya defendants having been in existence from long before the permanent settlement and also from long before the creation of Touzi No. 6 are not liable to be annulled in any way.

14. Upon the pleadings, the learned Subordinate Judge at the time of trial brought the parties to trial on the following issue:- "Are the defendants-tenants mere trespassers in respect of the land in suit"?

To have protection of the defendants' tenancy, if any, in the disputed land against eviction therefrom it is to be established by the defendants that their tenancy right in the disputed land falls, if not within clause (a), at least either within clause (b)(i) or b(ii) of sub-section (1) of section 37 (new) of Act XI, 1859, as introduced by section 4 of West Bengal Act VII, 1950. The defendants are to establish this much that not only their tenancy in the disputed lands falls within any of the clauses of sub-section (1) of new section 37 of Act XI, 1859, but also that it had its existence at a time before the issuance of the notification for sale of Touzi No. 6 under Act XI, 1859. If the defendants-appellants upon whom this burden wholly lies succeeds in so establishing their tenancy right in the disputed lands the suit must fail being hit by new section 37, sub-section (1), of Act XI, 1859, as introduced by section 4 of the West Bengal Act VII, 1950.

15. As we read the relevant paragraphs of the plaint, which we have just analysed, we notice that the plaintiff, Subodh Gopal, was, at the time of filing of the plaint, conscious about the existence of a Swatta Swatta i.e. interest of the defendants Addya in the lands in dispute. An encumbrance, as the old section 37 of Act XI, 1859 says requires neither avoidance nor annulment. Consequent upon the sale of a permanently settled estate for arrears of its own revenue, the auction-purchaser gets the touzi free from all encumbrances and by reason of his auction-purchase, acquires the right forthwith to eject all under-tenants. Encumbrance, therefore, goes ipso facto consequent upon the auction-purchase at the revenue sale of the estate, even if such encumbrance had been created upon the estate after the time of settlement; but under-tenures in the estate except four categories as specified in the old section 37 of Act XI, 1859, shall have to be avoided and annulled whereupon the auction-purchaser at the revenue sale shall forthwith eject the under-tenants. Thus the old Section 37 of Act XI, 1859 covers three types of Swattas (interests): (1) encumbrances which go ipso facto and ipso juri consequent upon the auction-purchase of the estate

sold for arrears of its own revenue; (2) under-tenures which the purchaser has the right to annul and avoid and then to eject the under-tenants therefrom forthwith; (3) protected four types of Swattas or tenanted interests. To sue an encumbrancer, the purchaser at the revenue sale of an estate, sold for arrears of its own revenue, is not required by law to avoid and to annul the same, but by mere filing of the suit for eviction of the encumbrancer, the purchaser can proceed to get a decree in the suit against the encumbrancer. To eject an under-tenant, the purchaser is required by law to avoid and annul the under-tenure whereupon he would forthwith have the right to eject the under-tenant of such under-tenure thus avoided and annulled by following the procedure prescribed by law. Protected interests are neither avoidable nor annulable and no suit for ejectment against protected interests can be brought by the purchaser at the revenue sale of an estate sold for arrears of its own revenue. Remembering the scope of old section 37, we have read the entire plaint and have noticed that the plaintiff, being conscious of existence of a swatta i.e. interest of the defendant-Addyas in the lands in dispute asserted in the several paragraphs of the plaint that the defendants' Swattas or Swattadhis interest or interests had been avoided and annulled by various modes even by a notice in that respect addressed to the defendants Addya served by post on them. We also notice that in the plaint, the plaintiff asserted that even though the defendants Addya had notice and knowledge of avoidance and annulment of their Swattas or Swattadhis interest or interests in the lands in dispute, they had not allowed the plaintiff to get khas possession and/or possession through tenants in the disputed lands. On those averments, the plaintiff prayed for a declaration of his 1/6th undivided shares in the lands in dispute and for khas possession of his share of lands jointly with the defendants in part and through tenants of the defendants in the rest by realising rent from such tenants. The plaintiff asserts in paragraph "5" of the plaint that the defendants Addya are occupying the lands in dispute without taking any bundabast . But if the defendant's Swatta or interest in the disputed lands was an encumbrance within the meaning of old section 37 of Act XI, 1859, the plaintiff would have come straight to the Court and filed the suit against the defendants. But the plaintiff, being conscious of the existence of the defendants' Swatta i.e. interest in the disputed lands other than an encumbrance, in so many paragraphs of the plaint, as we have analysed above, positively asserted annulment and avoidance of the defendants' Swatta in the disputed lands, and upon assertion of facts relating to the mode and manner of avoidance and annulment of the defendants' Swatla in the land in dispute as notified to the defendants, who had not allowed the plaintiff in spite of notice to possess his share of khas and tenanted land in dispute, he brought the suit. From the date of his auction-purchase of the Touzi No. 6 on 6.1.36 to the date of filing of the suit i.e. 23.11.44, complete 8 years 10 months had elapsed during which the plaintiff knew the existence of a Swatta of the defendants in the land in dispute and with that knowledge issued notice for avoiding and annulling such Swatta and on the assertion in the plaint about avoidance and annulment of such Swatta in the disputed lands, the plaintiff came with the prayers in the plaint as mentioned

above. We are to find upon the materials placed before us whether during the period intervening between 29th September, 1935 to 6th January, 1936 i.e. at the date of notification of sale of the Touzi No. 6 of 24-Parganas Collectorate under Act XI, 1859, the defendants had in the lands in dispute a tenancy right that may be protected at least under clause (b) (ii) of sub-section (1) of section 37 (new) of Act XI, 1859, as introduced by section 4 of Act VII, 1950. The defendants, as their written statement reveals, claim a Maurashi Makarari tenancy right in the lands in dispute appertaining to two jamas as mentioned above having had their existence at least prior to and at the date of issue of notification of sale of Touzi No. 6, sold for arrears of its own revenue on 6.1.36. If the defendants' such claim for a tenancy right in the disputed lands is established, it would come within clause (b)(ii) of sub-section (1) of section 37 (new) of Act XI, 1859.

16. We shall now examine the judgment of the learned Subordinate Judge as well as the oral and the documentary evidence adduced in the suit and shall come to our own conclusion on the issue joined.

17. The learned Subordinate Judge in his judgment (page 37 of the paper book, Part I) described Exts. F and F(1) as attested partition khattans and observed that its evidentiary value did not appear to him to be much. The defendants claim that within the jama of Rs. 10.6.8 gandas are the two Premises No. 10, Govinda Addya Road and No. 9, Govinda Addya Road and that the jama covering the two premises has been in existence from time immemorial. Exts. F and F(1) are not partition khatians. Ext. F in original appears to be a draft cadastral survey khatian that was not finally published so also Ext. F(1). Jama in Ext. F recorded in red ink by the attestation officer is Rs. 10.6.8 gandas. The settlement attestation officer attested the khatian on 13.8.41. The Maurash of the jama was Ram Kumar Modak and Bepin Bihari Mukhopadhyay and the persons in possession are recorded being the predecessors of Addyas, the present defendants. Ext. F(1) is the attested khatian attested by the settlement officer on 28.8.41 relating to a jama of Rs. 2.2.1 ganda in red ink. Maurash recorded was Bhutnath Chattopadhyay and the present possessors being predecessors of Addya defendants. The red ink entries in both the khatians read as . These two khatians cover total area of 3.44 acres and comprise plot 1015 a pathway, plots 1018, 1020, 1022 and 1025 all are bhities homestead land. Under these two khatians several sub-khatians were entered. So the two Jamas, one of Ramkumar Modak and Bepin Bihari Mukhopadhyay, and the other of Bhutnath Chattopadhyay, cover 3.44 acres of land appertaining to certain plots which had their existence in 1941. Exts. F and F(1) relate to Alipore Thana. In 24-Parganas, record of rights had been finally published in several police stations during 15th July, 1926 to 26th August, 1933 (Ghose's Bengal Tenancy Act, 1941 Edition page 1484 to 1486). In regard to Alipore Thana there had been no publication of settlement record of rights. On examining Ghose's Bengal Tenancy Act, pages 1484 to 1486, 1941 edition, we could not spot out within the thanas of 24-Parganas, the Thana Alipore. We notice Thana Tollygunge, Behala, Maheshtala.

