

(1984) 06 CAL CK 0014
In the Calcutta High Court
Case No : Suit No. 205 of 1973

Goswami Malti Vahuji Maharaj

APPELLANT

Vs

Purushottam Lal Poddar

RESPONDENT

Date of Decision : 20-06-1984

Acts Referred:

Evidence Act, 1872 — Section 64

Registration Act, 1908 — Section 33

Transfer of Property Act, 1882 — Section 105, 53A

Citation : AIR 1984 Cal 297

Hon'ble Judges : Pratibha Bonnerjea, J

Bench : Single Bench

Advocate : Jayanta K. Mitra and Pradip Mitra, for the Appellant; A.C. Bhabra, S.K. Kapoor and Ranjan Deb, for the Respondent

Judgement

Pratibha Bonnerjea, J.—In 1907, the suit property, premises No. 6, Kanulal Lane belonged to one Goswamini Shree Radha Vahuji Maharaj and one Shree Giridharilalji Maharaj jointly having undivided half share each therein. Radha Vahuji by a registered deed of lease dated 9-10-1907 leased out her half undivided share in the said property to one Gordhandas Poddar for 51 years from 1-9-1907.

2. By two separate registered deeds of lease dated 9-10-1907 and 19-12-1908 respectively, Giridharilalji also leased out his undivided half share in the said premises to the same Gordhandas Poddar for 51 years from 1-9-1907. Thus Gordhandas became the lessee in respect of the entire premises No. 6, Kanulal Lane. Giridharilalji died on 6-12-1908 leaving his last will and testament whereby he appointed his wife Sm. Krishna Priya as the executrix. Probate of this will was duly obtained on 7-3-1973. Pursuant to the authority given under the said will, Krishna Priya adopted Govardhaneshji on 14-12-1946. Krishna Priya died thereafter and Govardhaneshji became the co-owner of the undivided half share in the suit property. The other undivided half share of the property of Radha Vahuji devolved on one Brojobhusan and one Mahaluxmi jointly and they became

the joint co-owners of the other undivided half share.

3. The lease granted by Giridharilalji expired by efflux of time on 31-8-58. There was an option for renewal for 5 years and the option was exercised and the tenant remained in possession. The option period expired by efflux of time on 31-8-63. In the meantime, the original tenant Gordhandas died, on 3-10-62 the heir and legal representative of the deceased tenant. Gordhandas, the present defendant Purushottam, sent a cheque on account of 12 months rent from October 1962 to September 1963 which was received by Goverdhaneshji (hereinafter referred to as the original plaintiff). On 21-8-63, the original plaintiff, through his solicitor Messrs. Nanavati & Co. served a notice of ejectment on the defendant and by a money order dated 30-8-63, sent back the rent for the month of September, 1963. The defendant refused to accept the said money order.

4. In the meantime, the original plaintiff executed two powers of Attorney in favour of one Mathuradas Chaturbhuj Sha and one Radha Krishna Kothari respectively for execution and registration of a deed of partition in respect of the suit premises. It is the plaintiff's case that on 28-7-1970, the property in suit was partitioned mutually between the co-owners by a Deed of Partition duly executed and registered a notional partition was effected by demarcation on a plan annexed to the deed. Actual physical partition was not possible as the defendant was in possession. According to the original plaintiff, he became the absolute owner of the divided eastern portion of the suit property. The defendant had obtained a fresh lease for 25 years from the other co-sharer on 2-7-68 in respect of other undivided half share. According to the plaintiff the lease granted by the other co-sharers in favour of the defendant has shifted to their divided western portion due to the partition.

5. In May 1973, the present suit was instituted by the original plaintiff against the defendant treating him as a trespasser and claiming recovery of possession of his divided eastern portion of the suit property and mesne profit.

6. In the written statement filed by the defendant, the alleged partition of the property on 28-7-1970 was denied and disputed and it was alleged that the suit was bad for non-joinder of the other co-owners of the property. It was further alleged that a monthly tenancy in respect of the undivided half share of the plaintiff in the suit property was created due to payment of rent and acceptance of the same by the original plaintiff on the expiry of the lease on 31-8-63 for 5 years from 1-9-58 to 31-8-1963 as no fresh deed of lease was executed or registered for the option period.

