
(2005) 04 CAL CK 0028

In the Calcutta High Court

Case No : F.A.T. No's. 798, 1132 and 1195 of 2003

Sambhunath Mitra and Others

APPELLANT

Vs

Khaitan Consultant Ltd. and Others

RESPONDENT

Date of Decision : 01-04-2005

Acts Referred:

Evidence Act, 1872 — Section 116

Limitation Act, 1963 — Article 65

Registration Act, 1908 — Section 17

Transfer of Property Act, 1882 — Section 107, 109, 54, 58, 6

Citation : AIR 2005 Cal 281 : (2005) 2 CHN 519 : (2005) 1 ILR (Cal) 349

Hon'ble Judges : Rajendra Nath Sinha, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Biswajit Basu, Partha Pratim Roy and S. Banik, in F.A.T. No. 1195 of 2003, S.P. Roy Chowdhury and J.R. Chatterjee, in F.A.T. No. 798 of 2003 and Bidyut Kumar Banerjee, Shila Sarkar and Arnab Roy, in F.A.T. No. 1132 of 2003, for the Appellant; Anindya Kumar Mitra, Samit Talukdar and I.N. Bhattacharya, for the Respondent

Final Decision : Allowed

Judgement

Bhaskar Bhattacharya, J.—These three first appeals were heard analogously as those are interlinked and are preferred against a common judgment dated February 27, 2003 passed by the learned Judge, 11th Bench, City Civil Court at Calcutta, in Title Suit No. 3099 of 1996 and Title suit No.347 of 1997 which were heard analogously. By the said judgment, the learned Trial Judge dismissed Title Suit No. 3099 of 1996 and decreed Title Suit No. 347 of 1997 thereby passing a decree for khas possession by evicting the defendants of the said suit from the suit premises. The plaintiff of Title Suit No. 347 of 1997 was further given a decree for mesne profit to be adjudicated in separate proceedings. By the said decree, the defendants were directed to vacate the suit premises within two months from the date of passing of such decree.

2. Being dissatisfied with the aforesaid two decrees, the present three appeals

have been filed.

3. F. A. T. No. 798 of 2003 is at the instance of the defendant No. 3 in Title Suit No. 347 of 1997 against the decree for eviction. F. A. T. No. 1195 of 2003 has been preferred by defendant Nos. 1 and 2 in Title Suit No. 347 of 1997 against the judgment and decree passed in the said suit. The other first appeal being F. A. T. No. 1132 of 2003 has been taken by plaintiffs in Title Suit No. 3099 of 1996 being dissatisfied with the judgment and decree by which the said suit was dismissed.

4. The Title Suit No. 3099 of 1996 was filed by the appellants of F. A. T. No. 1132 of 2003, the widow and two daughters of late Sambhunath De as plaintiffs against Khaitan Consultant Limited thereby praying for declaration that neither Prasanta Kumar De, since deceased, was nor his heirs, i.e. defendant Nos. 2, 3 and 4 therein, were ever the sole tenant in respect of the suit premises with further declaration that those plaintiffs along with other heirs and legal representatives of Prabhat Chandra De, since deceased, were tenants in common in respect of the said room under the defendant No. 1 and that the alleged surrender of tenancy of the suit room by or on behalf of Prasanta Kumar De, since deceased, was void and not binding upon the plaintiffs. In the said suit a further prayer for mandatory injunction directing defendant No. 1 and defendant No. 1A to restore vacant possession of the suit room including the portion thereof as described in schedule "C" of the plaint was made. The plaintiffs further prayed for perpetual injunction restraining the defendant No. 1 and defendant No. 1A from interfering or disturbing the peaceful possession of the plaintiffs in respect of the suit room or any portion thereof. In the said suit, apart from Khaitan Consultant Limited, the defendant No. 1 figured therein, M/S Khaitan & Company was made defendant. Over and above, the heirs and legal representative of Prasanta Kumar De and the other heirs of Prabhat Chandra De, since deceased, the father-in-law of plaintiff No. 1, were made proforma defendants.

5. Title Suit No. 347 of 1997, on the other hand, was filed by Khaitan Consultant Limited, the defendant No. 1 in Title Suit No. 3099 of 1996, against the appellants of F.A.T. No. 1195 of 2003 as also the appellant of F. A. T. No.798 of 2003 thereby praying for decree of khas possession of portions of the suit property from appellants of F. A. T. No. 1195, the appellant of F. A. T. No.798 of 2003. In the said suit, prayer for mesne profit was also made against the defendants. Emerald Company Limited, the admitted owner of the building and the other heirs and legal representative of Prabhat Chandra De were made proforma defendants in the suit.

