
(1942) 09 PAT CK 0007
In the Patna High Court

Raja Sri Shiva Prasad Singh

APPELLANT

Vs

Lalit Kishore Mitra and Others

RESPONDENT

Date of Decision : 10-09-1942

Acts Referred:

Evidence Act, 1872 — Section 92

Citation : AIR 1943 Patna 152

Hon'ble Judges : Fazl Ali, J;Chatterji, J

Bench : Full Bench

Judgement

Fazl Ali, J.—This appeal arises out of a suit instituted by the appellant, Raja Shiva Prasad Singh of Jharia, in the Court of the Subordinate Judge of Dhanbad to recover a sum of Rs. 51,509-14-3 from the defendant-respondents in the following circumstances: On 2nd April 1908, one Raja Durga Prasad Singh, the plaintiff's predecessor-in-interest let out 300 bighas of land in mouza Dhansar to defendant 1 for mining coal. The terms on which the land was let out are set out in full in a kabuliyafc (Ex. 6) which was executed by defendant 1 in favour of the Raja and included the following provisions among others:

(1) That the lessee shall pay a sum of Rs. 2400 as yearly rental in four equal instalments payable respectively in the months of Asarh, Aswin, Pous and Chaitra. (2) That the aforesaid rent shall not be enhanced or reduced on any account. (3) That no plea of payment shall be accepted without production of such printed receipts as might be granted by the lessor to the lessee according to the practice prevailing in the lessor's estate. (4) That the lessee shall be bound to pay the road and the public works cess and also interest at one per cent, per month on the arrears of rent and cess. (5) That if surface land was required for carrying on the work of the colliery, the lessee shall pay Rs. 5 per bigha if the land in question was culturable paddy land and dobari land and Rupees 2 per bigha if it was uncultivated wasteland (patit). (6) That the lessor shall be supplied by the lessee two tons of coal per month for the purpose of fuel, the approximate value of such coal being fixed at Rs. 3 per ton. (7) That to secure

the payment of the rent due to the lessor and cess, the leasehold coal land and mine as well as the machinery and building put up by the lessee and the moveable properties which may be within the building shall stand hypothecated.

2. The plaintiff claimed in the suit rent and cess with interest from 1331 to chaitra kist of 1342 after making certain deductions for the payments made by defendant 1 to the plaintiff during this period. He further claimed surface rent for the same period in respect of 109 bighas 2 kathas and 6 ehataks of land which was said to be in the occupation of defendant 1 through his sub-lessees the other defendants. There was lastly a claim for the price of fuel coal for six years on the ground that the same had not been paid by the defendants. The claim was made not only against defendant 1, the lessee, but also against defendants 2 to 9 who were impleaded as his sub-lessees and it was urged that the amount due to the plaintiff in regard to the underground rent as well as the surface rent should be declared to be a first charge on the leasehold property (vide para. 14 of the plaint). The suit was resisted by all the defendants, but the chief contest was on behalf of defendant 1. The first point raised by this defendant in his written statement was that the plaintiff's claim for rent at the rate of Rs. 2400 per annum was not maintainable. It was pleaded that in or about the year 1910 there being a slump in the coal market, one Bejoy Kundu, who was then the sub-lessee of defendant 1, relinquished his interest under the sub-lease on the ground that the coal within the leasehold area was not marketable. Thereupon, this defendant told Raja Durga Prasad Singh, the original lessor, that he would also relinquish his leasehold interest, unless the rent was reduced. Raja Durga Prasad Singh thereupon after some discussion agreed to accept in lieu of the rent provided in the lease a commission payable at the rate of two annas per ton on the coal raised and dispatched from the land subject to a minimum royalty of Rs. 1200 a year. The present plaintiff also having agreed to this new term defendant 1 had been regularly paying the annual minimum royalty or commission as stated above. Such being the case of defendant 1 he contended that he had acquired a right to hold the land in suit on a commission¹ of two annas per ton with a minimum royalty of Rs. 1200 and the principles of waiver, acquiescence and estoppel prevented the plaintiff from realising any higher amount. In regard to the plea of estoppel the actual statement made by defendant 1 in his written statement was as follows:

That with reference to the allegations made in paras. 8 and 9 of the plaint this defendant states that in accordance with the agreement of 1911 to reduce the rent to minimum royalty and relying thereon this defendant granted an under-lease of the entire leased area in the name of Sewdhan Mull Marwary since deceased at an annual minimum royalty of Rs. 1200 and commission of 3 annas per ton which this defendant would not have done but for the said agreement. The said interest of Sewdhan Mull Marwary has been in possession of the other defendants in this suit.

3. Defendant 1 also pleaded another oral agreement. It was contended by him

that in the year 1908 he had become the retained pleader of the Jharia Raj on a monthly retainer of Rs. 400 and that he had continued to act as such till September 1933. After his appointment as the Raj pleader it was agreed as between him and Raja Durga Prasad Singh that the amount payable by him by way of rent and royalty in respect of the coal lands of Dhansar as well as certain other collieries would be adjusted as against the amount due to him on account of his fees and retainer. This arrangement continued during the lifetime of Raja Durga Prasad and upon his death a similar agreement was arrived at between defendant 1 and the plaintiff. In 1919, the widows of Raja Durga Prasad Singh instituted a suit in the Court of the Subordinate Judge of Alipur against the plaintiff claiming the entire Jharia estate and other properties left by their husband. The plaintiff thereupon requested the defendant; to take full charge of the case and began to supply the defendant with funds from time to time to meet the heavy expenses of the litigation. The defendant afterwards submitted to the plaintiff certain accounts (these accounts being described as accounts Nos. 1 to 15 in the written statement) which set out all the items of receipt and expenditure and which also showed that a considerable amount was due to defendant 1 from the plaintiff on account of fees as well as money spent by him on behalf of the plaintiff "from his own pocket." These accounts, to the best of the defendant's information, were examined by the plaintiff and were under his orders duly incorporated in his account books. These accounts according to defendant 1 constituted a sufficient answer to the plaintiff's claim and he set out his case on this point more precisely in the following words in his written statement:

That this defendant submits that on account of Calcutta expenses, fees and travelling expenses there was on 14th November 1924 a balance of about 25,000 due to this defendant from the plaintiff and the amount actually due from this defendant up to that date on account of rents and royalties has been paid and discharged from out of the said dues of this defendant from the estate according to the agreement stated above and by way of accord and satisfaction.