The reason is that Bengal Tenancy Act was not extended to the town of Calcutta as described in Schedule 1 to the Calcutta Municipal Act 1923 minus the area, added to Calcutta, as defined in section 3, sub-section (1) of the Calcutta Municipal Act. In view of the provisions of the Calcutta Municipal Act 1923 read with sub-section 3 of section 3 of the Bengal Tenancy Act 1885 as amended upto 1928, Alipore Thana fell within the "town of Calcutta" as described in Schedule 1 to the Calcutta Municipal Act, 1923. Therefore, in spite of the draft khatians, Exts. F and F(I) having had been attested by the attestation officer, there was and could be no final publication of the draft khatians, Exts. F and F(I) under Chapter X of the Bengal Tenancy Act to attract, in the finally published khatian, the presumption u/s 103B of the B. T. Act. So, Exts. F and F(I) had not been prepared under Chapter X, Bengal Tenancy Act which had no application in the town of Calcutta within which Chetla lies comprised in the police station of Alipore. Estate Partition Act Proceeding had been pending when the learned Subordinate Judge rendered his judgment on 1.3.54 (vide interrogatories and reply thereto, page 23 of the Paper Book, Part I). So, the learned Judge at page 37 of his judgment misread and misinterpreted Exts. F and F(1). The only witness who deposed for the defendants,-no witness deposing for the plaintiff,- was D.W. 1 Jogeswar Sur, Tashildar of the Estate of the defendants since 1941. He said that two jamas of Rs. 10.6.8. gds. and 2.2.2 1/2 gds. belonged to Raj Kumar Modak and others, included in the jama of Rs. 73.0.3 pies. According to this witness, vide his cross-examination, the jama of Rs. 73.0.3 pies covers premises No. 9 and 10, Govinda Addya Road 1, Mahesh Dutta Lane, 4, Govinda Addya Road, 5/1, Moyerpore Road, 7, Govinda Addya Road and 19A and 20/1, Chetla Hat Road and other premises.

18. Ext. A is a kobala dated 8th November, 1897. One Bepin Behari Mukherjee is the executant of the kobala and Rakhaldas Addya, the predecessor of the Addya defendants, was a recipient of the kobala. A plot of 6 bighas of land described by certain boundary was sold by Ext. A. That plot had been described in schedule "ka" of the document as a Kheraji Mourashi Mokalari Bastu land under the Ejaradar Nilratan Mukherji and Putnidar Goswamidas Ghose under the landlords Jatindramohan Tagore and Tarakumar Chowdhury. He described the tenancy once held and possessed by one Kali Charan Haider of Kalighat. Kalicharan Haider left three sons viz. Rajkumar, Chunilal and Krishna Kishore. Mokshada Devi was the widow of Krishna Kishore. Devolution of the interest in the 6 bighas Mourashi Mokalari Bastu land held under the Ejaraders and putnidars had been described and asserted in Kobala, Ext. A. This kobala, Ext. A would show that in execution case Nos. 1126 of 1889 and 1829 of 1896 of the Munsifs Court at Alipore, Bepin Bihari Mukherjee auction-purchased the share of judgment-debtor, Chunilal and Rajkumar, being 5 annas 6 gandas 2 karas 2 kranties each in the 6 bighas of Mourashi Mokalari Bastu land held under Ejaraders Nilratan Mukherjee and Putnidar Goswamidas Ghose of the touzi, then held by Jatindramohan Tagore and Tara Kumar Chowdhury. Ext. A(1) is the kobala dated 8th November, 1898 executed by Akul Chandra Baserjee in favour of Rakhaldas Addya, predecessor of

the Addya defendants. This kobala describes a Kheraji Mourashi Mekarari 6 bighas of land with trees, tanks etc. bearing an annual jama of Rs. 10.6.8 gds. payable to the estate of Raja Jatindramohan Tagore. In this kobala, Ext. A(1) Akul Chandra Banerjee, after asserting how the six bighas of Mourashi Mekarari land bearing a jama of Rs. 10.6.8. gds. devolving from Kali Charan Haider to Rajkumar, Chunilal and Krishna Kishore, Mokshada Devi and Manmohini Devi, stated in the kobala that in execution of a decree against Rajkumar, Chunilal and Mokshada Devi at the instance of Administrator General of Bengal in the Munsiff's 3rd. Court at Alipore being Execution Case No. 264 of 1898, Akul Chandra Banerjee auction-purchased the said Mourashi Mekarari land on 20th May 1898, and got delivery of possession. In the kobala, reference has also been made of the partition suit brought in between Monomohini Devi, Rajkumar and Chunilal and the decree passed thereunder. Further in the kobala, Ext. A(1) Akul asserted that Addyas had already purchased under kobala, Ext. A, share of Chunilal and Rajkumar in the jama of Rs. 10.6.8 gds. Therefore, Mokshada Devi's or as matter of that Monomohini's share auction-purchased by Akul in Execution Case No. 264 of 1898 was proposed to be sold to the predecessor of Addya defendants, Rakhal Das Addya. Thus from Exts. A and A(1), read together, it would appear that a plot of land measuring 6 bighas more or less situated in Mouza Chetla appertaining to Touzi No. 6 of the 24-Parganas Collectorate and other Touzi s bearing a jama of Rs. 10.6.8 gds. payable to the Putnidars and Ejaradars under Touzi holder had been purchased by the predecessor of the Addya defendants. The land of the said jama had been described in the two kobalas, Exts. A and A(1) of the year 1897-1898. One Haridas Chattopadhyay, son of Bhutnath Chattopadhyay of Kalighat by kobala, Ext. A (2) dated 4th December, 1898 sold the land, described in Schedule to such kobala, to Rakhal Das Addya, predecessor of the present defendants Addyas. A Mourashi Mekarari land situated in Mouza Chetla covering 12 cottahs 11 chittacks described as bounded and hutted by certain boundaries, bearing a jama of Rs. 2.2.2 gds. 2 karas payable to the sherista of the landlords Jnan Chandra Roy Chowdhury and others of Barishn was thus sold. The tenancy described in the kobala, Ext. A (2) in regard to the land sold (vide. Ext. A (2)) is a Mourashi Mekarari interest. Thus the Addyas in 1898 acquired from Haridas Chattopadhyay, son of Bhutnath Chattopadhyay, a parcel of land, bearing a jama of Rs. 2-2-2 gds. The jama of Rs. 10.6.8 gds. for 6 bighas of land was payable not to the Touzi holders, but to the Ejaradars and Patnidars of the Touzi holder (vide Ext. A). Ext. D(2) is the sale certificate in Execution Case No. 264 of 1898 which is to be read with the kobala, Ext. A(1) executed by Akul Banerjee in favour of Rakhal Das Addya. Under Ext. D (2) Akul Chandra Banerjee (Vide Ext. A(1)) auction-purchased on 21st July 1898, Lot No. 7 described with certain boundaries in which judgment-debtor Mokshada Devi was described as having had 5 annas 6 gds. 2 karas 2 krants in Mourashi Mekarari right in relation to a jama for the land so auction-purchased, bearing an annual rental of Rs. 10.6.8 gds. payable to the Sherista of Goswamidass Ghose and others Patnidars and Ejaradars of the Taraf of the landlord Kalidhan Roy Chowdhury. Thus Ext. A(1),

