
(1981) 12 CAL CK 0028
In the Calcutta High Court
Case No : A.F.O.D. No. 239 of 1980

D.R. Punjab Montgomery Transport Co. and Another	APPELLANT
Vs	
Raghuvanshi Pvt. Ltd. and Another	RESPONDENT

Date of Decision : 03-12-1981

Acts Referred:

Evidence Act, 1872 — Section 115, 145, 3
Transfer of Property Act, 1882 — Section 105

Citation : AIR 1983 Cal 343 : (1982) 2 CompLJ 74 : 86 CWN 759

Hon'ble Judges : Ramkrishna Sharma, J;Chittatosh Mookerjee, J

Bench : Division Bench

Advocate : Dipankar Ghosh, Nirmal Mitra, Swapan Gorai and Ananda Prosad Ghosh, for the Appellant; Hiranmoy Dutt, Ganpati Chunder and B. Mallick, for the Respondent

Final Decision : Dismissed

Judgement

Chittatosh Mookerjee, J.—In the year 1959, D. R. Punjab Montgomery Transport Co. was inducted as a tenant under Raghuvanshi Pvt. Ltd. at a monthly rent of Rs. 1152/- in respect of five rooms situated in the ground floor of 17, Kashinath Mallick Lane, P. S. Jorasanko, Calcutta. According to the plaintiff-appellants, at the relevant time Sardar Mohindar Singh (since deceased) and his mother were partners of the said firm D. R. Punjab Montgomery Transport Co. Raghuvanshi Pvt. Ltd., the defendant respondent No. 1, had instituted suit No. 1526 of 1964 against the said firm, D. R. Punjab Montgomery Transport Co., in the High Court at Calcutta for eviction on the ground of default in payment of rent. The said suit was decreed on compromise under which, inter alia, the monthly rent was raised to Rs. 1210/- per month and the said tenant was required to pay the arrears in instalments. In 1967 the then landlord had brought another ejectment suit being Suit No. 1293 of 1967 against the firm, D. R. Punjab Montgomery Transport Co. The same was also settled.

2. On 10th April, 1968, Raghuvanshi Pvt. Ltd. again brought Suit No. 915 of

1968 against D. R. Punjab Montgomery Transport Co. in the High Court at Calcutta for ejectment and mesne profits. On 31st July, 1969 said Raghuvanshi Pvt. Ltd. had assigned its interest in Premises No. 17, Kashinath Mallick Lane, Calcutta in favour of the present respondents 2 to 13. The said respondents 2 to 13 were thereupon added as plaintiffs in Suit No. 915 of 1968.

3. On 22nd Sept., 1970 A. N. Sen, J. (as he then was) ex parte decreed the Suit No. 915 of 1968. After the prayer made on behalf of the defendant, D. R. Punjab Montgomery Transport Co., for adjournment was refused and the attorney for the defendant having retired from the case, the learned Judge ex parte decreed the suit and ordered that the defendant do deliver up to the plaintiffs 2 to 13 (present respondents 2 to 13) vacant possession of five rooms in the ground floor of Premises No. 17, Kashinath Mallick Lane. The learned Judge further passed a decree for a sum of Rs. 8470/- as arrear rent and also for mesne profits in respect of the said rooms at the rate of Rs. 40/50 p. per day commencing from 1st day of April, 1968.

4. On 2nd March, 1972 D. R. Punjab Montgomery Transport Co. had filed a petition in this Court praying for recording adjustment of the decree dated 22nd Sept., 1970 passed in Suit No. 915/68 and for certifying the payments made by the defendant firm to the plaintiff's Solicitor. The plaintiffs had opposed the said petition for recording adjustment of the aforesaid decree. Ultimately, D. R. Punjab Montgomery Transport Co., had withdrawn the said petition for recording adjustment and satisfaction of the decree passed in the Suit No. 915 of 1968.

5. On 10th June, 1972 D. R. Punjab Montgomery Transport Co., as plaintiff had instituted Title Suit No. 619 of 1972 in the City Civil Court at Calcutta against the present respondents as defendants, inter alia, for a declaration that the plaintiff was in possession as a monthly tenant in respect of five rooms in the ground floor of Premises No. 17, Kashinath Mallick Lane at a rent of Rupees 1213/- per month payable according to English calendar under the defendants 2 to 13 and for permanent injunction restraining the defendants, their servants, agents and nominees and assigns from disturbing or from interfering with the plaintiff's right and enjoyment of the said five rooms. During the pendency of the suit on 1st Feb., 1976 the said Mahindar Singh died. Upon an application made by the heirs and legal representatives of the deceased Mahindar Singh, the Court below set aside the abatement of the suit and brought them on record as the plaintiffs 2 to 6 in Title Suit No. 619 of 1972. Further, in the plaint a prayer was inserted for declaration that the ex parte decree passed in Suit No. 915 of 1968 against M/s. D. R. Punjab Montgomery Transport Co. was not binding upon the plaintiffs.