4. Defendant 1 further pleaded that on account of the agreement between the parties in regard to the adjustment of mutual dues no interest was payable by the defendant and as to the claim for cesses his case was that he had paid them directly to the Government and the plaintiff was not entitled to claim them from him. Defendant 1 also pleaded that the plaintiff could not claim surface rent as he was not in occupation of any surface land and that in any event his claim for such rent beyond six years prior to the date of the institution of the suit was barred by limitation. The other defendants pleaded in their written statement firstly that there was no privity of contract between them and the plaintiff; secondly, that no valid charge had been created upon the lease-hold property and thirdly, that the plaintiff's claim for surface rent was without any legal basis and in any event they did not have in their possession 109 bighas 2 kathas and 6 chataks of surface land but were in possession of certain small areas.

5. The learned Subordinate Judge framed no less than 11 issues upon the pleadings of the parties which being set out in his judgment need not be reproduced here. It is sufficient to say that apart from the minor questions regarding the surface rent and cess, etc., the principal issues which had to be tried between the parties were those which arose out of the allegations made by defendant 1 regarding two oral agreements, one as regards the variation of the rent and the other as regards the mutual adjustment of the plaintiff's dues as against the dues of defendant 1. As regards the question of the variation of rent it has been contended on behalf of the plaintiff that no evidence is admissible to prove the existence of the agreement relied upon by the defendant under proviso 4 of Section 92, Evidence Act. This section provides that:

When the terms of any such contract, grant, or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms.

6. Again, proviso 4 which goes with the section runs as follows:

The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property, is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

7. It is contended on behalf of the plaintiff that inasmuch as the kabuliyat upon which defendant 1 bases his title is a registered document and contains a clear stipulation as to the payment of rent, therefore under proviso 4 the existence of a distinct subsequent oral agreement modifying the original contract as to rent which is embodied in the registered kabuliyat cannot be proved. In *Mayandi Chetti v. Oliver* (98) 22 Mad. 261 the lessor of a certain land which was held by the lessee under a registered deed of lease had agreed to a reduction in the rent. The agreement was not reduced to writing but rent was thereafter paid and accepted at the reduced rate. The lessor afterwards brought a suit to recover arrears of rent at the rate reserved in the registered lease whereupon it was held that notwithstanding the fact that the lessee had paid rent for a period of nearly nine years, that is to say, from 1886 to 1891 u/s 92, proviso (4), Evidence Act, the agreement to accept a reduced rent could not be proved. It was pointed out in that case that the word "oral" in Section 92, proviso 4, Evidence Act, was used in the sense of being not reduced to writing and the words "oral agreement" in that section included all unwritten agreement arrived at by word of mouth or otherwise. This case which is greatly relied upon by the plaintiff seems to me to be directly applicable to the facts of the present case because the point which has been greatly emphasised on behalf of defendant 1 is that he had paid to the plaintiff and his predecessor a minimum royalty at a reduced rate for many years.

8. Similarly, in *Lakhatulla v. Bishwambhar Roy* (10) 12 C.L.J. 646 it was held that no oral agreement is admissible to prove variation of the terms of a registered lease including a term as to the payment of rent and that an agreement is nonetheless oral, because it is to be inferred from the conduct of the parties. The same view was taken in *Lakshmi Charan Majumdar Vs. Nabadwip Chandra Pandit*, and a number of other cases cited before us by the learned advocate for the plaintiff which need not be discussed, as proviso 4 of Section 92 itself is couched in such terms as admit of no ambiguity. Another difficulty in the way of defendant 1 is that even if it be held that Section 92, proviso 4 was not a bar to the reception of the evidence adduced by him, the evidence in question, if carefully analysed is by no means conclusive. Defendant 1 has filed a large number of rent receipts which are Ex. B series and which are printed at pages 271 to 276 of the paper-book. A reference to these receipts will show that up to the Aswin Kist of 1317 rent was realized from defendant 1 at the rate of Rs. 2400 per annum as provided in the lease. Exhibits B-7 to B-21 which cover a period of nearly six years (September 1911 to December 1917) show that defendant 1 paid during this period only a minimum royalty at the rate of Rs. 1200 a year and in one year he also paid some commission. The payments made under these receipts are corroborated by the entries in the account books of the plaintiff (Exhibit R series) and by some of the letters addressed by the plaintiff's agents to defendant 1 for instance D-4 and D-5 which are letters written respectively by the Cashier of the Jharia Raj and another employee of the Raj named Kali Pado Roy to defendant 1 wherein it is stated that rent receipts were enclosed for Dhansar and the amount of rent is stated to be Rs. 1200 a year. Again in 1913 in an instrument of sub-lease executed by defendant 1 in favour of one Sheodarmal Marwari in regard to the mining lease of Dhansar the following statement is made by him:

But as the coal market was dull I have not been able to settle it with any one else. For that reason I have prayed for obtaining reduction of jama to the Raja Bahadur, he has fixed the minimum royalty of Rs. 1200 instead of Rs. 2400 annually and I have been paying the minimum royalty year after year.