7. It is further alleged in the alternative that by acceptance of rent for September, 1963 by the plaintiff, the defendant became a monthly tenant under him in respect of his undivided share in the suit property from September, 1963.

8. The following issues were settled for decisions:

1. Is the plaintiff sole and absolute owner of the eastern portion of the premises in suit as alleged in paragraph 11 of the plaint?
2. Has the defendant been in wrongful possession of the eastern portion of the premises in suit as alleged in paragraphs 11 and 12 of the plaint?
3. Is the notice dated 26th February, 1973 valid and binding?
4. Is the plaintiff entitled to damages on the alleged rate of Rs. 50/- per day or any other rate as alleged in Paragraph 15 of the plaint?
5. Did the defendant become a monthly tenant in respect of the premises in suit with effect from 2nd September, 1963 as alleged in paragraphs 9 and 10 of the written statement?
6. Is the suit bad for non-joinder of parties?
7. Was the Deed of Partition dated 28-7-70 executed and is it valid?
8. To what relief or reliefs is the plaintiff entitled ?

9. The first issue to be decided is whether the partition was valid and the original plaintiff became the absolute owner of the divided eastern portion of the Suit property. This claim of the plaintiff is based on the Deed of Partition dated 28-7-70. This original document was sought to be proved by the plaintiff through her witness Kothari and was tendered as Ext. A without any objection on the part of the defendant. Kothari said that Mathuradas, the power of attorney holder from the original plaintiff had executed the deed dated 28-7-70 and got it registered on behalf of the original plaintiff and he knew his signature. He further deposed that on behalf of the other co-sharers one Rash Behari Burman who held their power of attorney, had executed the deed (Kothari Qs- 90-94, 107, 246-258). The two powers of attorney dated 23-7-66 and 6-1-70 given in favour of Kothari and Mathuradas jointly by the original plaintiff have been proved and tendered as Exts. "G" and "H". The signature of the original plaintiff in Ext. "H" is in Gujarati. The defendant took objection in respect of Ext. "H". But I find that the original power dated 6-1-66 has been duly proved by the witness who is one of the power-holders. Hence the objection is Overruled. The objection is also overruled in view of the presumption embodied in Section 85 of the Evidence Act. The deed of Partition, Ext. "A", has been admitted in evidence without objection. At the stage of argument, submissions were made on behalf of the defendant that the Partition Deed has not been proved and is not admissible in evidence. The defendant is not entitled to raise the question of admissibility of Ext. "A" at the stage of the argument for the first time. The plaintiff's counsel cited P.C. Purushothama Reddiar Vs. S. Perumal, where after the police reports were marked as Exts., objection was taken by the other side regarding their admissibility at a later stage. It was held in paragraph 18 of this report relying on AIR 1929 110 (Privy Council) :--

"These reports were marked without any objection. Hence it is not open to the

respondent now to object to their admissibility."

It was also held in paragraph 19 of this report:--

"It was next urged that even if the reports in question are admissible, we cannot look into the contents of those documents. This contention is again unacceptable. Once a document is properly admitted the contents of that document are also admitted in evidence though those contents may not be conclusive evidence."

