

(1971) 12 CAL CK 0014

In the Calcutta High Court

Case No : Letters Patent Appeal No. 9 of 1971

M.S. Ram Singh

APPELLANT

Vs

Bijoy Singh Surana and Another
and Another Vs M.S. Ram Singh

RESPONDENT

Date of Decision : 17-12-1971

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 10
Evidence Act, 1872 — Section 64
Registration Act, 1908 — Section 17(1)
Transfer of Property Act, 1882 — Section 111, 115

Citation : AIR 1972 Cal 190 : 76 CWN 217

Hon'ble Judges : Sankar Prasad Mitra, J; Salil Kumar Datta, J

Bench : Division Bench

Advocate : Ranjit Kumar Banerjee, Rama Prasanna Bagchi, Snehansu Sekareswar, Hirendra Chundur Ghosh, Gautam Prasad Chatterjee and Samindra Chandra Ghosh, for the Appellant;

Final Decision : Allowed

Judgement

Salil Kumar Datta, J.—This is an appeal by the tenant defendant under Clause 15 of the Letters Patent The suit was dismissed by the learned Judge, Third Bench. City Civil Court, Calcutta. On appeal Chittatosh Mookerjee. J. set aside the judgment and decree under appeal and decreed the suit.

2. The case in the plaint is as follows: The defendant was a monthly tenant under the plaintiff Oswal Jain & Co.. in respect of certain rooms and one kitchen in the fifth floor of premises No. 7/1C. Lindsay Street, Calcutta (described in the schedule to the plaint and hereinafter referred to as the suit premises) at a monthly rent of Rs. 223.84p, the tenancy being according to English calendar month. The tenancy was determined by notice to quit, duly served on the defendant, with expiry of September, 1961. It was alleged that the defendant had sub-let his tenancy without the previous consent in writing of the plaintiff and as such was not entitled to any protection under the West Bengal Premises

Tenancy Act, 1956. The suit was accordingly instituted on December 7, 1961 claiming a decree for recovery of possession of the suit premises.

3. The suit was contested by the defendant who filed a written statement contending inter alia that the plaint was vague and misleading in material particulars and did not disclose any cause of action. It was further alleged that there were two sub-tenants since before the 1956 Act with the knowledge and consent of the landlord. The legality, validity and sufficiency of the notice and its service were also challenged. The defendant in the premises submitted that the suit should be dismissed.

4. The suit proceeded in its course and the following issues were framed by the Court on April 2, 1962.

1. Has the tenancy been determined by notice to quit?
2. Has the defendant sub-let, assigned or transferred Ms tenancy with consent in writing?
3. Is the plaintiff entitled to a decree for recovery of possession?
4. To what reliefs, if any, the plaintiff is entitled?

On June 28, 1963. Smt. Sukhdevi Kumari Surana filed an application stating that the plaintiff was the lessee of the premises No. 7/10, Lindsay Street, Calcutta under the owners, the Trustees to the Estate of Seth Mannalalji Surana Memorial Trust. The plaintiff surrendered his lease with all its existing right on May 15, 1963 and after surrender, the Trustees had leased put the premises to the applicant with right to continue the present suit. In the circumstances the applicant prayed for being substituted in the place of the plaintiff. The application was heard on July 5, 1963 when the defendant contended, as it appears from the order sheet of the suit, that in view of the documents the applicant had not the carriage of the suit although she might be the legal owner of the leasehold property. The trial court on the said date allowed the application without prejudice to the merits of the cases of the parties. The plaint was directed to be amended and was amended recording only that Sm. Sukhdevi Kumari Surana was substituted in place of the original plaintiff, as prayed for by her in her said application. An additional written statement was filed by the defendant after the amendment wherein he contended that the suit was not maintainable by the present plaintiff nor had she the right to proceed with the suit and further there was no relationship of landlord and tenant between the parties. Two additional issues were thereafter framed by the court as follows:

5. Is there any relationship of landlord and tenant between the parties?
6. Has the substituted plaintiff right to continue the suit?