6. The plaintiffs, inter alia, pleaded that upon receiving information that on 22nd September, 1970, A. N. Sen, J. had ex parte decreed the Suit No. 915 of 1968, Sardar Mahindar Singh, a partner of the plaintiff, in November, 1970 had contacted Vithaldas Bhimji Mansata and also Mr. B. Mallick, Solicitor, of the plaintiffs in Suit No. 915 of 1968. The said Mahindar Singh on behalf of the plaintiffs had offered to pay off all arrears of rent by instalments and had prayed

for accepting the plaintiff's firm on a monthly tenancy. The plaintiff further alleged that the said Vithaldas Bhimji Mansata ami B. Mallick had represented to the plaintiff's partners, Mahindar Singh that unless the plaintiff made substantial payments towards arrears of rent, the defendants could not be satisfied as to the bona fides of the plaintiff and could not commit themselves to any final agreement. The plaintiff further pleaded in their plaint that on Dec. 21, 1970 the plaintiff had paid Rs. 20,000/- to Mr. B. Mallick, Solicitor, for the defendants and also a further sum Rs. 2000/- on account of the costs of the said suit No. 915 of 1968. On March 4, 1971 the plaintiff paid a further sum of Rs. 9,517.50 to Mr. B. Mallick, Solicitor. The plaintiff in para 14 of the plaint stated that after several discussions ultimately in or about May, 1971 there was a verbal agreement by and between the plaintiff represented by Mahinder Singh and the defendants represented by their Solicitor, B. Mallick and said Vitalbhai Bhimji Mansata. It was allegedly agreed that upon payment of all arrears of rent at the rate of Rs. 40/50 p. per day by December, 1971 and upon payment of rent for January, 1972 in course of the succeeding month, the defendants 2 to 13 would accept the plaintiff as a monthly tenant of the said five rooms on and from February, 1972 at the enhanced rent of Rs. 1,213/62 p. per month, Unless and until the plaintiff paid all arrears and also rent for January. 1972 the defendants would issue receipts for payments to be made describing the same as mesne profits, under the decree passed in Suit No. 915 of 1968. The plaintiffs claimed that in pursuance of the said agreement they had cleared off all arrears of rent by December, 1971 and also had paid the rent for the month of January, 1972 in course of February, 1972 and, therefore, the plaintiff became a monthly tenant under the defendants 2 to 13 in respect of the five rooms of the premises at a monthly rent of Rupees 1,231.62 p. But the defendants 2 to 13 were purporting to go back upon the said agreement after receiving huge sums of money under the agreement and were threatening to execute the ex parte decree passed in Suit No. 915 of 1968.

7. Raghuvanshi Pvt. Ltd., defendant No. 1, filed a written statement inter alia, stating that by a Deed of assignment dated 31st July, 1969 the said company had assigned its right, title and interest in the suit property to the defendants 2 to 13 and as such the defendant No. 1 had no longer any right, title or interest in the suit property. The defendant No. 1 denied that any agreement was arrived at between the plaintiff and the defendants represented by Mr. Vithalbhai Bhimji Mansata and Mr. B. Mallick, Solicitor. According to the defendant No. 1, the plaintiff had paid to Mr. B. Mallick the sums in question towards part payment of the arrears of rent and mesne profits payable under the decree passed by this Hon'ble Court. The defendant No. 1 further denied the allegation that there was ever any agreement between the parties to create a new tenancy in favour of the plaintiff in respect of the disputed premises.

8. The defendants Nos. 2 to 13 by a separate written statement also denied the plaintiff's case. They in particular denied that any agreement was entered into by Mr. B. Mallick and Mr. Vithaldas Bhimji Mansata on their behalf to grant an

alleged tenancy in favour of the original plaintiff, D. R. Punjab Montgomery Transport Co. They further claimed that the said Mr. Mansata and Mr. Mallick had no authority to enter into any contract on behalf of the defendants 2 to 13. According to the defendants 2 to 13, upon the representation made by Mahindar Singh that peaceful possession would be given by November, 1971, the defendants had stayed their hands subject to the condition that the original plaintiff would pay and satisfy the mesne profits payable to them under the said decree dated 22nd Sept., 1970. When the original plaintiff failed to honour its promise even after February, 1971, the defendants had instructed their Solicitor to take steps for recovery of possession.

9. At the time of the final hearing the plaintiffs did not give any direct evidence that there was an agreement to create a new tenancy in favour of the plaintiff firm in May, 1971. Kuljit Singh, (P. W. 2) who was described as the Manager of the plaintiffs, deposed that in December, 1970 there was an oral agreement for creation of a new tenancy between late Mahindar Singh and Kuljit Singh, on the one side and B. Mallick and Mr. Mansata, on the other.

10. The learned Chief Judge, City Civil Court at Calcutta rejected the evidence of P. W. 2, Kuljit Singh that there was a verbal agreement in December, 1970. According to the learned Chief Judge, the said case was not pleaded in the plaint and the correspondence between Mr. S. C. Palit, the plaintiff's Solicitor and Mr. B. Mallick. Solicitor did not show that there was any concluded agreement in December, 1970 (vide Exts. 13 and 2a). The learned Chief Judge also did not place any reliance upon the tape-recorded telephonic conversation allegedly between Kuljit Singh, P. W. 2, on the one side and Mr. B. Mallick on the other (vide Ext. 19), or upon the alleged similar conversation between late Mahindar Singh and Mr. B. Mallick (Ext. 19-A). According to the learned Chief Judge, the defendant did not prove the lime, place and accuracy of the said tape recording and, therefore, it would not be safe to rely upon the tape recorded evidence. The learned Chief Judge also upheld the contention of the defendants 2 to 13 that the plaintiffs did not prove that Mr. B. Mallick, Solicitor and Mr. Mansata had any authority to represent the defendants 2 to 13 or that they had any authority to enter into any agreement with the plaintiffs. The learned Chief Judge lastly rejected the contention of the plaintiffs that by withdrawing from Court deposits of rent at the enhanced rate of Rupees 1,231.62 p. per month, the defendants had become estopped from raising the plea that there was no agreement to create a new tenancy in favour of the plaintiffs. The learned Chief Judge, City Civil Court at Calcutta accordingly dismissed the suit.