10. The defendant's counsel faced with this difficulty, tried to attack the partition deed in another way. It was contended by him that the registration of this document was invalid and the document, was inoperative. There is no evidence that the document was duly executed or duly presented for registration on behalf of the other co-sharers. The Deed of Partition is therefore a nullity. In support of this contention the defendant's counsel, relied on *Abdus Samad Vs. Majitan Bibi and Another*, . The suit property in that case jointly belonged to A and B. A had two annas share and balance 14 annas belonged to B. B was a resident of Mandalaya and as such B had executed a power of attorney in favour of C to sell and dispose of his interest in the suit property. B's 14 annas share were divided into 3 lots. C sold two lots to D and the last one to E. D exercised his right of pre-emption under Bengal Tenancy Act and purchased E's share and thereby became the purchaser of entire 14 annas share of B. D thereafter instituted a suit for partition against the co-sharer A. A challenged and contested the suit inter alia on the ground that the power of attorney executed by B in favour of C was not in accordance with the requirements of Section 33(1)(c) of the Registration Act and as such the documents executed and presented for registration by C were all inoperative. The power of attorney was Ext. 3 in the suit. The trial court dismissed the suit. The first appellate court upheld the dismissal of the suit by the trial court holding that Ext. 3 on the basis of which C had presented the conveyances for registration was hit by the provisions of Section 33(1)(c) of the Indian Registration Act as the same was not executed and authenticated in the manner provided therein and as such the presentations of the documents by C for registrations were invalid and documents were void. No title passed to D. the plaintiff in that suit and the suit for partition was not maintainable. The plaintiff preferred the second appeal and the second appellate court found that the vendor B was a resident of Mandalaya in Burma, his power of attorney in favour of "C" ought to have been executed and authenticated in accordance with the provisions of Section 33, Sub-section (1), Clause (c) of the Act. In that case, the power of attorney was before the court who could find out the infirmities from the document itself and it was also admitted in that case that the power-of-attorney, Ext. 3 was not executed or authenticated in the manner provided in Section 33(1)(c) of the Act. The Second Appellate Court therefore held that the registration of the documents were invalid and documents were void. On the basis of this decision the defendant's counsel in the present case submits that the power-of-attorney in favour of Rash Behari Burman who executed the deed of Partition (Ext. A) as the agent of the other co-sharers is not before the court.

In this case unless the power-of-attorney is found to be executed in accordance with the provision of Section 33(1)(a) of the Indian Registration Act, the Ext. A must be held to be a nullity. On the other hand, the plaintiff's counsel submits that when the Registering authority endorses on the document presented for registration a certificate containing the word "registered", there is a presumption that he had satisfied himself regarding the requirements of all the provisions of Sections 32, 33, 34 and 35 of the Registration Act before registering the document and the officer concerned has given Ms certificate after being satisfied regarding the same. This presumption of regularity of the Act arises u/s 114(e) of the Evidence Act and u/s 60(2) of the Registration Act. The certificate of the Registrar becomes admissible for the purpose of establishing the correctness of the facts that the document has been duly registered in the manner required by the Act and the facts recorded in the endorsement are correct But this presumption is rebuttable. The persons who challenges the validity or regularity of the presentation and registration of the document must adduce positive evidence before the court to rebut this presumption. In support of his contention the counsel for the plaintiff relies on AIR 1922 PC 279, AIR 1923 114 (Privy Council) and Miss Elizabeth May Toomey Vs. The Right Hon"ble Bhupendra Nath Bose and Others, . In AIR 1922 PC 279 (Rai Bahadur Chotey Lal v. Collector of Muradabad) it was held at para 280 :--

"The fact that the presentation is accepted by the Sub-Registrar as in proper form, is, however, prima facie evidence that the conditions have been satisfied, and after such acceptance, the burden of proving any alleged informality rests on the person who challenges the registration. In the present case no question arises upon the character of the power, it has not been put in evidence and having been formally accepted by the proper official it may be regarded as complying with the provisions as to its character imposed by Section 32 Sub-section (c)."

11. In Miss Elizabeth May Toomey Vs. The Right Hon"ble Bhupendra Nath Bose and Others, a document was executed and registered under Sections 32 and 33 of the Registration Act on the strength of a Power of attorney which was challenged as invalid inter alia on the ground that in the Registrar's certificate on the document, the concerned power-of-attorney was described as a general power of attorney. It was contended that it did not authorise the agent Mr. Kennedy to admit execution or to present the same for registration. It was held at page 313:--

"The document purports to have been properly registered in accordance with the provisions of Sections 32 and 33, Registration Act. It was the duty of the Sub-Registrar to satisfy himself that the power-of-attorney gave Mr. Kennedy the necessary authority and it must be assumed until contrary is proved that he so satisfied himself" before he admitted the document for registration and signed the endorsement. I am certainly not prepared to find merely because the power-of- attorney is described as a general power in the Sub-Registrar's endorsement

that it did not authorise Mr. Kennedy to admit execution or present the document for registration." A few other authorities were cited before the Court in Miss Elizabeth May Toomey Vs. The Right Hon"ble Bhupendra Nath Bose and Others, , but the power-of-attorney under challenge was not produced before the Court, Therefore the Court observed:--

"In those cases a defect in the formalities necessary for valid registration was affirmatively proved. This case is quite different..... The power-of-attorney is no longer forthcoming, which is not surprising, so many years after the event..."