9. Similar statements were made by defendant 1 in certain other documents also, and after the litigation had been started against the present plaintiff by the widows of Raja Durga Prasad the receiver who was appointed to take charge of the estate during that litigation dealt with defendant 1 on the footing that he was liable to pay a minimum royalty at the rate of Rs. 1200 a year. There can be no doubt, therefore, that for many years defendant 1 did not pay rent at the rate of Rs. 2400 a year but paid a minimum royalty at the rate of Rs. 1200 a year. Thus, if there had been no other evidence before us, we would have probably felt no hesitation in pronouncing in favour of the agreement relied upon by defendant 1. But defendant 1 himself has made some strange statements on certain occasions and these statements which are by no means easy to reconcile indicate that in all probability no final agreement was entered into between the parties in regard to the variation of rent. It is to be remembered that the present case of defendant

1 is that what had been agreed between him and the plaintiff as well as his predecessor Raja Durga Prasad was that he would pay commission at, the rate of 2 annas per ton upon the coal raised subject to a minimum royalty of Rs. 1200.

10. In a letter, however, which defendant 1 wrote to the receiver on 2nd September 1928 (Ex. 5) his version as to the alleged variation of the rent was as follows:

These are however minor points, the most important point is about the commission at the rate of 2 as per ton which to the best of my recollection I never agreed to pay. The original lease granted to me contained a clause for the fixed annual rent of KB. 2400 and according to that agreement up to Chaitra 1317 B.S. I paid the rent or it was deducted from my dues. But when the coal market fell down and I got no profits from the colliery I approached this late Raja D.P. Singha who very kindly reduced the rent to Rs. 1200 per annum which it was agreed would be treated as minimum royalty. Later on I was asked to execute a kabuliyat undertaking to pay a commission at the rate of 2 as. per ton, but I did not agree to pay the commission at that rate which was payable by other lessees but I claimed a concession rate and hence I did not execute the kabuliyat; there might have been some correspondence and there might also be some order of the late Raja D.P. Singha on this point, but I do not find any in my office and hence I cannot say definitely what orders, if any, were passed by the late Raja. To the best of my recollection nothing was settled either as to the rate of commission or as to whether Rs. 2400 the original rent would be the maximum amount of annual royalty. If you will please look into the old records you may be enlightened on the point.

11. Defendant 1 now tries to disclaim responsibility for these statements and explains it in these words:

My son Sailaja is responsible for the wrong statement contained in Ex. 5 to the effect that I never agreed to pay 2 annas per ton commission. It is incorrect because my son wrote out that letter without fully realizing what I had told him. (To Court) I signed that letter as it was presented to me without reading its contents. That letter was not drafted by me but by Sailaja. Certainly, I did consider that letter to be important. I signed the letter without reading its contents because I thought that my son was competent to deal with such matters. I must have given him instructions in the matter but can't say if they were detailed instructions.

In 1911 Sailaja, my son, was a student. Sailaja was not present regarding the talk I had with Raja Durga Prasad Singh about the reduction of rent and royalty of Dhansar.

12. The statement made by the witness that the letter was composed by his son and he signed it without reading it is wholly unconvincing and I have no doubt in my mind that defendant 1 was the author of the letter and he fully knew what he was writing to the receiver. It appears that on 15th April 1937 nearly a year after

the institution of the present suit by the plaintiff, defendant 1 instituted a suit against the plaintiff in which he asked for a decree directing a lease to be executed by the parties giving effect to the alleged agreement between the plaintiff and defendant 1 for substituting for the original rent of Rs. 2400 a year, a commission of 2 annas per ton on coal despatched subject to a minimum royalty of Rs. 1200 per annum. Paragraphs 7, 8 and 9 of the plaint filed in that suit run as follows:

(7) That not being able to find other sub-lessees the plaintiff in order to avoid his liability in respect of the annual rent of Rs. 2400 requested the said Rajah Durga Prasad Singh about the end of 1910 or beginning of 1911 either to accept a surrender from the plaintiff of the said plot or to reduce the rent whereupon the said Rajah Durga Prasad proposed in lieu of the rent a minimum royalty of Rs. 1200 a year with royalty or commission at the rate of 2 annas a ton on all coal despatched from the said plot from the next Bengali year 1318 B.S.

(8) That the plaintiff agreed to pay the minimum royalty of Rs. 1200 a year but proposed to pay a commission at the rate of one anna per ton but the said Rajah Durga Prasad Singh refused to accept royalty at the rate of one anna per ton and ultimately in or about the month of October 1912 it was agreed by and between the plaintiff and the said Rajah Durga Prasad Singh that he would pay royalty at the rate of two annas per ton on all coal despatched with a minimum royalty of Rs. 1200 a year and it was further agreed that there would be a fresh lease on the terms of the original lease save and except that in lieu of the fixed rent of Rs. 2400 a year there would be a provision for commission payable at the rate of two annas per ton with a minimum royalty of Rs. 1200 per annum.

(9) That no fresh lease was however executed by the said Rajah Durga Prasad Singh but he always during the lifetime charged from the year 1318 B.S., minimum royalty in accordance with the agreement hereinbefore set forth in para. 5 of this plaint.

13. Again, para. 24 of the plaint is to the following effect:

(24) That the plaintiff submits that the aforesaid agreement to pay a commission or royalty at the rate of two annas per ton on coal despatched with a minimum royalty of Rs. 1200 per annum is a concluded agreement by and between the parties and is binding upon them and the plaintiff is entitled to specifically enforce the same. The plaintiff is ready and willing to join in the execution of the lease with the defendant or to obtain from the defendant a registered agreement varying the rent of Rs. 2400 into a commission or royalty of two annas per ton on all coal despatched with a minimum royalty of Rs. 1200 per annum and the plaintiff is ready and willing to execute a corresponding ekrar.