11. The principal point in this appeal is whether or not really there was any agreement between the parties to create a tenancy in favour of D. R. Montgomery Transport Co. in respect of the disputed rooms. The plaintiffs' case was that there was an oral agreement in this behalf between Mahinder Singh on behalf of the said company on one hand and Mr. B. Mallick, Solicitor and Mr. Mansata on behalf of the defendants 2 to 13 on the other. The plaintiff's further

claim was that they had made payments towards mesne profits payable under the decree passed in Suit No. 915 of 1968 in pursuance of such an agreement to grant a new tenancy in favour of said D. R. Punjab Montgomery Transport Co. Undoubtedly, the burden of proof was upon the plaintiffs to establish their said case of grant of a fresh tenancy by the defendants 2 to 13.

12. Having given our anxious consideration to the pleading of the parties, the evidence on record and the submissions of the parties, we are of the view that the plaintiffs have failed to prove their case and learned Judge of the Court below rightly dismissed their suit. Mahinder Singh, who, according to the plaintiffs, was one of the partners of D. R. Punjab Montgomery Transport Co., died during the pendency of the case in the trial Court and, therefore, his evidence was not available to the plaintiffs. In order to prove their case of granting a fresh tenancy in respect of the disputed rooms, the plaintiffs relied upon the oral evidence of Kuljit Singh, P. W. 2, who was described as a relation of Mahinder Singh, and also the manager of the said transport Company. The plaintiffs also placed reliance upon the tape-recorded alleged telephonic conversation between Kuljit Singh. P. W. 2 and Mr. B. Mallick, solicitor and also the alleged conversation between Mahinder Singh and B. Mallick (Exts. 19 and 19-A) and also upon the conduct of the parties relating to payment of mesne profits and the decree holder's Suit No. 915 of 1968 net executing the ejectment decree for a long period. Lastly, the plaintiffs pleaded that by withdrawing monthly damages at the rate of Rs. 1231.62 p. deposited by the plaintiffs in Court, the defendants were estopped from denying the plaintiffs' case of a new tenancy at the said rate of rent per month.

13. Smt. Krishnakumari, P. W. 1 (substituted plaintiff No. 2), was the widow of late Mahinder Singh, who died on 1st Feb., 1976. She deposed that Kuljit Singh was her brother and after the death of her husband said Kuljit Singh Singh was looking after their business and other affairs. He was the manager of their firm. P. W. 1, Krishna kumari, did not depose about any agreement to create tenancy in favour of D. R. Punjab Montgomery Transport Co. Kuljit Singh, P. W. 2, in his deposition claimed that he had been acting as the manager of the said transport company since 1969 up to 1974 and that thereafter he left his job under the said company and at present he had got separate transport business of his own. P. W. 2 further stated that, since the death of Mahinder Singh, he was helping his sister in looking after the business and the litigation. But, Mahinder Singh had affirmed a petition filed in Suit No. 915 of 1968 (Ext. A), inter alia, slating that Sri Jogindar Pal who had been acting as the local manager for several years had joined some other firm in October, 1969. One Kuljit Singh took charge of Calcutta Branch about the last week of October, 1970 (vide paragraph 15). Kuljit Singh, P. W. 2, in his examination-in-chief testified that in December, 1970 when he and Mahinder Singh returned to Calcutta, they came to know about passing of the ex parte decree in Suit No. 915 of 1968. Thereafter, they personally contacted Mr. Mansata and also Mr. B. Mallick and offered to pay off all arrears of rent by instalments. "In December, 1970 there was an oral agreement between myself

and Sardar Mahindar Singh, on the one hand, and Mr. Mansata and Mr. B. Mallick Solicitor on the other, in the office of the said Solicitor. It was agreed between us that we shall pay off the entire arrears of rent by instalments and D. R. Punjab Montgomery Transport Co. will continue as a tenant at the enhanced rate of rent. In terms of that oral agreement a sum of Rs. 20,000/- was paid to Mr. B. Mallick, Solicitor in December, 1970; and further a sum of Rs. 2000/- was paid on account of costs of the suit No. 915 of 1968. Subsequently, other payments were also made; and the receipts were granted for such payments" (vide page 159 of the paper-book of the appeal).

14. The learned Judge of the Court below has rightly pointed out that in their plaint the plaintiffs did not plead that in Dec., 1970 there was any such agreement between the parties to create a new tenancy in favour of the original plaintiff company at the enhanced rate of rent. The plaintiffs in para (14) of their plaint had averred "after several discussions, ultimately in May, 1971 it was verbally agreed by and between the plaintiffs represented by Mahindar Singh and the defendants represented by their Solicitor Mr. B. Mallick and said Mr. Mansata.....". The plaintiffs thereafter set out in para 14 of the plaint the terms of the alleged oral agreement made in May, 1971. At the trial of the suit neither the P. W. 1 nor P. W. 2, Kuljit Singh spoke about any such concluded agreement between the parties in May, 1971. Therefore, the Court below legitimately observed that there was a serious divergence between the case pleaded in the plaint and the case sought to be proved, by the plaintiffs at the trial of the suit. Without at all pleading that there was an oral agreement in December, 1970, the plaintiffs at the trial cannot be allowed to urge that the alleged agreement of new tenancy in respect of the disputed rooms was made in December, 1970.