dated 8th November, 1898 and Ext. D(2) dated 29th August, 1898 are connected. Ext. D(1) is the sale certificate in execution case No. 1829 of 1896 Munsiff's 3rd Court, Alipore granted on 19th May, 1897. Decree-holder Biswanath Basu had put to sale the share of the judgment-debtor, Chunilal Haider in one 4 bighas plot more or less, described with certain boundaries and Bepin Bihari Mukherjee auction-purchased the share of Chunilal in a Mourashi Mekarari jama bearing a rental of Rs. 10.6.8 gds. per annum payable to the estate of Goswamidas Ghose Ejaradars of Sabarna Chowdhury of Barisha and Malik Barada Prosad Roy Choudhury. The Sale Certificate, Ext. D(1), shows that the auction-purchaser was Bepin Bihari Mukherjee, son of Barada Prosad Mukherjee who executed the kobala, Ext. A, dated 8th November, 1897, in favour of Rakhaladas Addya, predecessor of the present defendant-appellants. Thus, the two Sale Certificates, Exts. D(2) and D(1) and the two kobalas, Exts. A(1) and A contain assertions of existence of a jama of Rs. 19.6.8 gds. in Mourashi Mekarari right held under the Patnidars and Ejaradars of the Touzi covering a plot of 6 bighas of land in Mouza Chetla under Touzi No. 6 and other touzis of 24-Parganas Collectorate bounded and butted by certain boundaries. Ext. D is the sale certificate in execution case No. 1126 of 1898. Decree-holder Peary Mohan Roy put to sale the share of Rajkumar Haider in a tenancy at a rental of Rs. 10.6.8 gds. per annum. That tenancy is also described in Ext. D by certain boundaries. One Hara Kumar Bhattacharjee is the auction-purchaser (vide Ext. D). In Ext. A which is to be read with Ext. D, Bepin Bihari Mukherjee described how he purchased in Execution Case No. 1126 of 1889 (vide Ext. D) Rajkumar Haider's share in the benami of Hara Kumar Bhattacharjee. So, Exts. D, D(2) and D(1) are to be read with the kobalas, Exts. A and A(1) and those documents would show that in 1897-1898, there was a jama of Rs. 10.6.8 gds. per annum, covering a plot more or less 6 bighas of land described by certain boundaries, payable to the estate of the Ejaradars and Patnidars under the Touzi-holders of the Touzi No. 6 and other touzis of 24-Parganas Collectorate. Ext. A (2), as we have already observed, relates to the jama of Rs. 2.2.2 gds. 2 kranties. In relation to the jama of Rs. 2.2.2. gds. 2 karas, Haridas Chatterjee in kobala, Ext. A (2) of 4th December, 1898 asserted that the jama was payable to the landlords Jnan Chandra Chowdhury and others of Barisha and the Mourashi Mekarari land appertained to Taluk No. 6 and other Taluk of 24-Parganas Collectorate. So, the moot question is whether the two jamas, described and asserted in the two kobalas, Exts. A, A(1) as well as in the sale certificates Exts. D, D(1) and D(2), and in the kobala, Ext. A(2) respectively include the land now in dispute being Premises No. 10, Govinda Addya Road and 1, Mahesh Dutta Lane described in the plaint of the present suit as follows : "Within District 24-Parganas, Pargana Magura, Thana and Sub-registry Alipore, Mouza Chetla within the Municipality of Calcutta Premises No. 10 Govinda Addya Road and 1, Mahesh Dutta Lane". The question now is whether the two premises in suit are included within the two jamas of Rs. 10.6.8 gds. and 2.2.2 gds. 2 karas 2 krants, former relating to 10, Govinda Addya Road and the latter to 1, Mahesh Dutta Lane.

19. If it is found that within the disputed land, as described in schedule to the plaint, there are the two jamas as aforesaid held by the defendants and two such jamas creating two tenancies had their existence from before and at the date of issue of notification of sale of Touzi No. 6 of the 24-Parganas Collectorate, it is to be decided whether the defendants occupying the disputed lands, have their tenancy right in such lands being protected by sub-section (1) of section 37, (new) clause (b)(ii), Act XI, 1859, as substituted by sec. 4 of Act VII, 1950. The defendants' alleged tenancy right, if any, in the disputed lands cannot make up either a tenure or a holding within sub-section (1) of sec. 37, clauses (a) and (b) (i) of Act XI 1859, as introduced by section 4 of Act VII, 1950 since sub-section (2) of section 37 (new) says that for the purpose of that section "tenure" includes a tenure, as defined in Bengal Tenancy Act, 1885 and "holding" includes a holding, as defined in Bengal Tenancy Act, 1885. But Bengal Tenancy Act, 1885 was not extended, in view of sub-section (3) of section 3 of the Bengal Tenancy Act, in the town of Calcutta i.e. within the Municipality of Calcutta within which the disputed land is situated appertaining to the Mouza Chetla. Therefore, the alleged tenancy right of the defendants as claimed in the land in dispute may, if established fall within Clause (b)(ii):-"Other leases of land whether or not for purposes connected with agriculture or horticulture existing at the date of issue of notification for sale of the Estate under this Act" as occurring in sub-section (1) of section 37 of Act XI, 1859, substituted by section 4 of West Bengal Act VII, 1950.

20. There was a commission for local investigation. The Commissioner submitted his report which the learned Subordinate Judge accepted on 5.3.53, vide Order No. 153. The Commissioner was directed to relay the boundaries of the land mentioned in the documents filed by the defendants on 8.3.49 and the partition map and the partition decree in T.S. No. 97 of 1885 in the First Court of Subordinate Judge, Alipore together with the boundaries of the suit land and to ascertain whether the boundaries of the suit land are identical with those mentioned in the aforesaid documents filed with a Firisti on 8.3.1949. On 8.3.49, the three Kobalas, Exts. A, A(1) and A(2) and the partition map and the partition decree in T.S. No. 97 of 1885 in the First Court of the Subordinate Judge at Alipore were filed. The Commissioner in his report (Ext. G), page 51, Paper Book, Part II observed:-"I am, therefore, of the opinion that although the boundaries of the suit land are not identical with those mentioned in the documents filed with a Firisti on 8.3.49, the lands described in the documents filed with a Firisti on 8.3.49 include the suit land - viz. premises No. 10, Govinda Addya Road and 1, Mahesh Dutta Lane."

21. There was no objection against the report of the Commissioner, Ext. G. It was accepted by the learned Subordinate Judge but while dealing with the Commissioner's report (Ext. G), the learned Subordinate Judge at page 36 of his judgment, paper book, Part I, observed:-"Equally ineffective is the local investigation report of the Commissioner (Ext. G). It throws little light indeed on the Jama of Rs. 10.6.8 gandas."