14. From these statements two points very clearly emerge. In the first place, it is quite clear that according to defendant 1 by October 1912 the discussions which were going on between him and Raja Durga Prasad as to the variation of the original rent had ripened into a concluded agreement and he had definitely

agreed to pay 2 annas per ton as commission on all coal despatched from his colliery with a minimum royalty of Rs. 1200 a year. If this statement is true, it is impossible to believe that in 1928 defendant 1 would have written to the receiver that there had been no such agreement between him and the Raja. The second point arises from the statements made by defendant 1 to the effect that it had been orally agreed that there would be a fresh lease incorporating the new agreement that in lieu of the fixed rent of Rs. 2400 a year defendant 1 will pay commission at the rate of 2 annas per ton with a minimum royalty of Rs. 1200 per annum. If this statement is true it seems strange that defendant 1 never pressed Raja Durga Prasad Singh for the execution of the fresh lease. It is to be remembered that defendant 1, who is a very senior advocate of the Purulia Bar must have been aware that unless there was a registered instrument incorporating the alleged oral agreement, it could not be enforced or proved.

15. In my opinion, the fact that no registered instrument was ever executed by the Raja shows that in all probability the alleged agreement was not a final one though minimum royalty was accepted during a certain period for some reason or other. The case of defendant 1 himself is that there was slump in the market and that led the Raja to reduce the rent. It may be that the reduced rent or royalty was intended to be in force only so long as the market was dull or there may have been some other agreement between the parties. In this connexion, one cannot ignore the fact that Raja Durga Prasad who is said to have finally agreed to the proposal made by defendant 1 in 1912 died in 1916 and a very prolonged litigation started soon after his death. While this litigation proceeded, the receiver who was in charge of the estate seems to have assumed that defendant 1 was liable to pay only royalty and defendant 1 continued to pay such royalty so long as it suited him. In 1929, however, when the receiver proceeded to charge commission upon the coal despatched, defendant 1 at once turned round and told him that there had in fact been no concluded agreement and asked him to look up the old papers. The fact is that the alleged agreement was never reduced to writing when Raja Durga Prasad was alive and the present plaintiff never made any clear admission that such an agreement had been concluded or was binding on him. In my opinion, upon the evidence taken as a whole, it is difficult to hold that the plaintiff is precluded from claiming the rent which is provided in the registered lease.

16. I have considered the evidence regarding the alleged agreement for the variation of rent notwithstanding the provisions of Section 92, Evidence Act, because one of the points raised on behalf of defendant 1 is that the only inference which can be drawn from the conduct of the plaintiff and his predecessor is that the stipulation as to the payment of rent in the lease had been waived and the plaintiff is estopped from claiming from defendant 1 anything more than the minimum royalty or commission at the rate of 2 annas per ton on the coal despatched. In my opinion, there can be no case of waiver on the evidence adduced in the case, because the evidence as to the conduct of the plaintiff does not conclusively prove that there was any final agreement about

the reduction of the rent.

17. On the question of estoppel, defendant 1 has a specific case which is set out in paragraph 41 of the written statement (quoted above). The learned advocate for defendant 1 contends before us that the principle of estoppel applies in this case, because the plaintiff's predecessor Raja Durga Prasad had by accepting the minimum royalty of Rs. 1200 for several years led defendant 1 to believe that he had agreed to the variation of rent and acting upon such belief he (defendant 1) had sublet the lands of Dhansar to Sewdhan Mull Marwari in 1922. It is said that defendant 1 would not have agreed to accept a minimum royalty of Rs. 1200 annually from his sub-lessee but for the fact that he had been induced by Raja Durga Prasad to believe that he was liable to pay not Rs. 2400 but Rs. 1200 only. The learned advocate appearing for defendant 1 also referred us to the kabuliyat of 1908 (Ex. N) by which defendant 1 had sub-let the same lands to B.N. Kundu and others on a minimum royalty of Rs. 4000 because at that time a sum of Rs. 2400 was payable by him to the Raja. As to how far the law of estoppel can override the provisions of Section 92, proviso 4, Dr. Mitter adopts as part of his argument the following observations made by a learned Judge in *Dhanna Ram v. Chhabi Das* (23) 72 I.C. 931 (Pesh.):

Section 115, Evidence Act, may no doubt override Sections 91 to 94 because the law of estoppel is one which must prevail against a rule of procedure only. If a person has by his act permitted the other party to believe that the agreement was other than that embodied in the document and has caused him to act upon that belief he cannot fall back upon the provisions of Section 92 and thereby escape from the consequences of his own action.

18. In my opinion, the answer to the contention put forward on behalf of defendant 1 is a two-fold one. In the first place, if in fact there was no concluded agreement between defendant 1 and the Raja as regards the variation of rent as suggested in Ex. 6 then it is idle to say that defendant 1 was induced to sublet the lands on the terms to be found in Ex. N in the belief that the Raja had agreed to accept a lower rent from him. According to his own case as set out in Ex. 5 the question of commission had not been settled as between him and the Raja. Where was then the representation by the Raja and how could defendant 1 be held to have acted on the representation of the Raja? In the second place, after carefully considering the terms set out in the sub-lease, Ex. N, the kabuliyat executed by Sendarmall Marwari, I find it difficult to hold that defendant 1 would not have sublet the land to Sendarmall Marwari on the terms stated in that document, if the original rent of Rs. 2400 had not been varied. It is true that under this document the minimum royalty is fixed at Rs. 1200, but it is also provided that the sub-lessee

will be bound to pay commission at the rate of 3 as per ton on all sorts of coal despatched or sold at the mouth of the pit in a year.

