

(1955) 12 CAL CK 0010
In the Calcutta High Court
Case No : A.F.O.D. No. 73 of 1949

Kumar Pashupati Nath Malia and Another	APPELLANT
Vs	
Sri Sankari Prosad Singh Deo and Others	RESPONDENT

Date of Decision : 23-12-1955

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Evidence Act, 1872 — Section 116
General Clauses Act, 1897 — Section 2(25)
Transfer of Property Act, 1882 — Section 105, 3

Citation : AIR 1957 Cal 128 : (1957) 2 ILR (Cal) 587

Hon'ble Judges : Renupada Mukherjee, J; P.N. Mookerjee, J

Bench : Division Bench

Advocate : Radhabinod Pal, Purushottam Chatterjee, Ajay Kumar Basu and Sailendra Nath Banerjee, for the Appellant; Pramath Nath and K.C. Ghose, for the Respondent

Final Decision : Dismissed

Judgement

P.N. Mookerjee J.

1. This appeal is by the defendants and it arises Out of a suit for a charge decree for recovery of minimum royalty, price of royalty coal and interest. The suit which was valued at RS. 8,819-1-0 was decreed in part for Rs. 7,319-1-0 with proportionate costs Rs. 831-10-6 pies, making up a total of Rs. 8,150-11-6 pies, and from that preliminary charge decree the contesting defendants have preferred the present appeal.

2. The plaintiff respondent claims under a lease dated 4-5-1919. That lease was created by the Patta, Ext. E, and the kabuliyat, Ext. 2. This Kabuliyat was executed by the defendants' father in favour of the plaintiff's father who in his turn granted the Patta Ext. E. It was a lease of the "coal land" of Mouza Duburdihi. Under the lease the lessee obtained settlement of and became entitled to the "underground coal" of the said Mouza upon an undertaking to pay

royalty or commission at the rate of 2 annas per ton on coal, raised and despatched or sold from the said Mouza, a minimum royalty of Rs. 480/- per annum and also two wagons of coal for the lessor's personal use every year. The commission (royalty) and minimum royalty were payable in two kiste every year namely, in Aswin and Chaitra. There was also provision in the lease for payment of interest by the lessee at the rate of 12 per cent per annum on defaulted kists of minimum royalty and commission. It was also expressly pleaded in the plaint that the defendants' father who was the original lessee duly obtained possession of the underground from the lessor (the plaintiff's father) and such possession was continuing through the defendants as lessees under the plaintiff.

3. For an earlier default in the payment of royalty etc., namely, from 1332 to 1343 B.S., the plaintiff's father brought Mortgage Suit No. 9 of 1938 and recovered a decree which was eventually realised by the plaintiff by levying execution against the defendants, the fathers of the parties having died in the meantime. The present suit (Mortgage Suit No. 15 of 1945) was thereafter brought on 11-4-1945, for recovery of minimum royalty and price of royalty coal (payable as fuel for the lessor's personal use) from 1344 B. S. to Aswin 1351 B. S., for which period there was no payment made by the defendants and no information was also available to the plaintiff whether any coal had been raised or despatched or sold from the leasehold Mouza during the said years.

4. The suit was contested by the defendants. Their defence inter alia was as follows:

1. That the plaintiff had no title to the underground of Mouza Duburdihi which belonged to the defendants by virtue of their purchase from the Goswamis of Bero who had obtained the same along with other properties from the plaintiff's predecessor under a revenue-free grant, made in the remote past.

This was said to have been decided in T. S. No. 37 of 1936 of the court of the Subordinate Judge of Asansol and the said decision was claimed to operate as res judicata in favour of the defendants on the question of title in the present suit, necessarily involving a dismissal of the plaintiff's claim.

2. That the kabuliyat (lease) was vitiated by fraud, coercion, misrepresentation and/or mistake or mutual mistake and no claim was sustainable on the basis thereof, and

3. That the defendants or their predecessor did not obtain possession of the underground from the plaintiff or his predecessor but they were in possession by virtue of an independent and paramount title obtained from the Goswamis.

5. There was also a plea that a part of the plaintiff's claim was time-barred.

6. Of the seven issues framed in the trial court, issues Nos. 1, 2, 3, 4 and 7 were not pressed and the two remaining issues, namely, :--

"Issue No. 5:-- Has the plaintiff title to the property in suit? Can the defendants

deny the title of the plaintiff or his predecessor?" and

"Issue No. 6:-- Is the plaintiff entitled to a decree for the claim in suit? " were decided by the learned Subordinate Judge in the plaintiff's favour so as to entitle him to a part decree for Rs. 7,319-1-0 with corresponding (proportionate) cost Rs. 831-10-6 pies, and a preliminary first charge decree was passed for the said total amount (Rs. 7319-1-0 plus Rs. 831-10-6 pies : Rs. 8150-11-6 pies) with the usual provision for a personal decree, if necessary, subject inter alia to the relevant, law of, limitation. Being aggrieved, the defendants have preferred the present appeal.