6. The case made out by the plaintiffs of Title Suit No.3099 of 1996 who are appellants in F.A.T. No. 1132 of 2003 were as follows:

(a) Prabhat Chandra De, since deceased, the predecessor-in-interest of the plaintiffs and defendant Nos. 2 to 9, during his lifetime and at the time of his death was the recorded tenant under one Emerald Company Limited in respect of

room No. 23 on the third floor of premises No. 1B, Old Post Office Street, Calcutta -1. The said Prabhat Chandra De was a solicitor by profession and used to practise under the name and style of P C De & Company in the said room as sole proprietor thereof. The rent receipts were issued by landlords in the name of "Prabhat Chandra De".

(b) In the year 1950, Sambhunath De, the predecessor-in-interest of the plaintiffs and the third son of said Prabhat Chandra De, was qualified as a Chartered Accountant and started his practice in the north-western portion of the said room in the name and style of Sambhunath De & Company, a firm of Auditors and Chartered Accountant. The said Sambhunath De occupied the said space as a licensee of his father and the said portion of the suit room had been described in the schedule of the plaint as B".

(c) In the year 1963, Prasanta Kumar De, since deceased, the fourth son of Prabhat Chandra De was qualified as an Attorney-at-law and started his practice with his father.

(d) The said Sambhunath De died intestate on 6th August, 1976 leaving the plaintiffs being his widow and daughters respectively as his sole heirs and legal representatives and sometime prior to his death, he took his brother-in-law (wife's brother) namely, Sambhunath Mitra, Chartered Accountant, as a partner of the said firm Sambhunath De & Company and since the demise of Sambhunath De, the said firm is being run by Sambhunath Mitra as a sole proprietor thereof, whom the said Prabhat Chandra De granted leave and license to occupy the said portion.

(e) In the month of March, 1978, the said Prabhat Chandra De died and on his death, his heirs, being plaintiffs, the said Prasanta Kumar De, since deceased, and the proforma defendant Nos. 5 to 9 became entitled to the tenancy of the said deceased in respect of the suit room by way of right of inheritance.

(f) After the demise of Prabhat Chandra De, the plaintiffs in order to preserve the memory of Sambhunath De, who was the husband of plaintiff No. 1 and the father of the plaintiff Nos. 2 and 3 granted leave and licence to the said Sambhunath Mitra to carry on the said business of Sambhunath De & Company. Since the plaintiffs were enjoying the benefit of the tenancy of the suit room by using a portion thereof for running the business bearing the name of the said Sambhunath De, they also contributed a share of monthly rent through the said Sambhunath Mitra, who was paying the said share of rent on behalf of the plaintiffs by cheque every month to the said Prasanta Kumar De, who in his turn had been paying the full monthly rent to the landlord. The rent receipts, however, continued to be granted by landlord in the name of Prabhat Chandra De.

(g) Sometime in 1979, the defendant No. 1 namely, Khaitan Consultant Limited took the said premises on lease from the Emerald Company Limited and continued to issue rent receipt in the name of Prabhat Chandra De. The plaintiffs recently came to know that the rent receipt has been changed in the name of

Prasanta Kumar De in place of Prabhat Chandra De without obtaining any surrender from the other heirs of Prabhat Chandra De, namely, the plaintiffs and proforma defendant Nos. 5 to 9 and without their knowledge and consent.

(h) In May, 1995, Prasanta Kumar De became seriously ill and was admitted in the Belle Vue Clinic and during his illness the defendant No. 4 who is his daughter and was a student of law, started looking after the firm P. C. De & Company and the plaintiffs at the request of defendant No. 4 started paying their share of rent to her in cash, who assured them that she would be paying the full rent to the landlord. The said Prasanta Kumar De died on 21st June, 1996 leaving the defendant Nos. 2, 3 and 4 as his sole heirs and legal representatives.

(i) On 23rd September, 1996, after coming to Office, the said Sambhunath Mitra was surprised to find that the main door of the room was open and the Eastern part of the room No. 23 was under the occupation of Khaitan Consultants Limited, the defendant No. 1. On enquiry from Mr. Lalit Poddar of the said Khaitan Consultants Limited, the said Sambhunath Mitra came to know that Prasanta Kumar De had got the tenancy of the suit room transferred in his name and had purported to surrender his tenancy and delivered vacant possession of the said portion of the suit room in his possession to the defendant No. 1. The said portion was described as schedule "C" in the plaint.