22. The learned Judge's view was that the kobalas, Exts. A, A(1), A(2) and the sale certificates, Exts. D, D(1) and D(2), in which, the plaintiff and his predecessor touzi holders had not been parties, would have no binding effect on the plaintiff in regard to the defendants-appellants' claim for their tenancy right in the lands in dispute, and as to the existence of the two jamas in the disputed land held at least from the year 1897-1898 till this date. Exts. A, A(1), the kobalas and the sale certificates, Exts. D, D(1) and D(2) would show that a six bighas parcel of land in Mouza Chetla, bearing an annual rental of Rs. 10.6.8 gds. constituting, as it were, a Mourashi Mekarari tenancy, was being held at the relevant time when the kobalas and the sale certificates had come into existence in the year 1897-1898, under the Ejaradars and Patnidars of the Touzi No. 6 of 24-Parganas Collectorate, and not directly under the then touzi holders. Ext. A(2) would show that the jama of Rs. 2.2.2 gds. 2 karas 2 krants for a parcel of land measuring more or less 12 cottahs 11 chittacks, situated in Mouza Chetla constituted a Mourashi Mekarari Tenancy within Taluk No. 1 to 6 and 8 to 16 of the landlords Jnan Chandra Chowdhury and others of Barisha, and was payable to the Sherista of the said landlord. So, while considering the kobalas, Exts. A and A(1), the learned Subordinate Judge in his judgment overlooked this fact:- that the Jama Rs. 10.6.8 gds. was payable not to any touzi holder, but to the Ejaradars and Patnidars under the touzi holders. The plaintiff, Subodh Gopal, purchased an undivided share in the Touzi No. 6 on 6.1.36 and before him, Akshoy Bose was the touzi holder. Touzi No. 6 was held by one Sayed Abdul Ali 1892 as well as the Land Mortgage Bank of India, Calcutta, in 16 annas in all the Mouzas except the Mouza Palpara and Jafarpur (vide. Exts. 3 and 3(b), paper book, pages 53-55, Part II). After Sayed Abdul Ali as D Register, Ext. K shows the successive registered holder of the Touzi No. 6 was Nimai Chandra Bose, thereafter Akshoy Chandra Bose, Bipin Chandra Bose, thereafter Durga Prosad Khaitan, then again Akshoy Chandra Bose, after Akshoy Bose came Subodh Gopal Bose in 1936-1937. As found by the Commissioner for local investigation (Ext. G), within the boundaries of land described in the schedule to the kobalas, Exts. A series lay the Premises No. 10, Govinda Addya Road and the Premises No. 1, Mahesh Dutta Lane as described in schedule to the plaint of the present suit. Those kobalas show the existence of the two jamas of Rs. 10.6.8 gds. and Rs. 2.2.2 gds. 2 karas dating from before the year of the kobalas as 1897-98. The then tenant of the two tenancies of the two jamas aforesaid while transferring the lands of those tenancies to the transferee, Rakhal Das Addya, the predecessor of the Addya-defendant-appellant, described the tenancies, situated in Mouza Chetla as lying within certain boundaries given in the schedule to the respective kobalas and the transferee accepted the transfer and entered into possession of the land covered by those kobalas. The successors of the transferee who have been now occupying the land of two such tenancies, asserted that through their predecessor, Rakhal Das Addya, they have acquired mourashi mekarari tenancy right in the two premises in dispute existing from before and at the date of issue of notification for sale of the Touzi No. 6, sold for arrears of its own revenue on 6.1.36. Now, the question arises as to what is the

legal effect of the assertion of the tenancy right in regard to 6 bighas of land of Mouza Chetla as described in the kobalas, Exts. A, A(1) and in regard to 12 cottahs 11 chittacks of land in Mouza Chetla, described in kobala, Ext. A(2). In those kobalas, the ex-proprietor of Touzi No. 6, the present fractional co-sharer touzi-holder, the plaintiff-respondent and the Patnidars and the Ejaradars of the said Touzi were not parties. The tenants Mukherjee, Banerjee and Chattopadhyay (vide. Exts. A, A(1) and A(2)) asserted in those kobalas while transferring the land covered by those kobalas to Addyas, the existence of two jamas in two parcels of lands in Mouza Chetla. Within such parcels of land, covered by the three kobalas, the Commissioner for local investigation (vide Ext. G) has found at the locale the two disputed premises in suit viz. 10, Govinda Addya Road and 1, Mahesh Dutta Lane of Mouza Chetla. In those kobalas the previous proprietors of the touzi could never be conceived as parties. The then tenants under the Patnidars and the Ejaradars vide Exts. A, A(1), D, D(1) and D(2) and under the then Touzi-holders, vide. Ext. A(2), while transferring their two tenancies as aforesaid in the parcel of land described in those documents asserted in them : a tenancy right at certain rates of rent, payable to the then landlord of each of such tenancies. The existence of the tenancies thus dates back from the year 1897-1898 (vide. Exts. A, A(1) and A(2) and Exts. D, D(1) and D(2).

23. In (2) Jogendra Krishna Banerji and Another Vs. Sm. Subashini Dassi at page 600, referring to the decision in the (3) Jnanendra Nath Dutt v. Nesa Dassi reported in 39 CLJ 526 (1923), His Lordship Mr. Justice Pal observed:-"On the other hand, in (3) Jnanendra Nath Dutt v. Nessa Dassi the right in question being the permanency of the tenancy right, the statement in the sale deed by the tenant in favour of his transferee that it was a permanent one was held admissible in evidence."

At page 601 of the report His Lordship further observed considering the effect of the kobalas:-"Of course these may not be relevant to the establishment of the Mokarari character of the tenancy."

24. In Jogendra's case, one Shama Charan sold two tenancies on 27th May, 1919 to the plaintiff by a kobala and the plaintiff entered into possession of those tenancies on the basis of his purchase. The defendants in the case of Jogendra Krishna Banerji and Another Vs. Sm. Subashini Dassi , were the owners of the Touzi. They were not parties to the kobala. On 17th June, 1936, the plaintiff instituted a suit against the defendant the holders of the Touzi for a declaration of his Mourashi Mokarari right in the land, covered by kobala, Ext. 1, and recorded in C.S. Khatian. In the C.S. Khatian, plaintiff's possession only was recorded without specifying whether the plaintiff had any permanent mokarari mourashi mokarari right in it. Accordingly, the plaintiff in Jogendra's case prayed for a declaration of his Mourashi Mokarari tenancy right in the holding. In jogendra's case permanent character of the tenancy was a relevant fact. So, at page 599 of 45 CWN, His Lordship Mr. Justice Pal observed:- "Statements of such permanent character therefore are themselves relevant facts if they are

contained in any document which relates to any transaction of the nature mentioned in section 13(a). As has already been pointed out, the several transactions of transfer in the present case are such transactions. Consequently the statements as to the permanent nature of the tenancy contained in the several documents relating to these several transfers are themselves relevant facts and will be available for the purpose of proving the Plaintiff's permanent tenancy right."