15. The plaintiffs proved that on 21st Dec., 1970, Mr. S. C. Palit Solicitor addressed a letter (Ext. 13) to Mr. B. Mallick, Solicitor stating "I understand that my client, Sri Mahindar Singh, approached your clients for finalising the talks of settlement but the terms could not be finalised as the defendant firm has not been able to secure entire amount of your clients" claim and costs at a time."

Sri Palit in his said letter dated 21st Dec., 1970 further stated that his client proposed to pay a sum of Rs. 20,000/- towards part payment of dues under the decree dated 22nd Sept., 1970 in Suit No. 915 of 1968 and agreed to pay the balance amount of the decretal dues within the 15th day of March, 1971. Mr. Palit requested that in the meantime the clients of Mr. B. Mallick would stay their hands in execution of the said decree. The said Ext. 13, which was a copy of the original letter received by Mr. Mallick, contained an endorsement that Kuljit Singh had approved the same. The said endorsement was presumably made to prove that Kuljit Singh had knowledge of the contents of the said letter. There appears to be considerable force in the suggestion by the defendants that the said endorsement of approval was subsequently made and that in any case the said approval was not of any consequence in view of the clear assertion in his letter (Ext. 13) by Mr. S. C. Palit that the terms of settlement could not be finalised as

yet. Mr. B. Mallick, Solicitor in his reply dated 21st Dec., 1970 (Ext. 2-A) informed Mr. S. C. Palit, Solicitor that his instruction was to receive payment of the sum of Rs. 20,000/- towards the decretal dues without prejudice to his clients' right for recovery of possession or otherwise under the decree dated 22nd Sept., 1970. The receipt for Rs. 20,000/- bearing the same date (Ext. 2) was granted without prejudice to Mahindar Singh. The same also clearly stated that it was in part payment of the dues under the decree dated 22nd Sept., 1970. The said receipt (Ext. 2) further indicated that out of the said sum of Rs. 20,000/-, Rs. 17,485/- was payable to the present defendant No. 1 as rent and mesne profits up to 31st July, 1969 and the balance sum of Rs. 2,514/- was payable to the present defendants 2 to 13 towards part payment and mesne profits due from 1st Aug., 1969 up to 1st Oct., 1969. Mesne profits still remained due and outstanding from 1st Nov., 1969. Mr. Mallick D. W. 1 in his examination-in-chief stated that sometimes in November, 1970 his clients had instructed him to apply for execution of the decree for recovery of possession and the Master had directed the Sheriff of Calcutta to deliver up possession to the plaintiffs 2 to 13 of the said suit. Certain other steps were taken and a sum of Rs. 700/- was deposited with the Sheriff of Calcutta on account of poundage. Some time in the 2nd week of December, 1970, Mahindar Singh had seen Mr. B. Mallick in his office and had enquired about the suit. Mr. Singh had requested Mr. Mallick not to proceed with the order for possession and offered to make over vacant and peaceful possession of the suit premises, if he was allowed certain time. He had stated that his business would be ruined if the defendants were thrown out in execution of the decree and that he would also pay up the dues of the plaintiffs of the said suit gradually by instalments. Mr. B. Mallick after taking instructions from his clients, had informed Mr. Mahinder Singh, they were prepared to wait for four months subject to the condition that peaceful and vacant possession would be delivered within the said time and that the judgment-debtor would also go on paying the dues of the plaintiff under the said decree. In view of the above correspondence (Exts. 13 and 2-A), we are prepared to believe this part of the evidence of P. W. 2. We also hold that in Dec., 1970, there was no concluded agreement between the parties to create a new tenancy in favour of the said transport company. We have already observed that the plaintiff did not plead that in December, 1970 there was a final agreement and that a new tenancy was thereby created in plaintiff No. 1's favour. It was clearly averred in para 12 of their plaint that after Mahindar Singh became aware of the ex parte decree in November, 1970, he had approached Mr. B. Mallick and Mr. Mansata, but they had represented that unless the plaintiff made a substantial payment towards the arrears of rent, they could not be satisfied as to the bona fides of the plaintiff and could not commit themselves to any final agreement. We have also already mentioned that Mr. S. C. Palit, Solicitor in his letter (Ext. 13) dated 21st Dec., 1970 had stated that the terms could not be finalised as his client had not been able to secure the entire amount of the plaintiff's claim. Sri S. C. Palit conveyed a proposal regarding payment of the arrears and requested Mr. B. Mallick on behalf of his clients to stay their hands in the matter of execution of the

ejectment decree.