7. Under Issue No. 5 the learned Subordinate Judge discussed the question of validity of the lease and rejected the defence plea of coercion and misrepresentation in regard to the relative Kabuliyat (Ext. 2) and, having found that the lease was valid and binding between the parties and having held therefrom that there was a relationship of landlord and tenant between the parties, the learned Judge concluded that the defendants were estopped from disputing the plaintiff's title and, in that view, he did not actually go into or examine the dispute of title on the merits. The learned Judge also found inter alia that the decision in Mortgage Suit No. 9 of 1938 operated as res judicata on the question of coercion and misrepresentation and also on the question of relationship of landlord and tenant between the parties and on the further question of possession or, more precisely, defendants' initial possession of the disputed underground and the source thereof.

8. Each of the above findings, made by the learned Subordinate Judge under Issue No. 5, was challenged in this appeal and the appellants' learned Advocate contended:

(a) That the Kabuliyat (Ex. 2) was vitiated by fraud, coercion, misrepresentation and mistake, to wit, mutual mistake.

(b) that the decision in Mortgage Suit No, 9 of 1938 was not res judicata in the plaintiff's favour on the question of fraud or misrepresentation or on the question of relationship of landlord and tenant between the parties or the question of possession.

(c) that the decision in T. S. No. 37 of 1936 operated as res judicata in the defendant's favour on the question of title, disentitling the plaintiff from claiming rent or royalty etc. from the defendants, and (d) that the defendants were not estopped from disputing the plaintiff's title as held by the learned Subordinate Judge.

9. It was contended further that, in any event, the plaintiff's prayer for a personal decree in regard to his claim from Baisakh 1344 to Aswin 1346 B. S. was time-barred.

10. We shall first take up the question of res judicata as arising upon the decision in Mortgage Suit No. 9 of 1938. That was a suit brought by the plaintiff's

predecessor against the defendants and their predecessor for recovery of a charge decree in respect of the minimum royalty, price of fuel coal etc., as in the present case, for the preceding period 1332 B. S. to 1343 B. S. in respect of the present Mousa Duburdihi. The defence denied, inter alia, the plaintiff's title. The validity of the Kabuliyat (Ex. 2) also appears to have been challenged in the suit and the relationship of landlord and tenant expressly denied, at least at the trial. True, the written statement (Ex. 5) was not very clear or specific on these last two points but the judgment (Ex. 3(b)) sufficiently shows that these also were some of the grounds on which the plaintiff's claim was sought to be defeated. It was also pleaded by the defendants that their predecessor was in possession of the underground of Mouza Duburdihi at the time when he executed the Kabuliyat (Ex. 2) and that the defendants' possession of the said underground was not attributable to the lease of 1919 and such possession had not been obtained from the plaintiff or his predecessor. All these contentions were, however, overruled on that occasion by the learned subordinate Judge who eventually decreed the suit. In our opinion, that decision operates as *res judicata* on the question of validity of the Kabuliyat (Ex. 2) and also on the question of relationship of landlord and tenant between the parties and the source of the defendants' original or initial possession and precludes them from urging in this suit that the Kabuliyat (Ex. 2) is vitiated by fraud, coercion, misrepresentation or mistake, mutual or otherwise, (which, if not expressly taken, might and ought to have been taken as defences to the said earlier suit) or from denying the relationship of landlord and tenant between the parties in respect of the underground of Mouza Duburdihi under the lease of 1919 or from contending that they (the defendants) did not obtain possession of the same from the plaintiff's father under the said lease. The suit period was no doubt different but the validity of the Kabuliyat or the relationship thereunder or the question of initial or original possession did not depend upon the particular period in suit and the decision on these questions binds the parties irrespective of the said period.