25. Thereafter His Lordship Mr. Justice Pal referred to the case of Jnanendra Nath Dutt v. Nesa Dassi and made the observations already quoted. The executants of the kobalas, Exts. A, A (1) and A (2) of the year 1897-98 stated while transferring the lands covered by the kobalas to the transferee i.e. the predecessor of the Addya defendant-appellants, that in the land, described by boundaries and area in the schedule to the kobalas, the respective transferor had a Mourashi Mekarari tenancy right at the rental stated therein payable to the then landlord, as described in the kobalas themselves. The Mekarari character i.e. the character of fixity of rent of the tenancies covered by the kobalas, Exts. A, A(1) and A(2) cannot be established by those kobalas. But the statements in the kobalas by the tenant in favour of the transferee that in the land described in the kobalas, there was a tenancy right of the transferor of a permanent character without fixed rent,-mourashi, but not mekarari, at the relevant jama recited in the kobalas must be held admissible in evidence against the present plaintiff-respondent on the authority of the decision in Jogendra Krishna Banerji and Another Vs. Sm. Subashini Dassi , though plaintiff-respondent or the respective previous holders of the Touzis or the Patnidars and Ejaradars under the touzis had not been parties to those kobalas nor could they be conceivably parties to those kobalas. We have already pointed out that kobalas, Exts. A, A(1) and the sale certificates, Exts. D, D(1) and D(2) would show that the jama of Rs. 10.6.8 gds. was not payable to the Touzi holders of Touzi No. 6 but was payable to the Patnidars and the Ejaradars of the said Touzi. Therefore, the Patnidars and the Ejaradars of the said Touzi at the relevant time, when the kobalas, Exts. A, A(1) had come into existence were bound by the statements of the kobalas as to the permanent character of the tenancies but not as to its mekarari character as asserted in those two kobalas. There is no evidence that the Patnidars and the Ejaradars of the Touzi No. 6 had lost their under-tenures having had been avoided and annulled by the successive holders of the touzi already mentioned right upto Subodh Gopal, the plaintiff-respondent. In the kobala, Ext. A(2) of the year 1898 it was asserted that in respect of mourashi mekarari land measuring 12 cottahs 11 chittacaks situated in Monza Chetla within Taluk Nos. 1 to 6 and 8-16, jama of Rs. 2.2.2 gds. 2 karas 2 krants was payable to the Sherista of the then landlord, the holders of the Taluk being Jnanendra Roy Chowdhury and others of Barisha. Such statement is admissible in evidence to show the existence of the permanent character, but not mekarari character of the tenancy, in the land transferred by the tenant at the relevant time to the transferee, the predecessor of the present Addya defendant-appellants. There is no evidence

that this tenancy described and asserted in kobalas, Ext. A (2) in the year 1898 had ever been annulled and avoided by any one of the successive touzi holders right up to the present plaintiff-respondent, Subodh Gopal.

26. In (4) Sailendra Nath Bhaitacharjee v. Bijan Lal Chakravarty and ors. (Mukherjea, J., Akram J.) reported in 49 CWN 133 their Lordships Dr. Bijon Kumar Mukherjea and Akram JJ., followed the decision in Jogendra's case reported in (2) Jogendra Krishna Banerji and Another Vs. Sm. Subashini Dassi His Lordship Mukherjea, J., as His Lordship then was, observed:—"This view is further strengthened by the facts that from 1879 downwards, in all the documents of transfer executed by the tenants the tenancy was described and asserted to be a permanent mokaarari mourashi tenancy. Such assertions of permanent rights continuing over a long period of years in various transactions are undoubtedly admissible u/s 13 of the Indian Evidence Act, though the weight to be attached to these recitals in the documents must depend upon the circumstances of each case (vide. (3) Jnanendra Nath v. Nesa Dassi, 39 CLJ 526 and (2) Jogendra Krishna Banerji and Another Vs. Sm. Subashini Dassi)."

Those decisions thus establish in the present appeal that in the transactions under the kobalas, Exts. A, A(1) and A (2), the then tenant asserted, while transferring the tenancies covered by the documents, the existence in the tenant, tenancy right, be it permanent or non-permanent, be it mokaarari or non-mokaarari, bearing a certain rate of rent payable to the then landlord and the transferee under those kobalas being the predecessor of the present defendants-appellants accepted the lands constituting the tenancies covered by such kobalas as tenant under the then landlord of such tenancies, and entered into and began to occupy the land of such tenancies on the basis of such purchases; the statements in those kobalas are, therefore, admissible to show the existence of tenancy rights in the land covered by those kobalas held by the transferor tenant as well as by the transferee who became a tenant by purchase and entered into possession in the lands of the tenancies, covered by those kobalas. Therefore, the existence of the two tenancies:-One in respect of 10, Govinda Addya Road and the other in respect of 1, Mahesh Dutta Lane now in dispute can be traced backwards from the year 1897-1808. There is no evidence that those two tenancies ever ceased to exist or had been annulled and avoided by the successive holders of the Tonzi No. 6 till before the plaintiff-respondent, Subodh Gopal had auction-purchased the Touzi No. 6 on 6.1.1936.

On the other hand, as we have observed earlier in this judgment, being conscious of the existence of some Swatta i.e. interest of the defendants-appellants in the lands in dispute, the plaintiff-respondent, Subodh Gopal, came with a case in the plaint on 23rd November, 1944 that he had avoided and annulled Swatta or Swattadhis of the defendants-appellants in the land in dispute. His plaint would show that on 23.11.36, the plaintiff had by notice sent to the defendant-appellants by post annulled and avoided the defendant-appellants' Swatta in the land in dispute, and his cause of action arose for the

Suit No. 97 of 1944 on 23.11.36, though the plaint was filed on 23rd. November, 1944, and he found the defendant-appellants on 23.11.44 in occupation of the land in dispute. Sale Certificates, Exts. D series would show that, not the touzi holders, but the holders of Ejra and Patni interest under Touzi No. 6, as decree-holders in execution of the decree for arrears of rent of the tenancy, bearing a jama of Rs. 10.6.8 gds. had brought to sale the share of the judgment-debtors in the respective three execution cases in the land of the said jama. We have observed earlier that the respective auction-purchasers at the auction sale (vide. Exts. D, D(1) and D(2) is the transferor in Ext. A and A(1) respectively. Now, what is the legal effect of the sale certificates, Exts. D, D(1) and D(2) ? The then Touzi-holders at the time of auction-sale (vide. Exts. D, D(1) and D(2) were not the decree-holders, but the Ejaradars and the Patnidars under the Touzi-holder were so.

27. In (5) Rani Basanta Kumari Dasi and others v. Jnanendra Nath Ghosh and others, reported in 71 CLJ, 504 at page 505 Akram, J. observed:-"As regards Exhibit D, it is a sale certificate showing the lands of the tenancy as lying in Kismat Sarabaria and village Bhowanipur. This sale certificate was granted on the 24th June 1921 under Order 21, rule 94 of the CPC to one Adiluddi (the predecessor-in-interest of the contesting defendants) in connection with his auction purchase in execution of his own money decree against the former tenants of the land, namely, the Ghose, and it was tendered in evidence by the defendants in support of their claim regarding the lands comprised in the tenancy. In my opinion this document was rightly admitted in evidence u/s 13 of the Evidence Act as a transaction by which the right to possession of certain plot of land as constituting the tenancy-lands was recognised."

28. This decision was followed in the case of (6) Amar Nath Misra and others v. Trilochandas Dutta and others, reported in 76 CLJ, 251. At page 256 of 76 CLJ His Lordship Mr. Justice Khundkar observed: "Further, in agreement with the decision of Akram, J. in (5) Rani Basanta Kumari Dasi v. Jnanendra Nath Ghosh (71 CLJ, 504), I am of opinion that sale certificates are not instruments of transfer and so are not hit by that section at all. They are however documents evidencing a transaction, to wit, a rent execution sale by which a right to receive and a custom to pay rent in cash only were recognised and asserted. They are therefore admissible u/s 13, clause (a) of the Indian Evidence Act".