12. In AIR 1923 114 (Privy Council) it was laid down;--

"But the matter is finally rest by Section 87, which provides that nothing done in good faith -- pursuant to the Act by any Registering Officer shall be deemed invalid merely by reason of any defect in his appointment or procedure."

13. It is, therefore, clear that the presumption arising out of registration of a document can be rebutted by the party challenging its validity by adducing positive evidence proving the invalidity of the power-of-attorney or some other infirmity. The facts of the present case are that none of the co-owners had executed the partition deed personally. On behalf of both the co-sharers, their respective constituted attorneys executed the document. It has been repeatedly held by the Courts in India, including our Court, that where a person holds a power-of-attorney authorising him to execute the document on behalf of his principal and he executes the document, he is treated as the executant of the document for the purpose of registration. He is entitled to admit execution and to present the document for registration u/s 32(a) of the Act as the executant without production of any power-of-attorney as required u/s 33 of the Act. Authorities on this point are : (1920) 31 Cal LJ 447 : (AIR 1920 Cal 316) (Gopeswar Pyne v. Hem Chandra Bose); Ratilal Nathubhai and Another Vs. Rasiklal Maganlal and Others, : Sultan Ahmad Khan Vs. Sirajul Haque and Others , It was also held in Musammatt Aisha Bibi Vs. Chhajju Mal and Others, that the provisions of Section 33 of the Registration Act will only apply when the presentation of the document for registration is made by the agent and not when the agent as the executant of the document presents the document for registration. Ext. A in this suit reveals that Rash Behari Burman had executed Ext. A on behalf of the other co-sharers pursuant to a power-of-attorney dated 4-6-1970 granted for that purpose by his principals. Therefore, Rash Behari Burman was the actual executant of the document within the meaning of Section 34(1) of the Act and in that capacity he admitted the execution u/s 35 and presented the same for registration u/s 32(a) of the Act. Therefore, the provisions of Section 33 of the Act will not apply in this case as the executant himself admitted execution and presented the document for registration. There is no positive evidence in this case that the power given to Rash Behari Burman on 4-6-1970 was bad. The document is not before me. Another important fact is that the defendant himself had obtained a lease from the other co-sharers of their undivided half share on 2-7-1968 and the said lease was executed by the

same Rash Behari Burman on behalf of the other co-sharers on the strength of a power-of-attorney. The defendant's counsel got the signature of Rash Behari Burman proved through Kothari, the witness for the plaintiff in this suit and tendered the same as Ext. 7a (Kothari Qs. 219-225). It is an established fact that Rash Behari Burman was the constituted attorney of the other co-owners of the property and in that capacity he had been executing documents relating to the suit property on behalf of his principals. On the facts of this case as established in evidence and on account of the failure of the defendant to adduce any positive evidence to prove that the registration of the partition deed is invalid, I hold that Ext. A has been validly executed and duly registered and the plaintiff has become the absolute owner of the divided eastern portion of the premises in suit. Ext. A contains a plan of the suit property and the plan shows a notional division of the property as between co-owners. Kothari deposed that before preparing the plan, the property was measured in this presence and surveyed by the Surveyor and the plan was prepared accordingly. The property consists of 6 cottas and 13 chittaks of land with a building partly three and partly four storeyed. The plaintiff's share therein is $31\frac{1}{2}$ cottas of land and half of the building (Kothari Qs. 114, 119, 121, 127-128, 132). Kothari was asked in cross-examination as to when he had entered the suit premises last and his answer was when survey took place (Qs. 135). He was further asked in cross-examination whether partition was effected by metes and bounds or it was a notional partition only. Kothari's answer was "notional" (Qs. 138-140). Kothari's evidence was that on survey of the premises, a notional partition was made by putting a demarcation line on the floor. This part of this evidence was not at all challenged by the defendant's counsel. It was only suggested that no attempt was made by the plaintiff to divide the property by metes and bounds (Kothari's Qs. 142-143). The defendant himself gave evidence in this suit. In examination-in-chief he was only asked whether the plaintiff ever approached him to effect partition and his answer was "no" (Qs. 34-36). He did not deny Kothari's testimony that the property was measured, surveyed and the plan was prepared according to the notional partition made by demarcated line put on the floor. In cross-examination when the plan in Ext. A was shown to him, his answer was that he was unable to follow the plan (Poddar Q. 59). Poddar also deposed that the Plan was not correct (Qs. 61-62). But hardly any weight can be attached to his evidence on this point because admittedly he was unable to follow the plan. I, therefore, hold that plan in Ext. A was prepared in accordance with measurements and survey of the property with a view to make a notional partition and I accept Kothari's evidence that he was present during at that time. This part of Kothari's evidence remained unchallenged.