11. We are also of the view that, even apart from *res judicata*, the validity of the lease of 1919 must be affirmed. The defendants have adduced no evidence in this case in support of their allegation of fraud, coercion, misrepresentation or mistake. They have not taken oath themselves nor has any competent person pledged his oath on the point on their behalf. Whatever might have been the position otherwise, the decision in the *Petena Case*, *Hari Narayan Singh Deo Bahadur v. Sriram Chakravarti*, 37 Ind App 136 (PC) (A) and the two decisions of the Privy Council (*vide Raja Sri Sri Durga Prasad Singh v. Braja Nath Bose* 39 Ind App 133 (PC) (B) and *Sashi Bushan Misra v. Jyoti Prashad Singh Deo* 44 Ind App 46: (AIR 1916 PC 191) (C)) which followed it in more or less quick succession in the meantime, gave ample justification to the plaintiff's predecessor to assert rights to the underground and, that being so, the demand for the Kabuliyat (Ex. 2) and the representations, made for the purpose, cannot be said to have been necessarily fraudulent or *mala fide* or unwarranted within the meaning of Section 18, Contract Act. The mistake also, if any, was, in the facts of this case, a

"mistake of law" (vide Section 21) as to the rights of the parties and not a "mistake as to a matter of fact" as contemplated by Section 20 of the Act. In these circumstances, the defendants appellants can derive no assistance from the Supreme Court decision Kalyanpur Lime Workers Ltd. Vs. State of Bihar and Another, or the cases, there cited, and the onus that lay on them to establish the infirmity of the Kabuliyat (Ext. 2) on the grounds, alleged by them, cannot be held to have been duly discharged and their attack to the said document (Ext. 2) must fail. On the merits also, the defendant's challenge to the lease cannot, thererore, succeed and, once the lease is accepted, the relationship of landlord and tenant must be held, to exist between the parties unless, of course, there be some overriding legal impediment to the existence of such relationship or unless that relationship has come to an end by subsequent events which it is open to the defendants to canvass in the present suit. It is in this context that the defence claim of paramount and independent title and the interrelated question of estoppel, raised by the plaintiff, and their cumulative effect fall to be judged in this instant case. Of these again, estoppel is of primary importance for, if it can be successfully pleaded, the defence plea of title would recede to the background and would be totally unavailing. We shall, therefore, turn to estoppel first.

12. We take up now the question of estoppel but, before we deal with it, it is necessary to consider the effect of the decision in Title Suit No. 37 of 1936 as between the plaintiff and the defendants. That suit was brought by certain persons (Boy and Laik) for, inter alia, declaration of their title to the underground of Mouza Duburdihi as lessees from the Goswamis of Bero. In that suit the present defendants Searsole and also the present plaintiff's predecessor Panchete or Panchakote were parties defendants along with the said Goswamis. The suit was dismissed, upon the findings inter alia that the plaintiff's (Roy and Laik's) lease was invalid and without consideration, that their claim was barred by limitation and adverse possession and, further, that the Beros had lost their title to the disputed underground by reason of their earlier absolute transfer to the present defendants' predecessor and also by reason of the law of limitation and, accordingly, the plaintiffs in that suit as subsequent lessees from the Beros could not claim any title to the same. The Court, however, in the course of its judgment (Ext. A) on that occasion recorded a finding that, as between Panchakote (Defendant No. 6 (Ka)) and Bero (Defendant No. 7), the latter had title to the disputed underground and that the said title had passed to Searsole (Defendants, Nos. 1-4) by absolute transfer from the Beros. It is now contended by Mr. Chatterjee that this last mentioned finding operates as res judicata on the question of title between Searsole and Panchakote and debars the plaintiffs Panchakote from claiming rent or royalty etc. from the defendants in the present suit.

13. We are unable to accept Mr. Chatterjee's contention.

14. In the first place, Searsole did not, in the suit of 1936, challenge Panchakote's title. On the ther hand they accepted that title and actually relied

upon it (vide judgment Ext. A). There was thus no conflict of interest between them.

15. The plaintiffs' suit again was dismissed and that dismissal was on a ground which did not depend upon decision, of Panchakote's title. The plaintiffs in that suit claimed under the Beros. But it was found that the present defendants were, prior transferees from the Beros and, at the time of the plaintiffs' lease from the Beros, the latter had no title to the lease-hold property. For deciding the suit, therefore, it was not necessary --and the learned Subordinate Judge also, as we shall presently show, did not certainly think it necessary, -- to decide the dispute of title between Bero and Panchakote or between Searsole and Panchakote and, as a matter of fact, the dismissal of the suit was not based upon the finding on this question of title but was made in spite of it and Panchakote, having succeeded in getting the plaintiffs' suit dismissed on other grounds, had no occasion to appeal from the adverse decision against him on the question of title : (vide *Rajah Run Bahadoor Singh v. Mt. Lacho Koer* 12 Ind App 23 (PC) at p. 34 (E); vide also the case of *Abdul Rahman Mullick and Others Vs. Azahar All Khan*, which contains an illuminating discussion of the law on the subject).