29. We respectfully agree with and accept and follow the principle laid down in the two decisions quoted above in the present appeal. We hold that the sale certificates, Exts. D, D(1) and D(2) and the kobalas, Exts. A and A(1) show the existence of a jama of Rs. 10.6.8 gds. and to this jama appertains the land of premises No. 10, Govinda Addya Road, Mouza Chetla, existing at least from the year 1897-1898. We find no material in record to indicate that the jama in regard to 10, Govinda Addy Road ceased to exist at any time before the present suit was instituted by the plaintiff-respondent, Subodh Gopa1. Ext. A(2) of 1898 executed by Haridas in favour of the predecessor of Addya defendant-appellants

relates to a Mourashi Mekarari tenancy of 12 cottahs 11 chittacks within Taluk Nos. 1 to 6 and 8 to 16 situated in Mouza Chetla bearing an annual rental of Rs. 2.2.2. gds. payable to the Sherista of the landlord Touzi-holder Jnanendra and others of Barisha. This kobala is, on the authority of the decision reported in 45 CWN and 49 CWN discussed above, supports the existence of the tenancy right of the defendant-appellants in the land covered by such kobala existing from before the date of such kobala of 1898. Thus, the kobalas, Exts. A and A(1), the sale certificates, Exts. D, D(1) and D(2) and the kobala, Ext. A(2), in our view, established the existence of the two tenancies from before the date of the kobalas and the sale certificates of the year 1897-1898 in regard to two disputed Premises No. 10, Govinda Addya Road, and 1, Mahesh Dutta Lane, Mouza Chetla respectively. The identity of the aforesaid two premises as described in schedule to the present plaint with the land described in the Schedule to the kobalas, Exts. A, A(1) and A(2) respectively has been established on relayment of the kobalas on the two premises at the locale by the Commissioner for local investigation (vide. Ext. G). Against the Commissioner's report, the plaintiff-respondent raised no objection before the learned Subordinate Judge. The learned Subordinate Judge finding that the kobalas and the sale certificates had no binding effect against the plaintiff-respondent or his predecessor-in-interest, held that the report of the local investigation on (Ext. G) did not establish the identity of the disputed lands with the jama of Rs. 10.6.8 gds. as well as with the jama of Rs. 2.2.2. gds. 2 karas 2 krants. But the Commissioner for local investigation did find that within the boundaries of the land of the kobalas, lay the two disputed premises No. 10, Govinda Addya Road and the premises No. 1, Mahesh Dutta Lane, Mouza Chetla.

30. In (7) Chooni Lal Khemani v. Nilmadhob Barik and others reported in 41 CLJ (1924) 374, their Lordships of the Division Bench of this Court at page 377 of the report observed: "We are of opinion that a document between strangers to the suit in which mention is made of one of the parties or their predecessors as holding the land lying on the boundaries of the lands belong to the executants of the document is not admissible in evidence."

31. This view finds support from the decisions in (8) Soroj Kumar Acharji Chowdhuri and Others Vs. Umed Ali Howladar and Others , (9) Abdullah Vs. Kunj Behari Lal and others and (10) Pramatha Nath Chowdhury v. Krishna Chandra Bhattacharjee, 28 CWN 1092. All those cases relate to recitals of boundaries of land other than the land in dispute in documents between strangers to the suit and in those documents the land in dispute was mentioned as the boundary of the land transferred by the document. By those documents the boundaries of the disputed land itself had neither been described nor transferred. Accordingly, their Lordships in all those cases held that recitals of boundaries of lands other than the land in dispute in documents between strangers to the suit are not admissible in evidence against the defendant to the suit either as regards the boundary of the land itself in suit or as to the nature of the land in suit. To illustrate, we may mention that in (10) Pramatha Nath v. Krishna Chandra, 28

CWN 1092, a document being Ext. 4, purported to show that the land with which it was concerned, was bounded by some of the lands in suit which were therein described as brahmattar lands, another plot being described as Ishan's brahmottar. But in the present appeal, the kobalas, Exts. A series by which the land now in dispute had been transferred, described such land as bounded and butted by certain boundaries, covering within such boundaries specific areas of land, bearing a rental as specified therein payable to the landlord or landlords as mentioned in such kobalas. The boundaries of the land, transferred by the kobalas themselves, but not the boundaries of the land not covered by the kobalas, had been relayed on the land in dispute by the Pleader-Commissioner as the defendant-appellants claim that they had acquired tenancy right in the land lying within the boundaries of the kobalas as described in the kobalas themselves (Exts. A series). The line of cases: (3) Jnanendra Nath Dutt v. Nesa Dassi reported in 39 CLJ 526, (2) Jogendra Krishna Banerji and Another Vs. Sm. Subashini Dassi . (4) Sailendra Nath Bhattacharjee v. Bijan Lal Chakravarty and ors., 49 CWN 133 establishes, as we have already observed, that the statements made in a kobala executed by tenant in favour of his transferee that his right in the land transferred was a permanent one is admissible in evidence u/s 13 of the Indian Evidence Act in a suit by the landlord against the transferee for ejectment though the landlord was not a party to such kobala. On a parity of reason with the principles, established by the decisions in the line of those cases, referred to we are of the view, that the recitals of the boundaries of land in the kobalas Exts. A series are admissible in evidence against the plaintiff-respondent. The decisions in the line of cases ending with the decisions in Pramatha Nath's case (28 CWN 1082) just considered, would not, on facts of the present case, hold good. Therefore, the report of the Pleader-Commissioner for local investigation clearly establishes that within the boundaries described by the kobalas, Exts. A series relayed by him at the locale the premises No. 10, Govinda Addya Road and No. 1, Mahesh Dutta Lane, now in dispute are situated. The Commissioner, therefore, made no error of law in relaying the boundaries of the kobalas, Exts. A series on the land now in dispute. The kobalas, the sale certificates and the report of the Fleader-Commissioner all taken together lead us to conclude that from before 1897-98, in each of the two disputed premises, a tenancy has been in existence at certain rate of rent, payable to the landlord of such tenancies. The defendant-appellants claim no title adversely to that of the plaintiff-respondent. They, in succession to their predecessor-in-interest, claim to have been occupying the two disputed premises now in suit in tenancy right with a liability to pay rent to the landlord of such tenancies for the time being at a certain rate. In our view, the appellants' tenancy right at the relative jama in the two disputed premises now in suit, has been established. There is no case in the plaint, nor any evidence was led by the plaintiff-respondent suggesting that any of the previous touzi holders had avoided and annulled the defendant-appellants' any Swatta in the premises now in dispute. The Commissioner for local investigation in 1953 found identity of the lands covered by the relative kobalas, Ext. A series with the land of the two disputed premises now in suit. The