5. The suit was tried on evidence along with another ejectment suit between the parties when inter alia, an unregistered deed of surrender dated May 15, 1963 and a registered lease dated July 2, 1963. were proved by the plaintiff's only

witness and marked exhibits 7 and 6 respectively. The trial court held that there had been sub-letting as alleged in the plaint and notices were legal and valid and duly served. It was further held that the substituted plaintiff became landlord of the defendant in view of the documents, but as the deed of surrender was not registered it could not affect any Immovable property nor be received in evidence affecting such property. There was thus no assignment, creation or devolution of right to continue the suit within the meaning of Order 22, Rule 10 of the Code. The substituted plaintiff could not thus ask for decree on the basis of the notice served by the original plaintiff nor had she the right to continue the suit. It was also held that it was doubtful whether the relationship of landlord and tenant could be established between the substituted landlord and the statutory tenant. The suits, heard analogously, for the same reasons were dismissed.

6. Appeals were preferred in this Court against the said decrees by the substituted plaintiff and were heard analogously before Chittatosh Mookerjee. J. It was found by Mookerjee. J., that the original plaintiff was a monthly tenant and had admittedly yielded up the estate held by it in favour of the trust-tees. The said surrender was accepted and acted upon by the tenant and the landlord and it was not open to the defendant to dispute it. It was further held that by the surrender of the original plaintiff followed by the creation of a new lease in favour of the substituted plaintiff, there was a creation of interest in her favour within the meaning of Order 22, Rule 10. Accordingly she was entitled to be brought on record and to proceed with the suits. The finding of the trial Judge to the contrary, on the face of his finding that the substituted plaintiff became the landlord of the defendant by operation of law. was contradictory and untenable. The contention of the defendant that the transferee of the legal representative who was never brought on record, was not entitled to apply under Order 22, Rule 10 was not accepted. On the authority of Anil Chandra Banerjee and Another Vs. Gopinath Mukherjee and Others, , it was held that such transferee as the substituted plaintiff in the present case, could be brought on record u/s 146. Bringing the trustees on record and thereafter the substituted plaintiff would be a pointless formality and there was no illegality in straightway substituting the present plaintiff who was entitled to proceed with the suit. It was also held in this case that the defendant sublet the suit premises without consent in writing of the landlord and was not entitled to any protection. The suit was accordingly decreed while the other suit was dismissed as the ground for eviction was not established. The present appeal, by the tenant, arises from the judgment and decree passed against him as stated above.

7. Mr. Ranjit Kumar Banerjee, the learned Advocate for the tenant appellant, has raised several contentions assailing the judgment under appeal. His first contention is that the substituted plaintiff is not entitled to continue the suit. The right to continue the suit is claimed on the basis of a surrender by the original plaintiff of his interest to his landlord and subsequent lease of the suit premises to the substituted plaintiff. Even if there was a surrender, it was an extinguishment or effacement of the interest of the original plaintiff as lessee. As

such interest is wiped out. the lessor acquired no interest through the lessee as his legal representative nor was there any devolution or transfer of the interest of lessee to the lessor. By the surrender, however, the underlessee is brought under immediate relation with the lessor with the same incidents of tenancy u/s 115 of the Transfer of Property Act. Reliance was placed on the decision in *Ram Churn Singh v. Ranigunge Coal Association Ltd.* 25 Ind App 210 wherein surrender by a lessee was held to be a complete extinguishment of the interest of the lessee. Reliance was also placed on the decision in AIR 1934 105 (Privy Council) in which the Privy Council observed that the basis of the doctrine of surrender is the effacement of the widow's interest and not the ex facie transfer by which such effacement is brought about. Following this decision in *Mummareddi Nagi Reddi and Others Vs. Pitti Durairaja Naidu and Others*, it was observed that the basic principle upon which the doctrine rests is the self effacement by the widow or withdrawal of her life estate which opens the estate of the deceased husband to his next heirs at that date. In the case of lease, by surrender no interest of the lessee came on the lessor as it was effaced or extinguished while the underlessee is thereby brought under immediate relation with the lessor u/s 115 of the Transfer of Property Act, 1882.