16. It may also be pertinent to observe here that the learned Subordinate Judge who decided the 1936 suit prefaced his decision of the issue of title as between Panchakote and Bero with the following remarks:

"It is important to note that this issue concerns primarily defendant No. 6(a) (the Raja of Panchakote and defendant No. 7 Jagannath Acharya Goswami). The quarrel on this score would blow over the head of defendants 1 to 6. For, if ultimately it is found that the deity Keshab Roy Jieu or his Shebait (Rajguru) had not got by the original 400 years old grant from the Raja any interest in the underground minerals of these 4 mouzas and such interest remained with the original grantor, the Raja of Panchakote, it is immaterial to defendants 1 to 6 for they also took or rather compelled to take registered lease from the Raja of Panchakote when he came down upon them after the Privy Council decision in the Petena Case of 1910 (A).

* * * *

If on the other hand it is ultimately found that the original 400 years old grant by the Raja to his deity (Keshab Roy Jieu) and the Shebait (Rajguru) of these 4 Mouzas (which included Duburdihi) did convey also the underground mineral rights (there is no dispute that a grant of 57 1/2 Mouzas including these 4 was made by the Raja some 400 years ago), then defendants 1 to 4's predecessor having purchased the underground rights in these 4 Mouzas by the registered sale-deed of 1873 from the then Shebait or trustee of the deity (the sale being for valuable consideration and for legal necessity) as already found in deciding the other issues in this suit, defendants 1 to 4 and their lessees (defendants 5 and 6) are also perfectly safe.

Thus it appears to me that the decision of this "additional issue No. 2" re: the

title to the underground of these 4 Mouzas between defendant No. 7 and the Raja (defendant No. 6a) prior to 1873 (i.e. the date of the sale-deed) is perfectly immaterial to defendants 1 to 6.

But as the learned Counsel for defendant No. 6a (Raja) and the learned Advocate for defendant No. 7 want a decision of the issue and refer to AIR 1931 114 (Privy Council) I am constrained to decide the issue though, after the decision of the other issues, the discussion on this point of internecine dispute between two defendants is more or less academic."

17. These prefatory observations not only show that the finding on the question of Panchakote's title was unnecessary but they affect also the intrinsic value of the said finding as an effective or final judicial pronouncement on the point and rob it of much of its force which it would have otherwise possessed.

18. In the above context we are unable to hold that the decision in the 1936 suit on the question of title would operate as *res judicata* between Panchakote and Searsole who were co-defendants there, namely, Defendant No. 6 (Ka) or 6 (a) and Defendants Nos. 1-4 respectively.

19. The view we have taken above is not opposed to the decisions of the Judicial Committee in the cases of AIR 1931 114 (Privy Council) , AIR 1932 161 (Privy Council) , and Kedar Nath Goenka v. Bam Narain Lal, 62 Ind App 224 : (AIR 1935 PC 139) (I), where the tests of *res judicata* as between co-defendants were laid down, as, on our findings, made above, those tests would not be satisfied. On the other hand, our view would be well supported by a large number of judicial decisions (vide e.g. Abdul Rahman Mullick and Others Vs. Azahar Ali Khan, . Thakur Magundeo v. Thakur Mahadeo Singh, ILR 18 Cal 647 (K), Hafiz Mohammad Fateh Nasib Vs. Sir Swarup Chand Hukum Chand, Firm and Another, , Abhey Ram and Another Vs. Jhanda and Others , and Markanda Mahapatra v. Kameswar Rao AIR 1949 Pat 197 (N)) which hold that, generally speaking, an adverse finding against a defendant when the plaintiff's suit is dismissed, does not operate as *res judicata*. That is undoubtedly the general rule and the apparent exception or exceptions as illustrated by Krishna Chandra Goldar v. Mohesh Chandra Sana 9 Cal WN 584 (O) and envisaged in Kara Chandra Das v. Bhola Nath Das 39 Cal WN 567 (P) are all easily explained by the simple statement that an adverse finding against a successful party where the decree is not based upon it but is made in spite of it does not operate as *res judicata* (vide 12 Ind App 23 (PC) at p. 34 (E) and 48 Ind App 49 at p. 55 : AIR 1922 241 (Privy Council) .