16. Thus, the evidence of the plaintiffs' witness, P. W. 2, Kuljit Singh, about an alleged agreement between the parties in December, 1970 was totally belied by the documentary evidence adduced on the side of the plaintiffs. AH amounts paid by the plaintiffs between December, 1970 and Feb., 1972 were acknowledged by Mr. B. Mallick as payments of the decretal dues on account of mesne profits. Mr. B. Mallick Solicitor in his receipts and letters had mentioned that the same were granted without prejudice to his client's rights therein (vide Exts. 2, 2a, 3, 3a, 4, 4a, 5, 5a, 6, 6a, 7, 7a, 8, 8a, 9, 9a, 10, 10a, 11, 11a and 12). These documentary evidence which have come from the custody of the plaintiffs themselves do not corroborate their case that there was any final agreement creating a new tenancy in respect of the suit premises and on the other hand these documentary evidence established that all amounts in question were paid by the plaintiffs for satisfying their dues under the aforesaid decree dated 22nd Sept., 1970 and without prejudice to the rights of the clients of Mr. B. Mallick, therefore, the burden of proof was very heavily upon the plaintiffs to prove their case of new tenancy.

17. We have already found that there was neither any oral nor documentary evidence in support of the plaintiffs' case that in May, 1971 there was a concluded agreement of tenancy. They cannot rely on certain circumstances mentioned hereinafter to prove that in May, 1971 there was such an agreement between the parties. These alleged circumstances do not lead to the inference that in May, 1971 the parties had agreed to create a new tenancy in plaintiffs' favour. The appellants have urged that the defendants have not denied that in May, 1971 in his office Mr. B. Mallick met Mr. Mahindar Singh and Kuljit Singh on behalf of the plaintiffs and that there was no reasonable and probable explanation for so long not executing the decree passed in Suit No. 915 of 1968. According to the evidence of Mr. B. Mallick, in December, 1970 he had been instructed by his clients to take steps for execution of the ejectment decree and he had deposited a sum of Rs. 700/- in the office of the Sheriff of Calcutta on account of poundage. Therefore, there is nothing improbable in the case of the defendants that in December, 1970, Mahindar Singh had requested Mr. B. Mallick for granting them some time to vacate and had offered in the meantime to pay by instalments the arrear rent and mesne profits. Mr. B. Mallick (D. W. 2) has claimed that he had made it clear to Mahindar Singh that the payments made by him were being accepted against arrears of rent and mesne profits under the ejectment decree in question. Even if, we consider it probable, that Mahindar Singh on behalf of the transport company had requested Mr. B. Mallick and Mr. Mansata not to eject him and to grant him a fresh tenancy, there is no evidence warranting the finding that in May, 1971 Mr. B. Mallick and Mr. Mansata on behalf of the defendants had agreed to recognise the plaintiff-company as a tenant

18. In fact, the case pleaded by the present plaintiff in para 23 of the petition filed in Suit No. 915 of 1968 for recording adjustment of the ejectment decree

(Ext A) was not fully consistent with the case pleaded in para 14 of the plaint. It was averred in para 23 of the petition for recording adjustment that the present plaintiff would pay the balance amount of decretal dues at the rate of Rs. 40/50 per day up to December, 1971 by gradual instalments by Dec. 31, 1971. The para 14 of the plaint for the first time pleaded that the defendants 2 to 13 had agreed to accept the plaintiff as a monthly tenant from February, 1972, had enhanced monthly rent to Rs. 1,231.62 p. per month. The said case of enhancement of the rent for the proposed new tenancy was not averred in the adjustment petition (Ext. A) and there was no documentary evidence of payment by the plaintiff at the said enhanced rate prior to the institution of the suit in the City Civil Court at Calcutta. Further, whereas the plaintiff in his said petition filed in the High Court had claimed that upon payment of all arrears the decree-holder was to certify adjustment and record satisfaction of the ex parte decree, the plaintiff's case now is that upon such payments being made, the present defendants 2 to 13 agreed to issue rent receipts in plaintiff's favour in respect of the new tenancy of the plaintiffs.

19. There is also nothing improbable in the defendant's case that all payments towards use and occupation of the suit premises were made towards the decretal dues and not in fulfilment of the terms of the alleged agreement to create a new tenancy. The present defendants 2 to 13 in Suit No. 915 of 1968 had obtained decree for eviction and decree for arrear rent and mesne profits was passed in favour of the defendants. A very large amount had be-come due and payable as arrears of rent and mesne profits and, therefore, the defendants 2 to 13 as decree-holders might have kept the ejectment decree against the plaintiff pending in order to realise the said decretal dues. The defendant's case in this point is supported by the letters and receipts granted by Mr. B. Mallick, Solicitor on behalf of the defendants 1 to 13. We have already mentioned that these receipts and letters granted by Mr. B. Mallick clearly stipulated that payments were being received towards the decretal dues and without prejudice to the rights of Mr. B. Mallick's clients.

20. The learned advocate for the appellant submitted that the form of the receipts granted by Mr. B. Mallick for payments up to the month of January, 1972 made by the plaintiff was fully consistent with the case pleaded in para 14 of the plaint that unless and until the plaintiff paid up all arrears and paid the amount due for January, 1972, the defendants could not issue rent receipts in favour of the plaintiff but would issue receipts describing payments as mense profits under the decree passed in Suit No. 913 of 1968. The learned advocate for the appellant further argued that the defendants did not cross-examine Kuljit Singh, P. W. 2, regarding the statements made by him in his examination-in-chief that the present defendants had agreed to grant rent receipts in the above manner. We find no substance in this submission made on behalf of the appellants. In the first place, regarding the date of the alleged agreement there was a material divergence between the case pleaded in the plaint and the plaintiff's case at the time of the hearing of the suit. There was no direct evidence that there was any

agreement in May, 1971 as pleaded in para 14 of the plaint. We have already observed that the evidence adduced on the plaintiff's side only indicated that in December, 1970 there might have been some inconclusive talks between Mahindar Singh, on behalf of the plaintiffs and Mr. Mallick and Mr. Mansata on behalf of the defendants and, therefore, there was no truth in the deposition of Kuljit Singh, P. W. 2 that in December, 1970 an agreement was reached for creation of a new tenancy in plaintiff's favour.