8. Mr. Hirendra Chunder Ghosh, the learned Advocate for the substituted plaintiff, the respondent before us, referred to Section 111 of the Transfer of Property Act, 1882 which provides as follows:

Section 111. Determination of lease --A lease of Immovable property determines (e) by express surrender; that is to say in case the lessee yields up his interest under the lease to the lessor, by mutual agreement between them....."

Mr. Ghosh contends that surrender is not a complete extinction of the interest of the lessee, as the underlease is kept alive by Section 115 and the lessor steps into the shoes of the lessee as landlord in so far as the underlessee is concerned, who on surrender holds the same tenancy under the lessor. It is thus really a devolution or assignment of interest, as consequence of surrender under the statute, of the lessee's interest to the lessor in respect of the tenancy, attracting Order 22, Rule 10 of the Code. By the new lease to the substituted plaintiff, the lessor creates an intermediary interest between himself and the underlessee. upgraded by the surrender, to the status of a lessee, so that the substituted plaintiff claiming under the lessor could continue the proceedings in the same manner as the lessor could and there could be no dispute that the lessor in whom the interest of the original plaintiff devolved, was entitled to continue the suit in his name in view of the surrender. By the combined operation of Order 22, Rule 10 and Section 146, the suit in any event could be continued by the substituted plaintiff.

9. Surrender, under the statute, is the yielding up by the lessee of his interest to the lessor. In Woodfall's "Landlord and Tenant" Twenty Seventh Edition Vol. I pages 860-1. while considering surrender by express terms it is observed in

Article 1854.

"A surrender is the yielding up of an estate for life or years to him who has the immediate estate in reversion or remainder wherein the estate for life or years may merge by mutual agreement It differs from a release in this respect, that the release operates by the greater estate descending upon the less, whereas a surrender is the falling of a less estate into a greater."

Further in Article 1859. stating the requisites of a good surrender it is observed again.

"That the surrenderee has a higher and greater estate in the thing surrendered than the surrenderor hath, so that the estate of the surrenderor may be drowned therein."

The Privy Council in *Ram Churn Singh*. 25 Ind App 210 (PC) (supra) observed:

"The right of relinquishment is a privilege given to the tenants, by means of which they may restrict the lease and establish their tenure upon a new basis, or may extinguish the lease altogether."

It will thus appear that the surrender in law is the yielding up by the lessee of his interest in the lease and it thereby brings an extinction to the lease, so that the relationship of the parties to the lease comes to end. There is thus no subsisting interest of the lessee after its extinguishment by surrender, which may devolve or come on the lessor. If it were a question of devolution of interest of the lessee unto the lessor, the legal underlessee will automatically be the lessees immediately under the lessor.

This is however not so, and as otherwise the interest of the underlessee will determine with the determination of the original lease, the underlessee is given statutory protection of his interest under his new landlord, the lessor, on the same terms and conditions of his original tenancy. It is obvious therefore the underlessee becomes a lessee directly under the lessor with all incidents of his sub-lease and such relationship comes into existence under the operation of the statute, or surrender of the head lease and not by devolution or assignment by the lessee of his interest in the lessor.

10. It will be of interest to note that the reversion to which the lessor becomes entitled by surrender in respect of the underlease upgraded to the direct lease under him, is not the reversion on the underlease to which the lessee was entitled before surrender. As was observed in *Hill and Redman's "Law of Landlord and Tenant"* (15th Edition) Article 386 page 508.