20. We may also observe in passing that, in answering this plea of *res judicata* against the appellants, we have not overlooked the decision of the Judicial Committee in AIR 1932 50 (Privy Council) or the earlier decision of this Court to the same effect in the case of Mahomed Ismail and Others Vs. Sharfutullah and Others, . It is undoubtedly true that if the parties and the Court have dealt with a particular issue as a direct and necessary issue, the decision would be *res*

judicata and would bind the parties even if the issue may, on proper examination, be found to have been unnecessary and/or incidental and the position would be the same if, on an issue of this character, the parties invite and take a decision from the Court. But even *Pisani's* case; *Pisani v. Attorney-General for Gibraltar* (1874) 5 CP 516 (S) cited by Dr. Pal, would not take the matter further. Where, therefore, the Court expressly stated that the decision of the issue is unnecessary and the party who pleads (or against whom it is pleaded) *res judicata* in the subsequent suit was not a consenting party to the raising or decision of the particular issue in the earlier suit, the plea of *res judicata* would not be supportable on the authority of any of the above decisions, and, if that be the correct view, the appellants' contention must fail as they were not consenting parties to the framing or decision of the issue of title as between Panchakote and Bero in the earlier suit and the Court also considered it an unnecessary issue while pronouncing its judgment. Even upon the view, most favourable to the appellants' contention, the earlier decision on the issue of title would be *res judicata* between Bero and Panchakote but the appellants who were prior transferees from Bero and thus not their legal representatives in the matter of the said decision or for purposes of *res judicata* would not be entitled to take advantage of that decision just as the said decision, if it had been adverse to the Beros, would not have bound them (the appellants) and would not have operated as *res judicata* as against them for, apart from anything else, the test of mutuality -- a recognised essential test for the operation of *res judicata*,--would not have been satisfied.

21. It will be convenient at this stage to sum up the results of our discussion, so far made, which are as follows :

- (1) That the lease of 1919 was a valid transaction, not vitiated by fraud, coercion, misrepresentation or mistake.
- (2) That the defendants went into possession of the disputed underground under the said lease and were put in such possession by the plaintiff's predecessor as lessor.
- (3) That a valid relationship of landlord and tenant was created between the parties by the said lease of 1919 and
- (4) That the decision in the 1936 suit has not effectively negated Panchakote's title to the said underground and would not merely by itself entitle Searsole to claim superior or independent title as against Panchakote; and, in the background of these findings, we shall now proceed to consider the remaining question of estoppel.

22. The plea of estoppel arises u/s 116, Evidence Act. This has been accepted by the learned Subordinate Judge and the defendants-appellants have been held estopped to deny the plaintiff's title and claim title in themselves. The learned Judge has held that the defendants are under the plaintiff who is their landlord in respect of the underground of the disputed Mouza Duburdihi. He has further held

that they were put in possession of the said underground by the plaintiff's predecessor and he has concluded that the defendants-appellants are estopped from disputing the plaintiff's title. Obviously, the learned Judge had in mind Section 116, Evidence Act, and he applied the same.

23. It has been contended before us that the section (Section 116 of the Indian Evidence Act) has no application to this case and no question of estoppel would, therefore, arise. In the facts of this particular case, this contention requires very careful examination.

24. We have held above that the Kabuliyat (Ext. 2) is a valid document. There was also the corresponding patta (Ext. E). The two together purported to create a lease and nothing can be urged against the validity of the transaction. Prima facie they created a relationship of landlord and tenant between the parties and, as the title disputed is clearly the landlord's title at the beginning of this tenancy, the stage appears to be well set for the application of the section.

25. Mr. Chatterjee, however, contended that having regard to the property, dealt with by the above two documents, (Exs. 2 and E), and the nature of the right, given thereunder, namely, the "underground coal" and the right to extract coal, the transaction would not strictly be a lease,--at least, not a lease under the Transfer of Property Act, -- but a mere license for taking coal or, at the most, the grant of a "profit a prendre" which would not attract the first part of Section 116 which has apparently been relied on by the learned Subordinate Judge. He urged further that the defendants did not obtain possession of the underground from the plaintiff or his predecessor but were in possession of the same from before the 1919 lease and, accordingly, the section would have no application, and, thirdly that, by reason of the decision in the 1936 Title Suit, there was eviction by title paramount or the equivalent of it or at least breach of the covenant of quiet enjoyment on the plaintiff's part, either of which would exclude the application of the section (Section 116) and of the law of estoppel as between landlord and tenant or between licensor and licensee.

26. We are unable to accept any of the above contentions.

27. The transaction of 1919 (vide Exs. 2 and E) was clearly a mining lease and the broad proposition of Mr. Chatterjee that a mining lease is not a lease under the Transfer of Property Act is plainly unacceptable. It is unsupportable on principle and also opposed to authorities.