14. The next point to be decided is whether the defendant is a trespasser in respect of the plaintiff's portion of the suit premises or a monthly tenant under her. The leases dated 9-10-1907, and 19-12-1908 (Collectively Ext B) were granted by the predecessor-in-title of the present plaintiff in favour of the defendant's father expired on 1-9-68. Ext. B contained a clause and/or an

agreement that the lessee will have an option to renew the lease for a further period of five years on same terms and conditions as contained in Ext, B.

15. In paragraph 9 of the written statement, the defendant admitted that on expiry of the lease on 1-9-1958, the defendant duly exercised his option to renew the lease and continued in possession for 5 years on same terms and conditions although no fresh deed of lease was executed for that period. On those facts, the defendant alleged that a monthly tenancy in his favour came into existence due to payment of rent and acceptance thereof by the plaintiff. The defendant's counsel contends that a renewal of a lease is a fresh lease and in this case its period being only 5 years, it will come under the purview of W.B.P.T. Act, 1956. There being no registered lease in the present case for the option period, a monthly tenancy came into existence. In support of this two contentions, he relies on Delhi Development Authority Vs. Durga Chand Kaushish, and Biswabani Pvt. Ltd. Vs. Santosh Kumar Dutta and Others, . The plaintiff's counsel, on the other hand submits that if a lessee continues in possession on expiry of the original lease by virtue of a renewal clause contained therein without having any lease for the option period, he is entitled to defend his possession u/s 53A of the T. P. Act, but has no title to the property. On expiry of the agreed period, he becomes a trespasser. During this period, payments of rent are made by him in performance of his part of the contract. In support of his contention, he relies on Technicians Studio Private Ltd. Vs. Smt. Lila Ghosh and Another, , I shall have to consider their respective contentions, in Delhi Development Authority Vs. Durga Chand Kaushish, it was held in para 7:--

"A renewal of a lease is really a grant of a fresh lease. It is called a "renewal" simply because it postulates the existence of a prior lease which generally proceeds for renewal, as of right. In all other respects, it is really a fresh lease."

This case puts an end to the controversy on this point.

16. I am now dealing with the contention of the plaintiff that no monthly tenancy is created due to the reason of the lessee continuing in possession without a fresh lease during the option period and on account of payment of rent by the lessee and acceptance thereof by the lessor. According to the plaintiff's counsel, a transferee under a void lease is only entitled to protect his possession u/s 53A of the T. P. Act. He cites Technicians Studio Private Ltd. Vs. Smt. Lila Ghosh and Another, . In this case the appellant was a sub-lessee under the respondent and a suit for eviction was decreed against him. The appellant applied for revision and the same was compromised on terms that there will be a lease for 16 years in his favour on certain terms. No deed of lease was executed and the terms of settlement was not registered. The lease therefore became void. It was held that during the period of 16 years, the appellant was entitled to protection under the void lease in accordance with the provision of Section 53A of T. P. Act and had no right against eviction after expiry of 16 years. In this case, it had been argued on the basis of Ram Kumar Das Vs. Jagadish Chandra Deb Dhabal Deb and Another, that a monthly tenancy was created on account of payment of rent and

acceptance thereof by the landlord. This case was considered and distinguished by the Supreme Court in *Technicians Studio Private Ltd. Vs. Smt. Lila Ghosh and Another*, :

"We do not think that *Ram Kumar Das Vs. Jagadish Chandra Deb Dhabal Deb and Another*, is an authority for the proposition. Mr. Sen was contending for that in every case where a person enters into possession on the strength of an invalid lease and the landlord accepts "rent" in terms of that invalid lease, a monthly tenancy is created by implication of law. In *Ram Kumar*'s case it was admitted that in the beginning there was a relationship of landlord and tenant between the parties..... If Mr. Sen's contentions were correct, then it was unnecessary to enact Section 53A."