"Surrender of the term does not destroy the right of the underlessees. As regards them, and as regards third parties generally, the surrender operates only as a grant subject to their rights and the term is treated as continuing so far as is required for preservation of such rights. This principle makes it necessary to provide for the substitution of a new reversion for the leasehold reversion has

been surrendered and also, in the case of a surrender and renewal for the validity of the renewed lease as against the underlessees. Under the Law of Property Act, 1925 (Section 139), the estate of the head lessor is deemed to be the reversion on the underlease to the extent and for the purpose of preserving such incidents to and obligations on the surrendered leasehold reversion as, but for the surrender thereof, would have subsisted."

Under Section 115 of Transfer of Property Act, a substituted reversion on the underlease in place of its reversion to the lease has been provided in favour of the lessor as the lessor has been made entitled to the rent and benefits of contracts binding on the underlessee, on surrender of the lease by the lessee. It is a reversion created by statute and not the reversion to the lease which became extinct on surrender.

11. There is thus no escape from the conclusion that no interest of the original plaintiff-lessee devolved on the lessor, and it was accordingly not competent for the lessor to continue the pending ejectment suit instituted by the lessee against the underlessee. There can be no dispute that the lessor, on surrender, has become by operation of law the lessor of the underlessee now upgraded as lessee with the same terms and conditions as the original lease and such right carries with it the right to institute suit of eviction by the lessor against such underlessee. The lessor can carve out his interest as lessor of this lease in favour of some one as was done in favour of the substituted plaintiff, who, in turn, will be entitled to sue in ejectment on determination of this lease in a regular manner. Such interest again will be an independent and separate interest altogether created in favour of the intermediate lessee. That however does not mean that the lessee's interest devolved on the lessor and through him to the substituted plaintiff so as to enable her to continue the ejectment suit. As we have seen by the surrender the interest of the lessee became extinct and there was thus no interest in existence which could devolve on the lessor and through him to the substituted plaintiff. The suit accordingly is not maintainable by the substituted plaintiff.

12. Mr. Ghosh contended that the surrender was accepted and acted upon and the defendant as underlessee had no concern or right to challenge such surrender. On such surrender, accepted and acted upon the lessor, the Trustee, became entitled to the interest of the lessee and by the subsequent lease in favour of the substituted plaintiff, there was a creation of intermediary interest in her favour, so that she was entitled to be brought on record and entitled to proceed with the suit. This contention found favour with the first appellate court while decreeing the suit. As already seen, the position in law is that by surrender, the interest of the lessee is completely obliterated, so that no interest of the lessee subsists after surrender. The said lessor on surrender by operation of law becomes the immediate landlord of the defendant and by the new lease, the substituted plaintiff in turn becomes such landlord in respect of the tenancy, which needs be determined before the suit for eviction could be instituted by the

intermediary lessee. It has been observed in Foa'a "General Law of Landlord and Tenant" (8th Edition) Article 1001 (page 639) as follows:--

"Article 1001. Position of underlessee---Underlessees not being parties or privies to the lease, their rights are not disturbed by the surrender of the lessee's interest.

Hence, where the lessee underlets a portion of the demised premises and afterwards surrenders his lease to the lessor, the latter cannot dispossess the underlessee without determining his interest in a regular manner"

There is accordingly nothing contradictory in the finding of the trial court that though the substituted plaintiff had become the landlord of the defendant, she is not entitled to proceed with the suit as the interest of the original plaintiff was destroyed by surrender and no interest devolved on the lessor and through him, to the substituted plaintiff.

13. Mr. Banerjee contended that In view of the position in law there was no scope for the substituted plaintiff to be brought on record in place of the original plaintiff either under Order 22, Rule 10 or Section 146 of the CPC or by the combined operation of the said provisions. Mr. Ghosh on the other hand contended that there was first a devolution of interest of the lessee in favour of the lessor, the Trustees. Accordingly the substituted plaintiff was entitled to have the carriage of the suit claiming through the lessor. Both parties referred to the decision in Saila Bala Dassi Vs. Sm. Nirmala Sundari Dassi and Another, . where the Supreme Court in construing Section 146, observed:--