21. The receipts and letters issued by Mr. B. Mallick describing the payments up to January, 1972 were more consistent with the claim of the defendants that the plaintiffs made the said payments in discharge of their liabilities to pay alleged mesne profits under Suit No. 915/1968 and not in fulfilment of the terms of the alleged new tenancy in question. We find that in course of cross-examination of P. W. 2, Kuljit Singh, the defendants suggested that the said P. W. 2 was not the manager of the plaintiff-firm and that he had no knowledge about the facts of the case. The defendants further elicited that none of the receipts (Exts. 3 to 11) mentioned that payments were being made in terms of any settlement. The defendants had further suggested to P. W. 2 that after the writ of possession was issued, Mahindar Singh had approached V. B. Mansata and had offered to vacate the rooms and in the meantime to pay Rs. 20,000/-. It was further suggested to P. W. 2 that Mr. Mansata had asked Mahindar Singh to see Mr. B. Mallick. It was further suggested to the said witness that on the request of Mr. B. Mallick, Solicitor the defendants 4 and 8 on behalf of the defendants 2 to 13 had agreed to stay their hands and not to execute the decree till 15th March, 1971. Mahindar Singh could not deliver possession and had again approached Mr. B. Mallick for allowing him to stay for six months. The defendants had agreed not to execute the decree till November, 1971. Again, Mahindar Singh could not keep his promise and in February, 1971 Mr. B. Mallick had told Mahindar Singh that if he did not vacate the rooms within a week, the decree-holder will take steps for obtaining possession. In March, 1972 Mahindar Singh filed an application in the High Court for recording adjustment of the said decree. The same was ultimately withdrawn and the present suit was filed.

22. Mr. B. Mallick, D. W. 1, in his evidence also deposed to the effect that on [he request of Mahindar Singh he was granted time to vacate and ultimately in February, 1972 he had told Mahindar Singh that he had received instruction to proceed with the execution of the decree. In these circumstances, we hold that the plaintiff failed to prove that the defendants had agreed to grant fresh rent receipts and really there has been no failure on the part of the defendants to put their version of the case to P. W. 2. It would not be correct to say that the defendants did not put the essential and material part of their case to P. W. 2, Kuljit Singh. Therefore, the ratio of the decision of P. B. Mukharji and H. K. Bose, JJ. in A.E.G. Carapiet Vs. A.Y. Derderian, , has no manner of application to the facts of the present case. The observations made by P. B. Mukharji, J. in paras 9 and 10 of his judgment delivered in A. E. G. Carapiet's case (supra) were made in the context of the fact that without putting to the witness called by the

propounder to prove the testamentary capacity, the cavealor sought to examine a witness who testified that the testator was not in a fit physical and mental condition. In the present case, the defendants did put the important and the crucial part of their case to P. W. 2 and the defendant's witnesses also testified in support of their case.

23. There is also no substance in the submission made on behalf of the appellant that there was no explanation why the defendants did not execute the ejectment decree against the plaintiff although there was no restraint upon them and that the said inaction on the part of the defendants was only consistent with the plaintiff's case regarding a new tenancy. We have already pointed out that it is more credible that after the ejectment decree was passed Mahindar Singh on behalf of the plaintiff had approached Mr. B. Mallick and Mr. Mansata. Upon receiving instructions from the defendants 4 and 8, Mr. B. Mallick did not take steps in execution case in order to enable the plaintiff to amicably deliver possession. In the meantime, the plaintiff went on paying the mesne profits. In the circumstances the consideration shown by the defendants in not executing the ejectment decree upon repeated requests of Mahindar Singh, cannot be interpreted as an evidence of an agreement to create a new tenancy in favour of the plaintiff.

24. The learned advocate for the appellants has also submitted that the conduct of the parties ought to be considered in the background of various litigations between the Parties. According to the appellants, the previous suits brought by the defendant No. 1 were amicably settled and, therefore, it was probable that after obtaining the ejectment decree in Suit No. 915 of 1908, the defendants had again agreed to create a new tenancy upon receipt of arrear rents due from the plaintiff. We have found that the plaintiff failed to prove that there was any such agreement but on payment of mesne profits the plaintiff was given some time to vacate the premises appeared to be more credible. Further, in case a tenant repeatedly commits default, it is more probable that the landlord would refuse to condone further defaults and try to evict such a defaulting tenant.