19. It has been pointed out to us that the income from the commission charged

at the rate provided in this document could be far greater than the sum of Rs. 2400 and in fact defendant 1 has been receiving fairly large amounts from his sub-lessees after the sublease. That being so, it is difficult to hold either that defendant 1. has made a bad bargain with Sendarmall Marwari or that he agreed to accept a royalty of Rs. 1200 from him on account of his belief that the original rent for the coal lands had been reduced by the Raja to a minimum royalty of Rs. 1200 a year. There was also a somewhat novel argument put forward on behalf of defendant 1 which has curiously found favour with the learned Subordinate Judge. The learned Subordinate Judge after referring to the well-known case in AIR 1931 79 (Privy Council) and after summarising the facts of that case in his judgment observes as follows:

Their Lordships held that the respondent having allowed his right to enforce his contract to become time barred he could not resist the plaintiff's claim for ejectment since the title which he wanted to establish was forbidden by the statute for want of a subsequent registered contract. The principle to be deduced from this dictum in my humble Opinion is that if one of the contracting parties to the original registered contract of lease brings suit for specific performance of the subsequent oral or unregistered contract against the other within the period of limitation then his rights, so long as the suit has not been disposed of must be protected under the subsequent oral agreement and the other party to the original registered contract will not be permitted to succeed on its terms but will have to wait till the decision in the specific performance suit.

20. The learned Subordinate Judge after observing thus proceeded to quote certain other decisions and then came to the following conclusion:

When a suit has been brought by defendant 1 for enforcement of the oral agreement against the plaintiff which has reduced the original rental from Rs. 2400 to Rs. 1200 that fact alone gives protection to defendant 1 against the levy of the present claim at the rate of Rs. 2400 so that for the period of the claim in this suit the plaintiff cannot be deemed entitled to obtain a decree at the original rate. What will happen in future as the result of the specific performance of contract in regard to the rate of rent is not for me to decide here and if the plaintiff did not wait till the decision of the specific performance suit as Ex. J., plaint, being brought within three years of the date of repudiation by the plaintiff of the subsequent contract, nobody else than he is responsible and his claim therefore cannot succeed upon the old rate.

21. This reasoning even if it be assumed to be sound which may be doubted cannot help defendant 1, as the suit which was brought by defendant 1 for the specific performance of the contract could not succeed, because, as I have already said, defendant 1 has not been able to show that there was a concluded contract. Besides we have been informed that this suit was after the decree of the present suit allowed by defendant 1 to be dismissed for default. It seems to me therefore that the conclusion arrived at by the learned Subordinate Judge that the plaintiff cannot recover rent at the rate of rupees 2400 per annum is not

correct and his judgment must be reversed on that point. The next important question which we have to decide in this appeal relates to the second oral agreement set up on behalf of defendant 1, that is to say, the agreement as regards the adjustment of the plaintiff's dues as against the dues of defendant 1. Now, as I have already stated, the case of defendant 1 is that a sum of Rs. 25,000 is still due to defendant 1 from the plaintiff under accounts No. 1 to 15 which were submitted by defendant 1 in connexion with the case at Alipur (which for the sake of brevity will be hereafter referred to as the Raj succession case) and that this sum is sufficient to discharge the dues of the plaintiff from defendant 1 on account of the rent payable in respect of the coal lands at Dhansar. The plaintiff's answer to this plea is firstly, that it cannot be raised in this suit because it virtually amounts to a claim for a set-off and defendant 1 has paid no court. fee on this claim; and secondly, that the oral agreement upon which defendant 1 relies militates against one of the important terms of the lease (Ex. 6) which was to the effect that defendant 1 shall take printed receipts from the plaintiff's sherista in regard to all payment of rent and no plea of payment shall be accepted without the production of the said receipt.

22. In my opinion, once the facts of the case are clearly understood there will be hardly any serious question of law to be decided so far as the plea of adjustment is concerned, but as the case has been very elaborately argued on both sides on this point I wish to summarise my conclusions as briefly as possible. It is well settled that the provisions of Order 8, Rule 6, Civil P.C., are not exhaustive because apart from a legal set-off which is expressly provided in the CPC in regard to an ascertained sum of money legally recoverable by the defendant from the plaintiff, an equitable set-off may also be pleaded in the Indian Courts, if the defendant's claim is shown to have arisen from the same transaction as the plaintiff's claim. That the provisions of Order 8, Rule 6 are not exhaustive is clear from the provisions of Order 20, Rule 19, Clause (3) and it is now too late to hold that the plea of equitable set-off cannot be given effect to by Indian Courts. In para. 684 of Halsbury's laws of England (Hailsham edition), Vol. 29, the law on the subject is stated as follows:

A set-off may be created by agreement and on this ground a claim may be set-off which could not be pleaded under the statutory law. Such set-off is allowed even though the evidence of the agreement be slight, but there must be some evidence of which the Court can find an agreement express or implied. A course of dealing between the parties by which mutual debts have been set-off is evidence from which the Court will imply such an agreement.

23. There can be no doubt therefore that a set-off can be allowed in this case provided that there was some agreement between the parties on the point. It is equally clear that where set-off is claimed on the basis of an agreement, no set-off can be allowed outside the terms of the agreement which the Court finds to be proved. Again the question of set-off cannot arise in so far as the dues of the plaintiff are proved to have been adjusted in the past. It can arise only in regard

to the dues which are outstanding and have not been adjusted. The questions, therefore, which we have really to decide are firstly, whether any of the dues which are claimed in the present suit had already been adjusted and secondly, what is the nature of the agreement upon which the claim of set-off can be held to be admissible in regard to the outstanding dues. I will first deal with the nature of the agreement as well as the evidence relating to it. Now, the second witness for the defendant who was formerly in the service of the Jharia Raj has stated as follows:

Lalit Babu is holding possession over Dhansar, Ghazlitand and Chanduka Collieries. He has never paid in cash for his dues rent and royalties in respect of the aforesaid collieries but such dues were adjusted against his own dues from fees and retainers payable by the Raj to him. Such adjustments were made under the Raja's order.