28. The subject-matter of the transaction was the "coal land" or "underground coal" of Mouza Duburdihi. That certainly included the seams of coal and the bed thereof, which, even apart from the user of the surface, necessarily involved the working of the coal, would by themselves come within the description of "immovable property" under the Transfer of Property Act. In this Act (vide Section 3) or in the Indian General Clauses Act (vide Section 2(25)) which must be read as supplemental to it for this purpose there is no exhaustive definition of "immovable property". The "coal land" or the "underground coal", comprising the

seams of coal and the bed thereof is, like land, immovable. It has fixity of situation and immobility in the sense that it cannot be moved without destroying its integrity, as coal raised or extracted is certainly different from the "coal land" or the seam or seams, of which it formed an integral part, and the bed certainly cannot be moved. The "coal land", therefore, possesses all the essential attributes of "immovable property" and its description in terms of land which is an acknowledged, and indeed, the most common and important, form of "immovable property" is not inappropriate from this point of view. It would thus be "immovable property" and, as it does not come within the exceptions, mentioned in Section 3, Transfer of Property Act, it would be "immovable property" for purposes of either of the two relevant Sections 105 and 116 of that Act. Mr. Chatterjee's argument to the contrary must, therefore, fail.

29. The grantee Searsole had no doubt the right to extract coal and remove the same and thus appropriate the corpus minus the bed but this right of appropriation of part of the corpus which may result in its partial destruction or disappearance would not affect the nature of the transaction so as to convert it into something other than a lease (vide *Fala Krista Pal and Others Vs. Jagannath Marwari and Others*, or to go a step further, a lease under the Transfer of Property Act, as we shall presently see.

30. The two English cases, cited by Mr. Chatterjee, namely, (*Duke of Sutherland v. Heathcote*) (1892) 1 Ch. 475 (U) and *Watson v. Spratley* (1854) 10 Ex. 222 (V) do not carry him far. If, however English decisions had been of any real assistance in this matter, reference to the observations of Lord Cairns in *Gowan v. B. Christie*, (1873) 2 Sc & Div. 273 at p. 283 (W) and of Lord Blackburn in *Coltness Iron Co. v Black*, (1881) 6 A. C. 315 at p. 335 (X) would possibly have been more useful and appropriate. In view, however, of the decisions of the Judicial Committee in the cases of AIR 1931 299 (Privy Council) and AIR 1943 153 (Privy Council) , it is not open to contend in this appeal that mining leases are not leases under the Transfer of Property Act. The question has been very fully discussed by the Patna High Court in *Commr. of Income Tax B. & O. v. Kamakhav Narain Singh*, ILR 20 Pat 13 : (AIR 1940 Pat 633) (SB) (Z-1), which went up to the Judicial Committee in AIR 1943 153 (Privy Council) and appears to have been approved even on this point (vide at p. 189 of Ind App): (at p. 156 of AIR). We hold, therefore, that mining leases would not be outside the normal concept of a lease and would come well within the Transfer of Property Act and, accordingly, under the transaction of 1919 (vide *Kabuliyat Ext. 2* and *Patta Ext. E*), the defendants became tenants under the plaintiff's predecessor in respect of the disputed underground of Mouza Duburdihi. Even assuming that the defendants were not tenants, strictly so called, and the present case would not come under the first part of Section 116, there is no reason why it would not attract the second part of the section in view of our finding on the question of possession, and estoppel to deny right to possession instead of title would not be of much consequence in the present case as either would entitle the plaintiff to claim rent, royalty etc. from the defendants.

31. The position would undoubtedly be different if the appellants succeeded in showing that there has been eviction by title paramount or something equivalent to it or even if there has been really any effective breach on the plaintiff's part of his covenant of quiet enjoyment so as to disentitle him (the plaintiff) to raise the plea of estoppel: vide *Ram Chandra Chatterjee v. Pramath Nath Chatterjee* 35 Cal LJ 146: (AIR 1922 Cal 237) (Z2). We do not, however, think that any" of these elements has been made out in the present case. The decision in *T. S. 37* of 1936 is not, as found by us, conclusive on the point of title as against the plaintiff. Admittedly also, the defendants' possession has not at all been disturbed and, indeed, there was not the least possibility of any such disturbance as, even in the 1936 suit, the title to the underground was found to have been in the defendants. There was only a threat of disturbance but the threat was avoided on a ground which was found available to the defendants apart from protection from the plaintiff. They no doubt relied also on such protection but it was eventually found unnecessary and the matter was not pursued to its logical end. In these circumstances, we are unable to hold that there has been either eviction by title paramount or the equivalent of it, or any breach of the covenant of quiet enjoyment so as to enable the defendants to evade the bar of estoppel u/s 116, Evidence Act.