In Para. 5 of this report it was held:--

"It is well settled that Section 53A confers no active title on the transferee in possession, it only imposes a statutory bar on the transferor..... These monthly payments brought the appellant under the coverage of Section 53A, but from this fact alone that the appellant had performed his part of the contract it is not possible to conclude that a tenancy was brought into existence. Even acceptance of rent is not decisive..... Whether the relationship of landlord and tenant exists between the parties depends on whether the parties intended to create a tenancy and the intention has to be gathered from the facts and circumstances of the case, It is possible to find on fact of a given case that payments made by the transferee in possession were really not in terms of the contract, but independent of it and this might justify an inference of tenancy in his favour."

17. *Biswabani Pvt. Ltd. Vs. Santosh Kumar Dutta and Others*, is relied on by the defendant's counsel in support of his argument that a monthly tenancy will arise under the similar circumstances. In that case the appellant took lease of the disputed premises for 5 years under a registered lease dated 11-9-1948 with an option to renew upon giving two months notice prior to expiry of the lease. The period of lease was to expire on 31-8-1953 but prior to the expiry of the lease, the appellant applied to the Rent Controller under the provision of W.B.P. Rent Control (Temporary Provisions) Act 1950 for fixation of standard rent and the rent was fixed and accepted by the landlord. In October 1953 the lessors filed a suit for eviction on the ground that the period of lease had expired and no option had been exercised. The eviction suit was compromised and a decree passed. Under the terms of compromise it was agreed that there will be a lease for five years in favour of the appellant from 1-3-1955. The decree remained unregistered. The appellant continued in possession and went on paying the agreed rent: This agreed period expired on 24-2-1960. The consent decree clearly provided, that there will be no renewal of the lease after the expiry of 5 years. On expiry of this term, the respondents entered into the demised premises and locked a portion thereof. Thereupon the appellant filed a suit for declaration that it was a tenant in respect of the demised premises under the respondent and injunction restraining the respondents from interfering with his

possession. On these facts, the Supreme Court came to the findings as follows :

Para 6: "Appellant was accepted as tenant by the respondent Nos. 1 and 2 even though the indenture of lease dated 11th September. 1948 was executed..... Indisputably when the first lease expired on 31-8-1953 the appellant was the tenant of the demised premises, a fact demonstratively established and expressly accepted by the respondents Nos. 1 and 2 and evidenced by their conduct of accepting rent from the appellant company..... The option was not exercised. Notwithstanding the non-exercise of the option, on the date of expiry of the lease, the contractual tenancy having come to an end, the tenant would be a tenant holding over if requirements of Section 116 of the Transfer of Property Act are satisfied. However, on the date of expiry of contractual tenancy, the West Bengal Premises Rent Control (Temporary Provision) Act 1950 was in force and was applicable to the premises and therefore on the determination of contractual tenancy by efflux of time the terms and conditions of the lease are extinguished and the right of such person remaining in possession are governed by the statute alone."

In paragraph 11 of this report, the Supreme Court held:--

"In almost identical circumstances in Ram Kumar Das Vs. Jagadish Chandra Deb Dhabal Deb and Another, an inference of tenancy was made".

The Supreme Court in Biswabani Pvt. Ltd. Vs. Santosh Kumar Dutta and Others, also considered the facts of Technicians Studio's case at Page 232 and distinguished the same. After reciting the facts of the latter case the Supreme Court held:--

"On the expiry of the period of 16 years the first respondent commenced an ejectment action alleging that the appellant was a trespasser. The appellant resisted the suit contending that it was a monthly tenant. Negatiying this contention this Court, agreeing with the High Court, held that payments made by the appellant in this case can be explained as evidence of appellant's "willingness to perform its part of the contract and that a person who is led into possession on the strength of a void lease, does not acquire any interest in the property but gets u/s 53A a right to defend his possession. The decision of Ram Kumar Das's case was distinguished observing that in Ram Kumar Das's case it was admitted that in the beginning there was a relationship of landlord and tenant between the parties and the only question arose for decision was whether the defendant was in fact a monthly tenant under the plaintiff on the date when the notice to quit was served upon him. In the case before us the appellant was admitted to be a tenant".