24. This is substantially the case of defendant 1 and his statement as well as the statement of his witness is very strongly corroborated by a mass of documentary evidence which consists of receipts granted on behalf of the Raj a read along with entries in his account books and the letters addressed from time to time to defendant 1 by the employees of the Raja as well as by the receiver who was in charge of the estate between 1918 and 1933. The learned advocate for defendant 1 read to us the following documents in course of his argument: Exhibits D-4; D-5; H-1; D-6 ; D-8 and 9; R-1 and R-2; E; F-8 and A. To illustrate the nature of these documents a reference to some of them at least may be helpful. Exhibit D-6 is a letter written to defendant 1 on behalf of the Raj by one of its employees and runs thus:

Tour letter is just to hand. Rs. 2792-10-0 was due to you on account of your retainer. Rs. 1256-6-0 is due by you to the estate for Dhansar and Chandkuya. up to kist Chait 1323 B.S. which has been ordered by the Raja Sahib to deduo from your above due. The balance Rs. 536-4-0 (?) will be sent to you tomorrow.

25. Exhibit D.8 is a letter sent by the receiver to defendant 1 on 6th September 1938 containing a statement of account in regard to the dues of defendant 1 from the estate as well as the dues of the estate from the defendant 1 ending with these words:

I enclose herewith a cheque in your favour for Rs. 4949-9-9 the balance due to you as per account and request you to send me a receipt for the payment.

26. D-5 is a letter written by an agent of the Raja to defendant 1 in which the dues of defendant 1 and the estate are mutually adjusted and it is stated:

Further you will get the amount of balance, when received hereafter after crediting the amount on account of your bill for Rs. 570 (?) dated 30th April 1915 and the said amount on account of salary. This has been ordered by Raja Bahadur.

27. On an examination of these documents, which I have referred to as mere

samples as well as the other relevant documents, it seems to be clear that the ease of defendant 1 which is to the effect that the rent due by him used to be deducted from his dues from the estate is substantially correct. I think that one may infer some sort of an agreement between the parties from the course of conduct pursued by them for many years. At the same time it seems to me to be dear that the dues of defendant 1 which used to be adjusted were ascertained sums regarding which there was no controversy. They were mostly dues on account of "retainer" and also on account of bills for fees which had been passed on behalf of the estate. Defendant 1, however, wants us to hold that he is entitled to set-off a highly controversial item said to have been due to him on account of the Raj succession case which was a very protracted litigation and, in which, very large sums of money had been admittedly incurred by the Raja. It appears that there was a violent disagreement between the plaintiff and defendant 1 immediately after the conclusion of that case in the Court at Alipur and in a long correspondence which ensued between them each of them continued to make claims and counter claims against the other. The case of defendant 1 is that he had spent large sums of money on account of the Raj a in that case and had submitted accounts to him according to which the Raja owed at least a sum of Rs. 25,000 to him. On the other hand, the plaintiff had been pressing defendant 1 for the payment of a sum of Rs. 22,000 which is said to have been paid to defendant 1 in connexion with the succession case but had remained unaccounted for.

28. The agreement for a sot-off which is pleaded by defendant 1 was admittedly an oral agreement and we are asked by defendant 1 to infer it from the conduct of the parties.

29. I do not find, however, any sufficient materials for inferring that there was an agreement on the part of the plaintiff to set off the dues of the Raj succession case. The following statement which is made by defendant 1 in his deposition shows that the proposal made by defendant 1 to set off his dues in connexion with the Raj succession case was repudiated at the earliest opportunity.

I requested the receiver to make adjustment of my dues against my liabilities to the estate on account of rent of the period prior to his appointment. He did not give effect to my proposal as he refused to take into consideration my dues from the Raj in connexion with the Jbaria succession during its trial in the Alipur Court. When the receiver refused I moved the Raja and there was some correspondence between us but in the result he did nothing.

30. This statement is borne out by Ex. D-1, a letter which was addressed by the receiver to defendant 1 and which runs as follows:

Will you be so good as to send me an account of your dues from the estate for your salaries and fees in cases of the estate (barring the Raj Succession Suit) up to December 1927?

31. Defendant 1 did not demur to the receiver's suggestion, because on 9th May

1928 when he replied to this letter he merely wrote as follows:

The retainer has been in arrear from 1917 A.D.... The total amount in arrear up to December 1927 comes up to Rs. 91,400 only at the rate of Rs. 400 per month.

32. This letter shows that defendant 1 neither pressed the receiver to adjust his dues in connexion with the Raj succession case nor did he tell him that there had been a prior agreement that such dues also would be adjusted. As is stated in his deposition, he took up the matter again in his correspondence with the Raja, but the Raja also, as he himself has admitted, did not order any adjustment. It is true that after a long correspondence the Raja said:

However when I receive all the papers regarding this and from the same it is found that anything is due to you, you will know that you will get it, and I believe that if on adjustment of account anything is found due to me, you won't fail to pay the same.