continuity of the state of things existing from before the date of the kobalas, Exts. A series of 1897-98 must be presumed unless the contrary has been proved. There is no material on record to infer that the two tenancies covered by the kobalas, Exts. A series that had their existence from before 1897-98 had ever ceased to exist at the time when the plaintiff-respondent filed the present suit on 23.11.44. Accordingly, we hold that in the two premises now in suit the defendant-appellants have been able to establish the existence of their tenancy right for which they are liable to pay rent to the landlord, entitled to receive the same. In regard to premises No. 10, Govinda Addya Road appertaining to the jama of Rs. 10.6.8 gds., the rent was payable not to any touzi holder of Touzi No. 6 but to the Ejaradars and Patnidars of the said touzi (vide. Exts A, A(1), D, D(1) and D(2). Holders of the Taluk Nos. 1 to 6 and 8 to 16 when kobala, Ext. A(2) was brought into existence in 1898, were the Roy Chowdhurys of Barisha. The jama covered by Ext. A (2) being Rs. 2.2.2 gds. 2 karas, relatable to 1, Mahesh Dutta Lane in dispute, was payable to those landlords. In regard to the jama of Rs. 10.6.8 gds. i.e. in respect to the premises No. 10, Govinda Addya Road in dispute, it must be presumed as the contrary has not been pleaded and proved by the plaintiff-respondent that under the Touzi No. 6, the Patnidars and the Ejaradars mentioned in the kobalas, Exts. A, A(1) and the sale certificates, Exts. D, D(1) and D(2) had their rights existing when the plaint was filed in the suit by the plaintiff-respondent, Subodh Gopal. If the Patni and the Ejara under Touzi No. 6 had been annulled by any of the successive touzi-holders, in that event also, it cannot now be contended that in regard to Premises No. 10, Govinda Addya Road now in dispute relating to the jama of Rs. 10.6.8 gds., the defendant-appellants, at the time of the filing of the plaint by Subodh Gopal, the plaintiff-respondent, had been occupying such premises without taking any bundabast. Ext. A(2), as we have observed, is under several touzis. Under those touzi-holders, the jama of Rs. 2.2.2 gds. 2 karas relatable to 1, Mahesh Dutta Lane, now in dispute, was payable to the landlord, the holders of those touzis. The plaintiff-respondent, Subodh Gopal, is only the purchaser of an undivided share in Touzi No. 6 but not a purchaser in regard to other touzis as mentioned in kobala, Ext. A (2). So, in regard to Premises No. 1, Mahesh Dutta Lane relatable to the jama of Rs. 2.2.2 gds. 2 karas, it cannot be said, as alleged in the plaint, that defendant-appellants had been occupying the premises without taking any bundabast. Upon consideration of all these facts and circumstances and their cumulative effect, we make this inference that in the Premises No. 10, Govinda Addya Road and 1, Mahesh Dutta Lane, now in dispute, the defendant-appellants have been able to establish their tenancy right, existing from before and at the date of notification of the sale of Touzi No. 6 under Act XI, 1859 sold for arrears of its own revenue on 6.1.36. No document of lease was either pleaded or proved by the defendant-appellants. They have rested their claim for tenancy right in the premises in dispute existing at the date of notification of sale of Touzi No. 6 under Act XI, 1859. We find that in the two premises in dispute mentioned above, the defendant-appellants' tenancy right had its existence at the date of issue of notification of the sale of Touzi No. 6 under Act XI, 1859. From the plaint

it is clear that the lands in dispute are two Municipal Premises of the Calcutta Corporation, being No. 10, Govinda Addya Road and 1, Mahesh Dutta Lane, situated in the Chetla area of the Calcutta Municipality where Bengal Tenancy Act, 1885, had never been in force. So, we hold that the tenancy of the defendant-appellants in the two premises in dispute 10, Govinda Addya Road and 1, Mahesh Dutta Lane respectively is neither a holding nor a tenure but comes within "other lease" whether or not connected with agriculture or horticulture existing at the date of notification of sale under Act XI, 1859 falling within clause (b)(ii) of sub-section (1) of section 37 of the said Act, as introduced by section 4 of West Bengal Act VII, 1950.

32. Ext. C certified copy of plaint in Title Suit No. 97 of 1885 between Mokshada on one side, Rajkumar, Chunilal and Monmohini on the other, Ext. B certified copy of final decree in T. Suit No. 97 of 1885, arising out of the decree in the partition suit were mentioned and considered by the learned Subordinate Judge at page 36, Paper Book, Part I but they are not, however, admissible in evidence (11) (Narendra Nath v. Sannyasi Charan Das 54 CLJ) against the plaintiff-respondent. Ext. B(1) is the certified copy of the decree in Money Suit No. 805 of 1892 filed by Bepin Behari Mukherjee against Mokshada Devi, Chunilal, Rajkumar. That suit was for a declaration of Bepin's 16 annas title to 6 bighas of land situated in Mouza Chetla bearing a rental of Rs. 10.6.8 gds. described by certain boundaries. That suit was dismissed, but in appeal, vide. Ext. E Bepin's 1/3rd. share as against Rajkumar was declared. Ext. B(2) is the certified copy of the decree in Appeal No. 235 of 1893 arising out of the Money Suit No. 805 of 1892. These documents established the existence of a tenancy right in the jama of Rs. 10.6.8 gds. appertaining to 10, Govinda Addya Road, now in dispute.

33. Bepin's assertion of tenancy right in the jama of Rs. 10.6.8 gds. appertaining to 10, Govinda Addya Road in dispute supported by the kobalas and the sale certificates is admissible as we have already held, against the plaintiff-respondent.

34. The judgment and decree in the Money Suit of Bepin referred to above, though not inter-parties, are admissible u/s 13 of the Indian Evidence Act showing ancient possession on assertion of title (Ram Ranjan v. Ram Narayan 22 IA 6 and Dinamani v. Brajamani 29 IA 24). The facts, appearing in the documents Exts. A series, the kobalas, the sale certificates, Exts. D series and the decree and the judgment referred to above, though not inter-parties, are admissible in evidence against the plaintiff-respondent, and are to be weighed in the balance of probabilities in order to find the value of the claim made and asserted in those documents in relation to the defendant-appellants' claim for a tenancy right in the two premises now in dispute.

35. The learned Subordinate Judge, as we notice, failed to analyse, weigh and consider the totality of the evidence, appearing in the documents just considered by us, and its factual and legal effect on the claim of the defendant-appellants' tenancy right in the two premises now in dispute.

36. The learned Subordinate Judge in his judgment while referring to those documents at page 36, Paper Book, Part II observed:-"Reference may be made in this connexion to the decrees, Exts. B, B1 and B2, the plaint Ext. C and also the judgment of the court of appeal Ext. E".

37. We notice that while considering the Thoka, Ext. H, the learned Judge rightly held that it had no evidentiary value. While considering the D Register, the learned Judge did not notice that the jama of Rs. 10.6.8 gds. was not payable to the proprietor of Touzi No. 6 but to the Ejaradars and Patnidars under the said Touzi (vide. Exts. A, A(1) and D, D(1) and D(2)). The learned Judge after commenting that the Ext. H, Thoka, could not lead the Addyas anywhere, observed at page 37 of the judgment:-"Going by the Thoka it would seem that the jama of Rs. 73.0.3 pies includes the two jamas Rs. 10.6.8 gds. and Rs. 2.2.2 1/2 gds. upon which the defendants have so much relied. But in respect of what land? In respect of the land in suit? There is no clear evidence to come to such a conclusion."

38. The Thokas do not show the existence of jama of Rs. 73.0.3 pies. Ext. C(1) is the certified copy of the plaint of the 1st Court of Munsif at Alipure, filed on 27th February, 1939 by Akhoy Chandra Basu against Bejoy Kumar Addya and others i.e. predecessors of the Addya appellants. When the plaint (Ext. C(1)) was filed, Akhoy ceased to be the holder of the Touzi No. 6 of 24-Parganas Collectorate (vide Ext. K). Subodh Gopal, the plaintiff-respondent, became the auction-purchaser of the said Touzi on 6.1.36. In the plaint Ext. C(1), Akhoy described how he acquired by purchase, succession and partition, 16 annas share in Touzi No. 6 extending over Mouzas Chetla and others except two Mouzas. In that plaint Addya defendants were described as possessing undefined area of land within Mouza Chetla under Touzi No. 6 described within certain boundaries bearing a rental of Rs. 73.0.3 pies. Akhoy in his 14 annas 13 gds. 1 kara share sued the Addya-tenants for his share of rent payable at 12.2.14 gds. annually per kist. So far arrears of rent due from 1334 B.S. to 1337 B.S. Akhoy and Addya-tenants, the predecessors of the defendant-appellants for recovery of Rs. 49.6.19 gds. Ext. C(1), however, gives no boundary of the land. In 1931 (vide Ext. 1. certified copy of the rent suit register) Akhoy Bose brought a rent suit for the selfsame amount as in Ext. C1 against Addya-tenants, predecessors of the Addya-appellants and got an ex parte decree. Ext. 4 is the certified copy of plaint in Rent Suit No. 1097 of 1944 in the 1st Court of the Munsif at Alipore filed on 15th April, 1944 by Subodh Gopal, the present plaintiff-respondent against Bholanath Pande, the principal defendant and Addya-defendants, the predecessor of the present defendant-appellants. Bholanath Pande, the principal defendant in the suit was said to be a bharatia in respect of the premises 10, Govinda Addya Road and the Addya proforma defendants' interest, as Ext. 4 shows, had been annulled and avoided by Subodh Gopal, who therefore, claimed directly rent of the said premises from the bharatia Bholanath Pande. Schedule of property in Ext. 4 describes 10, Govinda Addya Road in one plot being a bustee in Mouza Chetla in the Municipality of Calcutta comprising 6 cottahs 6 chittacks 10 gds. of