It was again observed in paragraph 16:--

"In this case it is unquestionably established that at the commencement of the lease which turned out to be void i. e. on 1-3-1955, appellant was a tenant of the premises and that on its application standard rent in respect of the demised

premises was determined and the same was accepted as the rent to be paid under the second lease..... it would be unwise to hold that the payment of the standard rent fixed by the Rent Controller having jurisdiction could be by "any process of construction treated as payment under an agreement of lease."

18. On the facts of that case in *Biswabani Pvt. Ltd. Vs. Santosh Kumar Dutta and Others*, , it was held that the appellant became a tenant.

19. It should be noted that in both the cases *Ram Kumar Das Vs. Jagadish Chandra Deb Dhabal Deb and Another*, and *Biswabani*, the existence of the tenancy was admitted. In *Biswabani*, in spite of the first lease, and before expiry of its period, the relationship of landlord and tenant came into existence on account of the fixation of the standard rent by the Rent Controller and acceptance of the same by the lessor. In *Biswabani*'s case the question of Section 53A could not arise as it was the tenant's suit for declaration of his title. It is settled law that Section 53A can be used as a shield only and not as a sword. The void lease deed in *Biswabani*'s case became absolutely inadmissible due to the nature of the action instituted. All these facts were missing in *Technicians Studio Private Ltd. Vs. Smt. Lila Ghosh and Another*, and in the present case. In the present case, there is no evidence that rent during the option period was paid independent of contract. Hence there was no tenancy. There could be no question of filing suit u/s 13 of the W. B. P. T. Act as submitted on behalf of the defendant. The facts of the present case come within the coverage of Section 53A of T. P. Act and fall in line with *Technicians* case reported in *Technicians Studio Private Ltd. Vs. Smt. Lila Ghosh and Another*, . On expiry of the said renewal period on 31-8-1963 the defendant became a rank trespasser.

20. It is, however, submitted that on expiry of the option period, a new tenancy came into existence under following circumstances. The rent for one year used to be paid in advance in October of each year Up to September next year (Kathari Qs. 29-50, 173-201 read with Exts. "D" "E" "F" & IA). By a letter dated 3rd Oct., 1962, the defendant forwarded twelve months rent from 1-10-1962 to 30-9-1963 (Ext. 1A, Kothari Q. 197). The said money order was received by the plaintiff who acknowledged the payment on 6-10-1962 (Ext. 6). This rent for September 1963 was returned to the defendant on 30-8-1963 but the defendant refused to accept the same. The period of renewal expired on 31-8-1963. It is submitted that the rent for September 1963 was accepted and retained by the landlord up to 30-8-1963 and this established the intention to create a tenancy from September 1963 in favour of the defendant. The plaintiff's witness Kothari said that due to mis-stake and inadvertence, the original plaintiff did not notice that one month's rent was paid in excess and it was returned as soon as the same was detected. The plaintiff's counsel submits that a tenancy can only come into existence if the parties intend to create the same otherwise not. He strongly relies on 66 CWN 338 (*Annapurna Seal v. Tincowri Dutt*):

"The implication of the new tenancy rest upon the presumed intention of the parties.. ... The presumed intention may be negated and it may be shown

that the parties never intended to create a new tenancy."

21. The plaintiff's counsel submits that this presumed intention has to be gathered from the facts and circumstances surrounding the time when the alleged tenancy could have been created. He relies on *Karnani Industrial Bank Limited Vs. The Province of Bengal and Others*, in support of his contention. In that case the Supreme Court was dealing with Section 116 of the T. P. Act. In that case also one month's rent in excess was paid one year before the expiry of the lease. It was contended that a new tenancy was created by acceptance of that rent. The Supreme Court negated that contention and construed Section 116 of T. P. Act in the manner as follows :--

"The use of the word "otherwise" suggests that acceptance of rent by the landlord has been treated as a form of his giving assent to the tenant's continuance of possession. There can be no question of the lessee "continuing in possession" until the lease has expired and the context in which the provision for acceptance of rent finds a place clearly shows that what is contemplated is that the payment of rent and its acceptance should be made at such a time and in such a manner as to be equivalent to the landlord assenting to the lessee continuing in possession."