(See Exhibit A dated 27th May 1930.) This statement, however, was coupled with the assertion that on proper accounting money would be found to be due to the Raja from defendant 1 and it was nowhere conceded that defendant 1 was entitled to a set-off on the basis of any prior agreement between him and the Raja. The accounts submitted by defendant 1 on the basis of which he claims that a sum of Rs. 25,000 is due from the Raja are of a complicated nature and unless each item is properly scrutinised and investigated it is not possible to come to any definite conclusion as to what amount, if any, is due to defendant 1. Again in the letter (Ex. 5) which defendant 1 wrote to the receiver lie made the following statement among others:

I believe though you are not authorised to make payments of the pleaders fees in the succession suit, you can pay me my dues on account of retainer, if the dues of the estate exceed my dues, on account of the retainer. I think my dues on account of fees should be adjusted against my liability (if any) to the estate.

33. The statement that the receiver was not authorised to make payment on account of the fees in the succession suit implied that the fees of the succession suit was outside the scope of the agreement pleaded by defendant 1. In my opinion, therefore, defendant 1 is not entitled to claim a set-off in the present suit in respect of the dues of the Raj succession case. I am also not prepared to accept the learned Subordinate Judge's conclusion as to the dues of defendant 1, because I think that he has too readily assumed that the accounts submitted by defendant 1 must be correct. In my opinion, the necessary materials for adjusting this account between the parties are not before us.

34. I will now consider the effect of certain prior adjustments regarding which some evidence has been adduced. In the present suit the plaintiff claims rent from Chaitra 1330 B.S. to chaitra 1342 B.S. or roughly speaking from April 1924 to April 1986. It appears that the first attempt that was made during this period to adjust the account between the parties was in 1928 and this is evidenced by

Ex. E which is an account prepared by the receiver for the years 1917 to 1928 on 11th March 1928. From this account, it appears that a sum of RS. 14,269-8-6 was found to be due to the Jharia estate by defendant 1. One of the items in this account was "commission for Dhansar Colliery" and this was estimated to be Rs. 41,396-8-0. It appears that the receiver prepared this account on the footing that defendant 1 was liable to pay commission at the rate of 2 annas per ton on the raisings in the colliery, but defendant 1 at once wrote to the receiver that there was no final agreement for paying commission. Defendant 1, however, has never objected to any other items in the account excepting the item relating to the commission in connexion with the Dhansar colliery. Now, upon his own case, the plaintiff cannot charge commission at the rate of 2 annas per ton and this being also precisely the ground on which defendant 1 repudiated the account Ex. E in 1928 we must in adjusting the account delete the item as to the commission and replace it, by such amount as would have been due to the plaintiff on the basis that the rent for the colliery was chargeable at the rate of Rs. 2400 per year. Now, it is common ground that on such calculation nothing will be found due to the plaintiff from defendant 1 and in this view the plaintiff cannot get a decree for the years 1924 to 1928 which period is included in the longer period 1917 to 1928 covered by Ex. E. The plaintiff cannot be allowed to approbate and reprobate and it was not seriously contended on his behalf that in adjusting the account for this period he was entitled to charge more than Rs. 2400 as yearly rent.

35. Then we have before us Ex.D.10 (1) which purports to be an account of the dues of defendant 1 for the period 1928 to 1931. This adjustment is admitted by both the parties and it appears that as a result thereof a sum of Rs. 11,662-8-9 was found to be due to defendant 1 by the estate. Out of this sum, as appears from Ex. D-7, a letter written by the receiver to defendant 1, a sum of RS. 7000 was paid by cheque. This letter recites that the accounts relating to the period 1928 to 1981 had been sent to defendant 1 and had been confirmed by him as correct subject to the addition to two small bills. Defendant 1 also admits receiving a cheque for Rs. 7000 as a result of this adjustment. Then, there was a further adjustment on 6th September 1938 and this is evidenced by D-8 which is a letter written by the receiver to defendant 1 on that date. This letter shows that there was an adjustment up to June 1933. It was conceded on behalf of the plaintiff that it was not his intention to re-open accounts which had been finally adjusted. His only objection to this adjustment is that this was made after the receiver had given up possession of the estate. But it appears that the receiver was not discharged by the High Court until December 1933. This adjustment admittedly was at the time it was made accepted by defendant 1 as well as the receiver and I think it was binding on both the parties.

36. One of the questions which arises here is whether defendant 1 is entitled to the sum of Rs. 4662-8-9 which was left unpaid in connexion with the account Ex. D-10 (1). In my opinion, in this suit, he cannot claim a set-off in regard to this amount firstly because the account having been. Adjusted already, if anything

was found due to him he should have sued for whatever was found due to him within three years of the adjustment and secondly because even though there is no documentary evidence to prove that this sum was afterwards paid by the receiver to defendant 1, it seems improbable that the receiver would have proceeded to settle up the account of a subsequent period without adjusting prior dues. We find that the dues of defendant 1 used to be promptly paid out after each adjustment and, in all probability, this sum also must have been paid out. The plaintiff was not in possession of the estate until about the end of 1933 and this may well account for his inability to produce any direct evidence of payment. The fact that defendant 1 never demanded the sum in question from the receiver is in his favour and I think that in the circumstances of the case we must hold that the account between the plaintiff and defendant 1 has been adjusted up to June 1933. It is said that Exs. D-10 (1) and D-8 are based on the assumption that the royalty payable was Rs. 1200 per year, but the question of royalty cannot be re-opened now so far as these accounts are concerned because the adjustments were complete and the parties had for some reason or other hitherto proceeded on the footing that defendant 1 was liable to pay a minimum royalty of Rs. 1200 and not a rent of Rs. 2400. It follows, therefore, that the plaintiff can claim rent only from July 1933 to April 1936 at the rate of Rs. 2400 per year.