25. The plaintiff had produced tape-recordings of the alleged telephonic conversation between Kuljit Singh and Mr. B. Mallick and also the alleged telephonic conversation between Mahindar Singh and Mr. B. Mallick. In our view, the trial Court rightly declined to place any reliance upon these tape records. The plaintiffs did not prove by competent witness the time, place and accuracy of the said tape-recordings (vide Yusufalli Esmail Nagree Vs. The State of Maharashtra, and N. Sri Rama Reddy, etc. Vs. V.V. Giri,). Neither Kuljit Singh, P. W. 2, nor any other person proved what time, at what place and by whom the said tape-recordings were made. Mr. B. Mallick, D. W. 1, stated that he could not recognise his voice recorded in the tape. After hearing the conversation on the tape, D. W. 1, Mr. B. Mallick stated that the voice was so indistinct that he could not recognise his voice. He had further stated that the telephonic discussions recorded on tape were not his discussions. The plaintiff did not satisfactorily

prove that the second voice in the tape-recording was that of Mr. B. Mallick, D. W. 1, Mr. Mansata, D. W. 2, also denied that there was any agreement to create a new tenancy. The plaintiffs did not claim that the voice of D. W. 2 was tape-recorded. Therefore, it was not necessary for him to deny the said tape-recorded conversation. We agree with the trial Court that the tape-recording (Ext. 19) was not proved according to law. Secondly, even if the said tape-recorded conversation be considered as admissible evidence, the same would not prove that there was any concluded agreement regarding creation of a new tenancy in favour of the plaintiff either in December, 1970 or in May, 1971. The learned Judge of the Court below correctly pointed out that the alleged conversation between Kuljit Singh and Mr. B. Mallick did not support the case of the plaintiffs inasmuch as the first voice in the said tape-recording mentioned about a pending case for which he had been attending Court regularly. Further, there was offer to enhance rent which according to the first voice might be an inducement for Mr. Mansata in granting a new tenancy. The second voice in the tape-recording which according to the plaintiffs was that of Mr. B. Mallick did not accept that there had been already a concluded agreement between the parties on the other hand had pleaded his inability to do anything. Therefore, even if the tape-recorded conversation (Ext. 19) is held to be admissible, the same would not prove that the defendants Nos. 2 to 13 had agreed to recognize the plaintiff-firm as a tenant under them. The learned advocate for the appellants has himself conceded that Mahindar Singh was dead and, therefore, his alleged statements recorded in the other tape-recording (Exhibit 19 (a)) was not admissible in evidence and the appellants did not propose to rely upon the said alleged conversation between Mahindar Singh and Mr. B. Mallick. We may also record that Mr. B. Mallick (D.W. 1) did not admit that the second voice in the said tape-recorded conversation (Ext. 19 (a)) was his voice.

26. There is another insurmountable bar in the way of the plaintiffs. Since 31st July, 1961 the defendant No. 1, M/s. Raghuvanshi Pvt. Ltd., was no longer the owner of the Suit Premises No. 17, Kashinath Mallick Lane. The plaintiffs have not proved that either Mr. B. Mallick or Mr. V. B. Mansata had any authority to conclude any agreement of tenancy on behalf of the defendants Nos. 2 to 13. During his cross-examination Kuljit Singh, P. W. 2, admitted that he did not know if the defendants Nos. 4 and 8 had the authority to act on behalf of the defendants 2 to 13. Mr. B. Mallick, D.W. 1, in his examination-in-chief deposed that he had no authority from the defendants 2 to 13 to enter into any agreement with Mahindar Singh or with Kuljit Singh. D. W. 1 further added that there was no such agreement in 1971 or 1972. The plaintiffs in course of cross-examination of Mr. B. Mallick did not even suggest that either D.W. 1 or Mr. V. B. Mansata had such authority. It was only suggested to Mr. B. Mallick that he and Mr. V. B. Mansata and not the defendants Nos. 4 and 8 were in actual charge of the affairs of the plaintiffs. Mr. V. B. Mansata, D. W. 2, in his examination-in-chief claimed that he had told Mahindar Singh that he had no authority to talk on behalf of the defendants Nos. 2 to 13 and only the defendants Nos. 4 and 8 were

authorised to speak on their behalf. D. W. 2 had also denied that there was any oral agreement between himself and Mr. B. Mallick, on the one hand, and Mahindar Singh and Kuljit Singh on the other. According to D. W. 2, Mahindar Singh had seen him in the middle of December, 1970 and had prayed for some time to enable him to find suitable accommodation and had promised to pay the entire arrears of rent and mesne profits.

27. P. K. Popat, D. W. 3, was the defendant No. 8 in the suit. He stated that he held a power of attorney from some of the defendants and Suryakania V. Mansara the defendant No. 4, held power from the remaining defendants. D. W. 3 stated that he had instructed Mr. B. Mallick for taking steps for executing the ejectment decree and was informed by the said solicitor that the other side had promised to evict voluntarily if they were given some time. D. W. 3 had allegedly asked his solicitor to grant time till March, 1971. According to D. W. 3, when the other side did not give up possession Mr. B. Mallick was again instructed to proceed with the matter. But the other side had approached him again and they wanted six months' time. After six months, the decree-holders did not get possession. Mr. Mansata had taken steps. In the meantime, in March, 1972 the judgment-debtor had filed a petition in the High Court for recording adjustment of the decree passed in Suit No. 915 of 1968. After the said application which was opposed, was withdrawn, the plaintiffs filed the instant suit. D. W. 3 denied the authority of Mr. Mansata or Mr. Mallick to enter into any tenancy agreement with the other side. The plaintiffs in course of cross-examination of D. W. 3 had suggested that there was an agreement between Mr. B. Mallick and Mr. Mansata on the one hand, and Mahindar Singh, on the other for creating a new tenancy at the enhanced rent of Rs. 1,231.62 per month. But D. W. 3 had denied the same and had claimed that there was no such agreement. In view of the foregoing facts, we hold that there had been no agreement of tenancy between the plaintiff-firm represented by Mr. Mahindar Singh, on the one hand, and the defendants NOS. 2 to 13, on the other.