32. There can be no doubt that the title which was sought to be denied in the present case was the landlord's title at the beginning of the tenancy the plea being that the landlord had no title at that time, he having parted with it long ago. We have found also that the tenants dsfendants were let into possession by the plaintiff landlord and that there has been no eviction by title paramount or the equivalent of it or any breach on the landlord's part of the covenant for quiet enjoyment. Clearly, therefore, Section 116, Evidence Act applies, all its requirements having been rigidly proved and nothing being established to exclude its application.

33. In the above view of the matter, the defendants must be held estopped from denying the plaintiff's title to the leasehold underground or to set up title in themselves as against the plaintiff and the question of title thus requires no discussion on the merits. Indeed, this question of title has not also been sufficiently argued before us. We may add that our view on the question of estoppel is well supported by an early decision of the Bombay High Court vide *Patel Kilabhat Lallubhal v. Hargovan Mansukh I. L. R. 19 Bom. 133* (Z3) and also by the decision of the Judicial committee in the case of AIR 1933 29 (Privy Council) and of the Supreme Court as well in the recent case between the present parties Civil Appeal No. 91 of 1949, D/- 18 1 1952 (SC) (25). Reference in this connection may also be made to the decision in the case of AIR 1927 151 (Privy Council) , where a real owner who had accepted a tenancy from a person without title was held estopped from denying the latter's title and setting up title in himself. The decision in the case of *Secy. of State v. Krishnamoni Gupta*, 29 Ind App 104 at pp. 114 117 (PC) (Z7), also, though not very direct, lends support to the above view.

34. We may add further that, in view of our finding on the question of the source of the defendants' possession of the disputed underground, it is unnecessary, -- as was also the position before the Supreme Court in Civil Appeal No. 91 of 1949 D/-18-1-1952 (SC) (Z5) between these parties, referred to in the preceding paragraph, -- to discuss the further question whether, for attracting Section 116, Evidence Act, the landlord, pleading estoppel, has to show that the tenant, against whom estoppel is set up, was let into possession of the disputed property by him (the landlord), but we may just mention that there is good authority for holding that the said section (Section 116, Evidence Act) postulates no such requirement and it applies irrespective of the fact that the tenant at the time of creation of the tenancy was or was not in possession of the demised property, vide AIR 1937 251 (Privy Council) , explaining the earlier decisions, apparently holding the contrary; vide also the judgment of Seshagiri Aiyar, J. in the Madras Full Bench case of Venkata Chetty v. Aiyanna Goundan ILR 40 Mad 561 at pp : (AIR 1917 Mad 789 (Z9). It will not also be out of place to mention that, amongst the reported cases, there is one having close resemblance to the present and clearly relevant, so far at least as the point of estoppel and also the appellants' plea of res judicata are concerned. That case is reported in Bhagavatulla Krishna Rao Vs. Mungara Sanyasi and Others, (Z10) and the decision there unmistakably supports our conclusion on either of the above two points.

35. It is unnecessary to discuss further the point of estoppel. We have stated our conclusion and mentioned authorities in support of the same. We would now end this part of our discussion by referring briefly to the other cases, cited during argument on this point.

36. The appellants sought support from three cases of this Court 35 Cal LJ 14C (Z2) Jogendra, Lal v. Mahesh Chandra ILR 55 Cal 1013 : (AIR 1920 Cal 32) (Z11) and Kumar Raj Krishna Prosad Lal Singh Deo Vs. Barabani Coal Concern Ltd. and Others, , arid three cases of the Madras High Court, Alaga Pillai Vs. Ramaswami Thevan and Others, (Z13) and S. Chokkalingam Pillai and Another Vs. M.S.S.M. Ganesa Shanmugasundaram Pillai, (Z14) and K.S.M. Guruswami Nadar Vs. N.G. Ranganathan, (Z15). The reliance, however, appears to have been misplaced. It is undoubtedly true that, in the cases cited above, the main principles, underlying this law of estoppel between landlord and tenant, were elaborately examined in the light of leading authorities, but it is difficult to see how they or any of them would assist the appellants in the present case. None of those cases purports to hold that the tenant would be entitled to deny the landlord's title even though there was no eviction, actual or constructive, by title paramount. They merely emphasise that, where there is such eviction and the landlord fails to protect the tenant, the estoppel would cease. The eviction, no doubt, need not be actual and a real and genuine threat by a third party followed by submission by the tenant, e. g. attornment under compulsion, would be enough to enable him (the tenant) to override this estoppel against the landlord. More than that we are not prepared to read in any of those decisions, but, unless more is read,