land bounded and butted by certain boundaries. The plaintiff-respondent did not file the decree, if any, passed in the said suit. No evidence was led by the plaintiff-respondent to say that the said suit was decreed in presence of Addya-appellants against Bholanath Pande. From the assertion in the plaint Ext. 4 made by the present plaintiff-respondent, Subodh Gopal, it would appear that in actual occupation of the premises No. 10, Govinda Addya Road, on the date of filing of the plaint. 15th April, 1944, was Bholanath Pande and the proforma defendants' interest above the bharatias' interest in the bustee land of premises No. 10, Govinda Addya Road had been annulled and avoided by Subodh Gopal, the auction-purchaser of the Tauzi No. 6 sold for arrears of its own revenue. This document, Ext. 4, clearly indicates that bharatia Bholanath Pande held the premises No. 10, Govinda Addya Road under Addyas, while Addyas, vide. Exts. A, A(1), D, D(1) and D(2) claim to have had purchased from Bepin and Akul, the tenancy interest in the land of premises No. 10, Govinda Addya Road, since the identity of such land covered by those documents with 10, Govinda Addya Road, has been found by the Pleader-Commissioner for local investigation (Ext. G). If Ext. 4, Kobalas, Exts. A, A(1) and the Kobala, Ext. A (2) together with the sale certificates, Exts. D series and the judgment and the decree already referred to are taken into consideration along with the report of the Pleader-Commissioner, Ext. G, conclusion is irresistible that from before 1897-98, the defendant Addya-appellants have been in occupation of the land of the premises No. 10, Govinda Addya Road and No. 1, Mahesh Dutta Lane, situated in Mouza Chetla in a bustee area of the Calcutta Corporation, in a tenancy right. The identity of the land of the two premises in dispute with the land covered by the Kobalas, Exts. A series, in our view, has been established, without any challenge, by the Pleader-Commissioner's report, Ext. G.

39. D.W. 1 the only witness for the defendant said that Rajkumar Modak and others had a jama of Rs. 10.6.8 gds. and another jama of Rs. 2.2.2 1/2 gds. and both the jamas were under all the touzi holders of Chetla Mouza. He further said that the present jama of Rs. 73.0.3 pies besides other jamas, sum total of all jamas Rs. 73.0.3 gds. In cross-examination he asserted:—"I know the land in respect of which this jama of Rs. 73.0.3 pies was created, 9 and 10 Govinda Addya Road, 1, Mahesh Dutta (sic), 4, Govinda Addy Road, 5/1 Moyerpore Road, 7, Govinda Addy Road, and 19A and 2011, Chetla Hat Road and other premises."

40. So, from the oral evidence the existence of the two jamas (vide. Exts. A, A(1) and A(2) respectively can also be traced. For all these considerations, we cannot agree with the learned Subordinate Judge when he held that identity of the land in regard to the two jamas pertaining to the two premises in suit had not been established. The learned Subordinate Judge in his judgment at page 37, Paper Book, Part I, noted that all the two jamas had been in existence for all these years but it was surprising to him that not a single rent receipt was forthcoming to substantiate such a jama. He, however, observed that non-payment of rent even for 100 years would not destroy the tenancy but he was not satisfied about the existence of the tenancy at the jamas mentioned above.

We cannot subscribe to the views of the learned Subordinate Judge. The learned Subordinate Judge took each item of evidence and rejected each item as insufficient. He was to have considered the effect of the entirety of the evidence in order to find whether the defendant-appellants had on the whole of the evidence established their tenancy right in the land in dispute. The learned Judge did not do so. In (4) Sailendra Nath Bhattacharjee v. Bijan Lal Chakravarty and ors., reported in 49 CWN 133, where the question of existence of a tenancy and its permanent character was to be determined, their Lordships at page 137 of the report observed:-"It is also well established that the legal inference of permanency is to be drawn from the ascertained facts taken as a whole. It is not proper to take each element by itself and to reject them one after another as insufficient."

41. We have, however, considered all relevant documents as well as the oral evidence and the totality of their effect in relation to the defendant-appellants' claim for a tenancy right in respect of the two premises in dispute and have come to our conclusion in the manner we have already expressed ourselves in this judgment.

42. There is no document in writing showing the creation of the two tenancies in regard to the premises No. 10, Govinda Addya Road and No. 1, Mahesh Dutta Lane included within the jama of Rs. 10.6.8 gds. and Rs. 2.2.2 1/2 gds. respectively situated in Mouza Chetla. So, the origin of the two tenancies in the two premises is unknown. We find from the documents, Exts. A, A(1), A(2) and Exts. D, D(1) and D(2) and other documents already mentioned, the existence of two tenancies -a jama of Rs. 10.6.8 gds. and a jama of Rs. 2.2.21 gds. in 1897-98. The Commissioner for local investigation in 1953 on relaying the kobalas, Exts. A, A(1) and A (2) found that the lands, described by boundaries in these documents include the suit lands-premises No. 10, Govinda Addya Road and 1, Mahesh Dutta Lane respectively. The cumulative effect of all the documents and of the oral evidence, as we have analysed and considered, lead us to hold that the defendant-appellants Addyas have been occupying the premises No. 10, Govinda Addya Road and 1, Mahesh Dutta Lane included in the jama of Rs. 10.6.8 gds. and in the jama of Rs. 2.2.2 1/2 gds. respectively situated in Mouza Chetla in tenancy right existing at least from before 1897-98. Such tenancy, in the two premises, being now lands in dispute had originated at least from before 1897-98 and each of such tenancy continued to exist at the date of issue of notification of sale of the Touzi No. 6 which must have had been notified at a date during the period from 29th September, 1935 to 6th January, 1936 when the Touzi No. 6 was sold in auction for arrears of its own revenue and was purchased by the plaintiff-respondent, Subodh Gopal. So, our conclusion is that the two Municipal Premises, being No. 10, Govinda Addya Road and 1, Mahesh Dutta Lane, situated in Mouza Chetla within Calcutta Corporation are two leases or as matter of that tenancies, that come within clause (b)(ii) of sub-section (1) of section 37 (new) of Act XI, 1859, introduced by section 4 of West Bengal Act VII, 1950. Therefore, in our view, the defendant-appellants having

their tenancies i.e. leases within clause (b)(ii), sub-section (1) of section 37 (new) of Act XI, 1859, as introduced by section 4 of West Bengal Act VII, 1950, cannot be ejected by the plaintiff-respondent. We, therefore, cannot agree with the decision arrived at by the learned Subordinate Judge. In our view, the suit ought to have been dismissed by the learned Subordinate Judge. The appeal is allowed with costs. The judgment and decree passed by the learned Subordinate Judge be and are hereby set aside and reversed, and the suit be and is dismissed on contest with costs to the contesting defendants and ex parte against the rest.

Amaresh Roy, J.

I agree.