Para 10 : "But it seems to us that the very fact that the payment was made at a time when there was no question of lessor assenting to the lessee's continuing in possession and neither party treated the payment as importing such assent, is sufficient to take the case out. of the mis-chief of Section 116 of T. P. Act."

22. The plaintiff's counsel, strongly relying on the aforesaid observations of the Supreme Court submits that rent for September 1963 was paid in October 1962 -- almost one year before the expiry of the agreed period. No occasion arose for creation of a new tenancy at that point of time. On the contrary, when the occasion for creating a new tenancy became possible in August 1963, the excess rent was returned- This is a conclusive evidence that the plaintiff had no intention to create a new tenancy. This argument has a lot of force and I accept the same. On the facts of this case, I am unable to hold that any new tenancy was created in favour of the defendant from September 1963 as alleged by the defendant. The defendant, therefore, became a trespasser on expiry of 31-8-1963.

23. On the facts and circumstances aforesaid, I have already held that no tenancy was created in favour of the defendant and the defendant was not a tenant under the original plaintiff or the present plaintiff. In that, view of the matter, the issue regarding the validity of the notice dated 26-2-1973 has become immaterial. The defendant was a trespasser and no notice was necessary for instituting the present suit.

24. The last question is what would be the rate of mesne profit payable by the defendant to the plaintiff on account of his wrongful possession of the divided eastern Portion of the suit property. No reliable evidence has been adduced on

behalf of the plaintiff as to the rate of mesne profit per month in respect of the property in suit. I find that before partition the defendant has taken a lease of the undivided half share of the other co-sharers for twentyfive years by a registered deed of lease dated 2-7-1968 (Ext. 7). The rent reserved under that lease was Rs. 275/- per month. In my opinion, the plaintiff will be entitled to recover mesne, profit from the defendant at the rate of Rs. 275/- per month from 15-5-1970 until recovery of possession from the defendant,

25. The partition of the suit property as between the co-owners has been proved in this case. It has been held in Shankar Shaw Vs. Anukul Ch. Bose, :

"..... .. the effect of partition, when there is a valid partition, is to convert joint title of the parties into exclusive title of the particular allottee and along with it to convert joint possession into his exclusive possession all the authorities are agreed that it effects a transfer and converts the original joint title into a separate title to the allottee. That being so, the plaintiff got exclusive title to the Property in question by partition."

26. In the present case on account of the partition the plaintiff is entitled to have exclusive possession of the divided eastern portion of the suit property. The plaintiff is also entitled to recover possession of the divided eastern portion of the suit property from the defendant who is in wrongful occupation of the same. It does not matter that the property has not been divided by metes and bounds. The plaintiff will be entitled to separate his divided portion by metes and bounds in accordance with the Ext A, after recovery of possession from the defendant. The issues are, therefore, answered as follows:--

Issue No. 1 -- Yes.

Issue No. 2 -- Yes -- on and from 1-9-3963.

Issue No. 3 -- The question of validity of the notice did not arise as the defendant is a trespasser.

Issue No. 4 -- No. The plaintiff is entitled to recover mesne profit at the rate of Rs. 275/- per month only until recovery of possession from 15-5-1970.

Issue No. 5 -- No.

Issue No- 6 -- No.

Issue No. 7 -- Yes.

27. In the premises, it is declared that the plaintiff is the absolute owner of the divided eastern portion of the premises No. 6, Kanulal Lane, as shown in the notice dated 26-2-1973 being, Annex. "D" to the plaint and Ext. I in the suit, a decree for recovery of possession of the divided eastern portion, and decree for mesne profit at the rate of Rs. 275/- per month from 15-5-1970 until recovery of possession. The plaintiff will be entitled to the cost of this suit. Certified for two counsel.