(j) The plaintiffs subsequently came to know that sometime before March, 1996, the defendant No. 1 had let out room No.23 along with 15 other rooms in the premises to defendant No. 1A who was in actual possession of Eastern portion of room No. 23.

(k) The said Sambhunath Mitra, on behalf of the plaintiffs protested against such illegal acts. As the said Prasanta Kumar De was seriously ill and lying unconscious for nearly a year preceding his death, he was not capable of surrendering his tenancy and furthermore, was not by himself competent to surrender the said tenancy as the said tenancy had been inherited by the plaintiffs along with the said Prasanta Kumar De and proforma defendant Nos. 5 to 9.

(l) As defendant Nos. 1 to 4 were denying and were interested to deny the plaintiffs' right of tenancy in respect of suit room jointly with the heirs of Prabhat Chandra De and had wrongly dispossessed the plaintiffs from Western part of the room described in schedule "B", the plaintiffs were compelled to file the suit with the prayer mentioned above.

7. The said suit was contested by the defendants by filing three sets of written statements, one by defendant No. 1 and other by added defendant No. 1A and the third one, by defendant Nos. 2, 3 and 4. The defence taken by defendant No. 1 in their written statement may be summarised thus:

a) The suit was misconceived, not maintainable and was instituted in gross suppression and misrepresentation of the facts.

b) The plaintiff had no cause of action against the defendant No. 1 nor did the plaint disclose any cause of action. The suit was barred by principles of waiver, estoppels and acquiescence and also barred by law of limitation.

c) Prabhat Chandra De, a solicitor was the tenant of room No. 23 on the third floor of the said premises No. 1B, Old Post Office Street, Calcutta -1. The said Prabhat Chandra De was the sole proprietor of a solicitor firm by the name and style of P C De & Company and by a deed of partnership dated May 1, 1966, Prasanta Kumar De, the fourth son of Prabhat Chandra De became a partner of the said P.C. De & Co. and according to the terms of partnership deed, tenancy of the room No. 23 of premises No. 1B, Old Post Office Street would be transferred to the firm's name and the firm should pay rent of the said room, the bills for electricity and telephone standing in the name of Prabhat Chandra De. It was further stipulated in the deed that the retirement or death of a partner should not dissolve the firm but the continuing or surviving partner would be at liberty to continue the business in the name of the firm as the sole proprietor thereof. On such retirement or death, all the assets of the firm including unrealised bills, books, furniture and the said tenancy should devolve on the continuing partner who should become the absolute owner thereof.

d) Thus, after the conversion of P. C. De & Co. from a proprietorship to a partnership firm in May, 1966, the tenancy in respect of the said room No. 23 stood transferred from Prabhat Chandra De to the firm P.C. De & Co. and the said P. C. De & Co. started making payment of the rent payable in respect of the said room.

e) Upon the death of Prabhat Chandra De in 1978, Prasanta Kumar De became the sole tenant of the said room in accordance with the provisions of the said partnership deed and with effect from January, 1985, the rent receipt was issued in the name of Prasanta Kumar De who had by virtue of the said deed of partnership become sole proprietor of P. C. De & Co.

f) Prasanta Kumar De, prior to his death by a letter dated 4th May, 1996 surrendered the tenancy of the said room No. 23 to defendant No. 1 and the possession of the said room was handed over to the defendant No. 1 on May 19, 1996.

g) At the time of taking possession of the suit room No. 23, it was noticed by defendant No. 1 that portion of the suit room was used by Sambhunath Mitra carrying on business under the name and style of Sambhunath De & Company and it was also noticed that another portion of the suit room was being used by Anil Kanti Roy Chowdhury.

h) The said Sambhunath Mitra, Sambhunath De & Company and Anil Kanti Roy Chowdhury were trespassers and bound to hand over possession of the said portion of the suit room in their occupation to the defendant No. 1 and in the circumstances, the defendant No. 1 filed Title Suit No. 347 of 1997 in the City Civil Court at Calcutta for decree of khas possession of the said two portions of

the room No.23 from those persons.

8. The other two sets of defendants have virtually supported the defence of defendant No. 1 thereby denying the assertion of right of joint tenancy by the plaintiffs.