37. The plaintiff has also claimed surface rent for 109 bighas 2 kathas 6 chhataks (equivalent to 36.07 acres) at the rate of Rs. 2 per bigha. A reference to para. 4 of the kabuliyat, Ex. 6, shows that defendant 1 had agreed to pay surface rent at the rate of Rs. 2 per bigha for all such uncultivated patit danga land as might be required by defendant 1 for the purpose of carrying on mining operations. The khatian of village Dhansar which has been filed in the case shows that the sublessees of defendant 1 are in possession of 109 bighas 2 kathas 9 chhataks. The learned Subordinate Judge has in dealing with this part of the case misconstrued this kabuliyat, but I have already set out the true effect of para. 6 of the kabuliyat and it is unnecessary for me to pursue the matter any further. It is sufficient to say that the learned Subordinate Judge has dismissed the claim of the plaintiff with regard to the surface rent mainly on the ground that evidence is wanting to show that the land in respect of which surface rent is claimed has been taken possession of by the sub-lessees under the subleases granted to them by defendant 1 and not otherwise. The learned Subordinate Judge has pointed out that nothing was realised by the plaintiff from defendant 1 for surface rent on any previous occasion and that indicates that defendant 1 was not liable for any surface rent and that the lessees had taken possession of the land independently and not on the strength of the subleases granted to them by defendant 1. He has also referred to the khatian and Exs. 10 and 10 (a) in which the sub-lessees are recorded not as tenants holding land under defendant 1 but as tenants holding land directly under the plaintiff. His final conclusion is that "for want of any affirmative evidence of a reliable nature the plaintiff's claim for surface rent in face of the defendant's denial must fail."

38. Now, it seems to me that though the possibility of defendant 1's sub-lessees being in possession of the lands in question under the authority given to them by the subleases cannot be wholly excluded, the evidence of the plaintiff is undoubtedly somewhat meagre on the point and therefore the conclusion arrived at by the learned Subordinate Judge cannot be properly disturbed in this appeal. I would therefore uphold the judgment of the learned Subordinate Judge negating the claim of the plaintiff for surface rent, but, it should in my opinion, be made clear that the decision in this suit will not preclude the plaintiff from obtaining a decree for surface rent in a future litigation, provided that the plaintiff is able to offer necessary proof in support of his claim. The plaintiff also claims a decree for a sum of Rs. 1837-8-0 which is said to be due on account of cess. This claim is based on para. 2 of the kabuliyat by which defendant 1 has undertaken to pay "the road and public works cess." The case of defendant 1 is that he has to pay the cesses directly to the Government and no part thereof is payable to the plaintiff. Now it seems to me that the plaintiff's claim for cess must fail, because we do not find in the kabuliyat any covenant by which defendant 1 bound himself to pay not only the cess, which he was liable to pay directly to the Government, but also such cess as the plaintiff was liable to pay to the Government, as a proprietor of the land. It has been pointed out to us that in none of the numerous rent receipts which have been filed in this case the plaintiff or his predecessor realised or described as payable to him any amount on account of cesses. Accordingly, the judgment of the learned Subordinate Judge with regard to the plaintiff's claim for cess must also be upheld. After some argument at the bar, it was conceded by both sides that if the plaintiff's claim up to June 1933 is to be negated, the plaintiff will be entitled to 12 kists of Rs. 600 up to the date of the suit, and upon that footing the following account was submitted to us by the learned advocate for the plaintiff:

From July 1933 (17th Asarh 1340 B.S. to Chait 1342 B.S. (vide page 4-5 of the plaint) 12 kists at Rs. 600 per kist Rs. 7200-0-0 Interest for the above kists from default (vide p. 4-5 of the plaint) up to date of suit Rs. 1262-4-0 Surface rent at Rs. 2 per bigha for 109 bighas for three years (i.e. 12 kists) Rs. 654-0-0 Fuel coal 2 tons per month at Rs. 3 per ton for three years (i.e. 12 kists) Rs. 216-0-0.

39. I have already dealt with the question of the surface rent and held that the plaintiff is not entitled to recover it. Again, there is no dispute between the parties as to the price and quantity of the fuel coal and both the parties conceded that the plaintiff should upon our findings get a money decree for Rs. 216. The point which was raised on behalf of defendant 1 was that he should be given credit for a Hum of Rs. 1200 which was due to him on account of retainer from July to September 1933 when he ceased to be the Raj pleader. It was further urged that the amounts due on account of retainer should be set off against the kists for Asarh 1340, and Aswin 1340, (that is to say, July and September 1933). To this the appellant had no objection and it was also conceded on his behalf that as a result of the set-off no interest would be payable for the Asarh and Aswin

kists. The interest as given in the plaintiff's account; at the end of the plaint for these kists amounts to Rs. 210-6-0 and : Rs. 191-4-0 respectively. The total of, these sums, viz., Rs. 401-10-0 must therefore be deducted from Rs. 1262-4-0 which is claimed as interest by the plaintiff and the account must be recast as follows:

Rent due	Rs. 7200-1200	=	Rs. 6000-0-0	Interest	Rs. 860-10-0
-----	Rs. 6860-10-0		-----		

40. In the result I would partly allow this appeal and grant a money decree to the plaintiff against defendant 1 for Rs. 216 which sum will carry interest at 6 per cent, until realization, and also grant a decree to him for Rs. 6860-10-0 in the following terms: (1) The amount so decreed shall carry interest at the (sic) of 6 per cent, until realization. (2) This amount shall be a charge on the property mentioned in Schedule 1 of the plaint and the decree should provide that if the said amount be not paid by the defendants within a period of six months from today, the plaintiff will be entitled to sell the property in question to realise the decree. (3) The defendants other than defendant 1 shall not be personally liable for this decretal amount.

41. As the success is divided in this litigation, the parties will bear their respective costs in this Court and in the Court below.

Chatterji, J.

I agree.