they would not be of any assistance to the appellants. The same remarks apply to the Privy Council case of AIR 1949 124 (Privy Council) , to the extent that it is relevant here. At the most, the appellants themselves may purport to claim title to the underground vis-a-vis their landlord Panchakote but that would certainly not involve any eviction or threat of eviction which at least implies quitting against the tenant's will or some real or tangible threat to throw out the tenant against his will and/or avoidance of such threat by the tenant by some sort of submission under compulsion. In the present case the tenants (appellants) had to face no such situation. There could not have been any legal process against the appellants for eviction which they could not have lawfully resisted. Having title in themselves, they had no chance of being evicted or losing possession unless they themselves chose to quit. If their purchase from the Beros had not been earlier but had to be made as a result of or under threat of the 1936 suit or any like proceeding, the position might well have been different but, as matters stand, they (the appellants) cannot plead eviction or the equivalent of it or any adequate breach of the covenant of quiet enjoyment on the landlord's part. Even in the S. Chokkalingam Pillai and Another Vs. M.S.S.M. Ganesa Shanmugasundaram Pillai, (Z 14) which is the nearest to the appellants' contention, the threat of eviction was real and had to be avoided by the tenant by attornment to the third party owner under compulsion.

37. The appellants also relied on the statement of the law on the subject at page 157 (Art. 255) of the Seventh Edition (1947) of Poa's Landlord and Tenant but we do not find anything there different from what we have already discussed and found insufficient for the appellants' purpose. Nor do we think are the appellants any the more benefited by the other statement in the same book at page 461 (Article 740) to the effect that the tenant can show that the landlord's title "has expired or become defeated at a period subsequent to the demise" in view of our adverse finding on their plea of res judicata by reason of fee decision in the 1936 suit.

38. Two other cases cited by the appellants' learned Advocate also deserve mention, namely, Nesbitt v. Mablethorpe Urban District Council 1917-2 KB 562 (Z17) and N. Muhammad Hussain Sahib and Others Vs. Selambukara Abdul Gaffoor Sahib and Another, (Z18). Very strong reliance was placed by him upon the observations of Ballhache, J. at page 579 of the King's Bench report running as follows:

"The doctrine of estoppel which operates between landlord and tenant has no application to the same parties even while the tenancy exists when the question of title arises between them not in this relationship of landlord and tenant but of vendor and purchaser" and the present case was sought to be brought within the ambit of the said observations by pointing out that the appellants were really claiming to set up title as purchaser from the plaintiffs grantees the Goswamis of Bero. AIR 1945 Mad. 321 (Z 18) was cited as an illustration where the principle, underlying the above observations of Ballhache, J., was applied."

39. It seems to us, however, that this argument overlooks the very important qualification, laid down by Ballhache, J. himself,--and which was reiterated in the Madras case AIR 1945 Mad 321 (Z 18) too,-- namely, "when the question of title arises not in the relationship of landlord and tenant but of vendor and purchaser", which at least means that the observations however relevant in suits on title"-- and both the cases cited were suits on title -- would not apply to suits, based on the relationship of landlord and tenant. The present suit which is a charge suit for rent etc., is certainly not a suit on title but is definitely a suit, based on the relationship of landlord and tenant. On this ground alone the appellants' argument, founded upon the quoted observations, must fail. The same view appears to have been taken and the same distinction emphasised and adopted in K.S.M. Guruswami Nadar Vs. N.G. Ranganathan, (Z 15), already cited, at page 405, although the ultimate decision there on this question was in the tenant's favour as eviction by title paramount, or, rather, the equivalent of it, was actually found.

40. As to the remaining point, raising the question of limitation with regard to personal decree for a part of the plaintiff's claim, it is enough to say that, as usual, the liberty given to the plaintiff by the preliminary decree to apply for a personal decree of a provisional character, namely, that it will be available only "where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force" which, of course, includes the law of Limitation. The plea of limitation in this regard will, therefore, be open to the appellants at the time the personal decree is applied for and/or sought to be made and it will have to be considered by the court, passing such decree, at that time. We do not, therefore, express any opinion on the merits of this contention of the appellants,

41. In the result, we hold that this appeal would fail. It is, accordingly, dismissed with costs.

R.P. Mukherjee, J.

42. I agree.