"That section was introduced for the first time in the Civil P.C. 1908 with the object of facilitating the exercise of rights by persons in whom they come to be vested by devolution or assignment and being a beneficent provision should be construed liberally and so as to advance justice and not in a restricted or technical sense,"

Mr. Ghosh also relied on the decision in Anil Chandra Banerjee and Another Vs. Gopinath Mukherjee and Others, which laid down that u/s 146. an application or proceeding of a like nature can be taken by a transferee as could have been taken by the transferor, so that if a transferor could ask for substitution, his transferee could also make an application claiming through him u/s 146. Applying the principle in this case Mr. Ghosh submitted that even though the Trustees were not substituted, there was no bar to the substitution of the present plaintiff as transferee. A point was raised that Section 146 does not apply to pending proceedings for which the procedure would be under Order 22, Rule 10. The said provisions, however, do not apply, as no interest of the original lessee devolved or came on the lessor who again was not the applicant. As we have seen, in the findings we have arrived at, it is not necessary to consider this aspect at all as the interest of the original plaintiff extinguished on surrender and there was no occasion for any devolution or assignment of his interest to the lessor or any one else.

14. In the view we have taken, It may not be necessary to consider other contentions raised in the appeal. For disposal of the appeal, however, on all points, we feel called upon to consider the other interesting points raised in the appeal. Mr. Banerjee has contended that there is no pleading nor evidence in support about the alleged surrender by the original plaintiff. The case of surrender was made in the application for substitution, supported by the evidence of the plaintiff's only witness, who stated that the surrender took place on May 15, 1963 and after surrender there was an intermediary lease by the Trustees, the head lessor, in favour of the substituted plaintiff. The surrender as it appears from the deed of surrender Ex. 7 was not on May 15, 1963 but with the expiry of May 1963. It was contended that there could be no legal surrender in future. It was also contended that the deed of surrender being in writing was compulsorily registrable and not being registered is inadmissible in evidence. In absence of proof of title of the substituted plaintiff which it was incumbent on her to establish to obtain a decree for possession, the suit is liable to fail, apart from other consideration.

15. Mr. Ghosh has disputed the above contentions and submitted that there was ample pleading and proof of surrender by the original plaintiff and the subsequent lease to the substituted plaintiff. The factum of surrender was stated in the application for substitution and there was at no point of time any denial or dispute about the factum of surrender, rather than there was an admission by non-traverse. A new question of fact, now raised for the first time is not permissible. Mr. Ghosh further wanted the Court to ignore the date of surrender mentioned in the application as being on May 15, 1963. Basing his case even on oral surrender as no writing for such surrender is necessary, he submitted that in the case of substitution no further amendment of the plaint is necessary after the disposal of the application for substitution when the claim for substitution is decided on contest.

16. It appears to us that when there is a substitution on the death of a party to the proceedings, a note to that effect in the cause title may be sufficient. In cases where the substitution is claimed on the basis of any assignment, creation and devolution of title, it will be proper to insert necessary averments in the plaint by its amendment at proper stage enabling the contesting parties an opportunity to meet the claim as also the court for determination of the matters in controversy. If this course is not taken, it would result in incongruous pleadings, as in the instant case, as the original plaintiff has been substituted, the reference to the word "plaintiff" in the several paragraphs of the plaint stating the tenancy of the defendant and its determination can have no reference to the substituted plaintiff. The contesting party will have no occasion to deal with such claim in his written statement. There will also be no scope of any issues being framed thereon in absence of pleadings, and even the Court will have no occasion to determine the claim of the substituted plaintiff to the reliefs.

17. In the light of above discussion there is force in the contention of Mr.

Banerjee that in absence of pleading as to surrender, the substituted plaintiff's claim to have the carriage of the suit and to the reliefs prayed should have been rejected. It is obvious that there was no surrender on May 15, 1963 as stated in the application for substitution and in the evidence of P.W. 1. The deed of surrender recited as follows:--

".....Messrs Oswal Jain and Co. hereby surrender and yield up all its right, title and interest and possession as the Lessee in respect of the premises in favour of the Landlords (i.e. Trustees with effect from expiry of the last day of the month of May, 1963."