28. The plaintiffs have lastly submitted that the defendants having withdrawn from the trial Court rent/mesne profits deposited by the plaintiffs at the rate of Rs. 1,231.62 p. per month, the defendants were now estopped from denying that there was a new tenancy in favour of the plaintiffs at the said rate of rent. The tenancy held by the plaintiff-firm at a rent of Rs. 1,210/- per month had been extinguished by the ejectment decree dated 22nd Sept., 1970 in Suit No. 915 of 1968. Before the plaintiffs instituted the instant suit in the City Civil Court, Mr. B. Mallick on behalf of the defendants had granted receipts describing payments made by the plaintiffs as mesne profits and also clearly stipulating that the same were without prejudice to his client's rights under the said decree dated 22nd Sept., 1970. After instituting the said suit in the City Civil Court the plaintiffs had prayed for temporary and ad interim injunction to restrain the present defendants from evicting the plaintiffs from the suit premises. After the institution of the suit, the plaintiffs did not deposit or pay mesne profits due since February, 1972 till a much later date. Initially, the trial Court issued a show cause

notice and did not grant any ex parte ad interim order. Thereafter, on 25th August, 1976 the trial Court granted ad interim orders on condition the plaintiff deposited Rs. 15,000/-.

29. On 14th Feb., 1978 the trial Court allowed the plaintiff's prayer for temporary injunction on condition they deposited Rs. 36,475/- by three instalments and also would go on depositing current damages from February, 1978. The plaintiffs had complied with the said order for deposit. Subsequently, on 10th July, 1978 the defendants filed a petition in the trial Court and the said Court by its order No. 80 dated 7th Aug., 1978 permitted the defendants to withdraw said amounts deposited by the plaintiffs without prejudice to the rights of the parties. The defendants in their said petition had stated that the plaintiffs were liable to pay mesne profits @ Rs. 1,210/- per month. Thereafter, under the order of the Court below the defendants had withdrawn the said amounts deposited by the plaintiffs.

30. Upon these facts the plaintiffs cannot plead estoppel against the defendants. In India estoppels have been treated as rules of evidence and the foundation of the same is representation by a party which has been acted upon by the other party. In this case, the trial Court had permitted the defendants to withdraw without prejudice monthly damages deposited by the plaintiffs in Court and the defendants themselves did not expressly or impliedly make any representation or mis-representation to the plaintiffs who had deposited the said monthly damages in fulfilment of the conditions imposed by the Court below while granting temporary injunction in their favour. In other words, the plaintiffs had deposited the said monthly damages in Court in order to obtain an order of temporary injunction in their favour. It was the plaintiffs who had obtained a favourable interlocutory order by making the said deposits which the Court below had later on permitted the defendants to withdraw without prejudice. Therefore, the plaintiffs cannot claim any equity as against the defendants. When the Court below allowed the defendants to withdraw the aforesaid deposits without prejudice, the defendants could not suffer any detriment by acting in accordance with the said interlocutory order of the Court below. Further, the words "without prejudice" in the order of the trial Court imported that the withdrawal of the money shall not have any legal effect on the rights of the parties in the pending suit. The Division Bench of the Patna High Court in Umesh Jha Vs. The State and Another, , while considering the effect of acceptance of rent without prejudice by the State observed that the said words "without prejudice" import into a transaction that the parties have agreed" that as between themselves the receipt of money by one and its payment by the other shall not by themselves have any legal effect on the rights of the parties, but they shall be open to settlement by legal controversy as if the money had not been paid. We respectfully agree with the above statement of law. It may be noted that the Supreme Court in State of Bihar and Another Vs. Umesh Jha, on other points had reversed the decision in Umesh Jha's case (supra) but did not dissent from the view of the Patna High Court regarding the meaning of the words "without prejudice". Mr. Ghosh,

learned advocate for the appellant had relied upon the decision *Daintrey. Ex p. Holt*, (1893) 2 QB 116, which dealt only with the admissibility of a letter written without prejudice in a bankruptcy proceeding. Therefore, the said decision is not relevant for deciding the controversy before us.

31. Mr. Dutt, learned advocate appearing on behalf of the respondents, has also drawn our attention to the decision of the Supreme Court in *Bai Chanchal and Others Vs. Syed Jalaluddin and Others*, whereunder a decree for eviction the judgment-debtors who were liable to immediate eviction, were allowed to continue in possession for a period of five years from the date of decree in view of granting consents by the decree-holder and the judgment-debtors were required to pay mesne profits at the rate higher than rate of rent. There was also a clause in the decree that in case of default in payment of mesne profits, the judgment-debtors would be called upon to immediately deliver possession. The Supreme Court held that the said terms of the consent decree neither constituted a new tenancy nor a licence. The aforesaid reported decision is against the contention of the plaintiffs-appellants that by paying mesne profits either before or after the institution of the suit in the City Civil Court they had acquired a new tenancy. In the result, we reject the plea of estoppel raised on behalf of the plaintiffs.

32. For the foregoing reasons, we dismiss this appeal with costs.

On the prayer of Mr. Mitra, learned advocate for the appellants we stay the operation of the judgment for six weeks.

R.K. Sharma, J.

33. I agree.