Such surrender is not legal or valid, nor being in terms with express surrender mentioned in Clause (e) in Section 111 which as we have seen, provides for immediate yielding up of the interest and a surrender in futuro is not warranted by law. Faced with this difficulty Mr. Ghosh asked us to read the document as a whole and also suggested that the surrender was oral, and no writing is necessary therefor. There is no dispute that a surrender takes place by yielding up of the interest of the lessee and no writing is necessary. Even so. nowhere in the pleadings or in the application for substitution there is a whisper of oral surrender at all or of surrender on a date other than May 15, 1963. Though in the application for substitution, the surrender is stated to have taken place on that date, which could be oral, the plaintiff's only witness stated in evidence that "that company (the original plaintiff) by this deed of surrender surrendered the monthly tenancy in favour of the Trust." As is well known, the plaintiff, in a suit for recovery of possession, must affirmatively prove that he is the rightful owner entitled to possession as enunciated in *Mohima Chunder Mozoomdar v. Mohesh Chunder Neogi*, 16 Ind App 23 at p. 26 (PC) and that the plaintiff must recover by the strength of his own title. The same principle was again enunciated in AIR 1949 278 (Privy Council) . There can therefore be no doubt that the plaint suffers from fatal infirmity, firstly because it contains no pleading of surrender and secondly if the pleading in the application be treated as a part of the plaint, such pleading of surrender and the evidence in support do not establish a surrender valid in law.

18. The next point urged by Mr. Banerjee is about the admissibility of the deed of surrender Ex. 7. A surrender need not be in writing, but if in writing. Mr. Banerjee contends, it must be registered as it purports to extinguish right, title and interest of the value of one hundred rupees and upwards, to or in immovable property, as provided in Section 17(1), under Clause (b) of the Indian Registration Act. 1908. Accordingly Ex. 7 was compulsorily registrable and in absence of such registration, the consequence will follow.

19. Mr. Banerjee referred to the decision in *Bengal Coal Co. Ltd. v. Monoranjan Bagchi*. AIR 1919 Cal 694 in which it was observed that a surrender or relinquishment does not require to be in writing but may be inferred from acts of parties. In *Abdul Majid v. Hari Charan Halder*. AIR 1919 Cal 840 it was held that a surrender is not required to be by an instrument registered. The same view was

taken in *Sari Debi v. Sailabala Dasi* AIR 1920 Cal 858. in which it was held that even though the original tenancy was created by a registered lease, its surrender would be valid if it is accepted and acted upon by the landlord. But in the present case, as the surrender was by instrument in writing it was compulsorily registrable as was held in *Nadig Neelakanta Rao v. State of Mysore* AIR 1960 Mys 87. It was held that as the instrument of surrender purports to extinguish the right of the tenant, valued at over Rs. 100/-, it is compulsorily registrable.

20. Mr. Ghosh disputed the contention and in his turn contended on the authorities of this Court cited above, that as the surrender was accepted and acted upon, as also evidenced by Exs. 6 and 7, no further instrument was necessary. He further contended that surrender was not an extinguishment of interest in Immovable property as contemplated in Clause (b) of Section 17(1) of the said Act. but as it was relinquishment of the lessee's interest, Clause (b) of Section 17(1) was not attracted. Further the interest of the original tenant was that of a monthly tenant and such tenancy does not require registration under Clause (d) and its surrender accordingly did not require registration. Mr. Ghosh also contended that the Ex. 7 did not by itself create, declare or extinguish any right as would appear reading the document as a whole and accordingly it came under the exception in Clause (b) of Sub-section (2) of Section 17. On that ground the decision in *Nadig Neelkanta Rao*, AIR 1960 Mys 87 (*supra*) was sought to be distinguished.

21. As we have seen, surrender is an extinguishment of the lessee's interest and there is no dispute that value of the interest would be over Rs. 100/-. The document recites a surrender in praesenti and even if the surrender purports to be effective on a further date, it would make no difference on this aspect for the purposes of registration. Clause (b) of Section 17(1) includes all instruments which purport or operate to create, assign, limit or extinguish whether in present or in future any right, title or interest of value of Rs. 100/- and upwards, to or in Immovable property. Apart from the surrender as evidenced by the document Ex. 7 and the evidence in support thereof there is no other pleading or evidence in support of oral surrender nor it is dependent on any subsequent document. The document Ex. 7, as we have seen, purports to extinguish the interest of the lessee in his tenancy, and though a surrender on a future date as contended it is an invalid surrender, for the purpose of Section 17(1) of the Indian Registration Act, the document is compulsorily registrable and is not excepted by any of the provisions of the Act.

22. The next point for consideration is the effect of non-registration of the instrument of Ext. 7. Mr. Banerjee contended that as the document Ex. 7 was compulsorily registrable. in absence of registration, the document is inadmissible in evidence. u/s 49. a document required to be registered, unless registered will not be received as evidence of any transaction affecting such property except that the document may be received as evidence of any collateral transaction not required to be effected by registered instrument. Mr. Ghosh. however, contended

that the appellant should not be allowed to raise this issue after the document has been exhibited and marked as an exhibit. Such objection should have been taken at the earliest opportunity so that the party concerned could have taken steps for registration, for which in the present case, the prescribed period of registration was yet to expire. Mr. Ghosh further contended that the provisions of Section 17(1) strike at the documents and not at transactions and reliance was placed on the decision in *K. Panchapagesa Ayyar and Another Vs. K. Kalyanasundaram Ayyar and Others*, . The provisions of the Registration Act cannot render invalid an oral surrender which does not require any written instrument at all. Mr. Ghosh also referred to Section 48 which provides for the cases where registered documents take effect against oral agreements. Mr. Ghosh however based his real objection on the proviso to Section 49. contending that the document could be treated as evidence of any collateral transaction not required to be effected by registered instrument.

23. There is no doubt that the objection as to the admissibility of the document has to be taken at the earliest stage of hearing. As Mr. Banerjee has pointed out, such objection relates to the mode of proof of documents, where if such objection was taken, the party concerned could adduce stricter formal proof. If however, the objection relates to the admissibility of the document itself under the law, such objection is available to the party even at the appellate stage. This seems to be the effect of the observations made by the Privy Council in *Gopal Das v. Sri Thakurji* (1943) 47 CWN 607 at p. 613. As to the contention regarding Sections 48 and 49, it appears that while Section 48 has no application, the proviso to Section 49 also does not support the contention of Mr. Ghosh. as in this case there is no collateral transaction other than surrender.

24. Mr. Ghosh has lastly contended that if the application for substitution is found as not maintainable, the original plaintiff should be allowed to proceed with the suit. It is obvious that the order of the trial court in allowing substitution without prejudice to the merits of the cases of the parties and keeping the question open is wrong and contrary to the principles of provisions of Rule 5 or Rule 10. Order 22 of the Code. The trial court, on hearing, found that the substituted plaintiff was not entitled to proceed with the suit and accordingly the suit was dismissed. No appeal was preferred by the original plaintiff against the decree and at this stage, it is no longer possible to put the clock back as submitted by Mr. Ghosh. as the decree of the trial court which has been final and binding on the original plaintiff cannot now be reopened and it was open to the original plaintiff either to prefer an appeal or to be added as appellant in the appeal under provisions of Order 41, Rule 20 of the Code in proper time.

25. In the result this appeal succeeds and is allowed, the judgment and decree under appeal are set aside and those of the trial court are restored. There will be no order for the costs of this appeal.

Sankar Prasad Mitra, J.

26. I agree.