9. As indicated above, the defendant No. 1 of Title Suit No.3099 of 1996 has filed a separate suit being Title Suit No. 347 of 1997 thereby praying for recovery of possession from portion of the suit property which is subject-matter of Title Suit No.3099 of 1996 from Sambhunath Mittra, Anil Kanti Roy Chowdhury and Sambhunath De & Company on the basis of the case as put forward by the said defendant No. 1 in their written statement of the other suit.

10. In the said suit the Emerald Company Limited and other heirs of Prabhat Chandra De including the heirs of Prasanta Kumar De were made proforma defendants.

11. The aforesaid Title Suit No. 347 of 1997 is contested by Sambhunath Mittra and Anil Kanti Roy Chowdhury by filing two sets of written statements. The plaintiffs of Title Suit No. 3099 of 1996 who were defendant Nos. 5 to 7 in the latter suit being Title Suit No. 347 of 1997 have also filed written statement opposing the prayer made in Title Suit No. 347 of 1997 on the basis of the plaint case of the Title Suit No. 3099 of 1995.

12. In the written statements filed by Sambhunath Mittra and Anil Kanti Roy Chowdhury, they have supported the claim of joint tenancy by plaintiffs of Title Suit No. 3099 of 1996 and according to them, they are entitled to retain the possession of their respective portion as licensee under the plaintiffs of Title suit No. 3099 of 1996 as on the death of Prabhat Chandra De, the old tenancy is continuing.

13. In Title Suit No.3099 of 1996, Smt. Sulata De, the plaintiff No. 1 therein, gave affidavit of evidence as PW-1 and was cross-examined on behalf of defendant No. 1. One Sri Lalit Kumar Poddar filed affidavit of evidence as DW-1 on behalf of Khaitan Consultant Limited in the said Title Suit No. 3099 of 1996 and was cross-examined. A. K. Jhunjhunwala and Kalyan Kumar Basu also submitted affidavit of evidence on behalf of defendants in Title Suit No.3099 of 1996. Apart from those persons, Sambhunath Mittra, Arun Kumar Sarkar, Debabrata Mittra and Sucharita De also filed affidavit of evidence in Title Suit No. 347 of 1997 in opposing the prayer of the plaintiff therein and those persons were cross-examined.

14. Ultimately, the learned Trial Judge by a common judgment dated 27th February, 2003 dismissed the Title Suit No. 3099 of 1996 and decreed the Title Suit No. 347 of 1997.

15. As indicated earlier, these three appeals have been preferred against the aforesaid judgment and decrees passed by the learned Trial Judge.

16. Mr. Biswajit Basu, the learned advocate appearing on behalf of appellants in F. A. T. No. 1132 of 2003, Mr. Banerjee, the learned senior advocate appearing on behalf of the appellants in F. A. T. No. 1195 of 2003 and Mr. Jiban Ratan Chatterjee, the learned advocate appearing on behalf of appellant in F. A. T. No. 798 of 2003 have raised various questions of law in support of their respective appeals.

17. So far the decree passed in Title Suit No. 347 of 1997 is concerned, the learned counsel challenging such decree have vehemently contended that even on the basis of averments made in the plaint of Title Suit No. 347 of 1997, the suit was not maintainable. They point out that Khaitan Consultant Limited, the plaintiff therein, has claimed that by virtue of lease deeds executed by Emerald Company Limited, the admitted owner of the building, it has been given right to realise future rent from the tenants and to file suit for eviction against those tenants and on the basis of such right, the plaintiff filed the aforesaid Title Suit No. 347 of 1997. According to them, once the property is in possession of a tenant or lessee, the landlord of the premises cannot execute another lease deed in favour of a third party over the self-same property for the purpose of mere realisation of rent from the existing tenant when the lessor is unable to give actual possession to the second lessee. In support of such proposition of law, they rely upon a decision of a Judge of this Court sitting singly (one of us) in the case of Swapan Kumar Dutta v. Dharam Chand Jaiswal and Anr., reported in 2002(2) CHN 627. Apart from the aforesaid fact, they contend that even if the said deed of lease is presumed to be valid, by the said lease right having been conferred upon the plaintiff to file suit against only the existing tenants, the suit filed by Khaitan Consultant Limited for eviction of the defendants, the alleged trespassers, was not maintainable.

18. They further contend that it is for the Emerald Company Limited, the admitted owner of the building, to file appropriate suit for eviction of the appellants. They further point out that even when the suit was filed, the alleged second lease executed by Emerald Company, the admitted owner, had come to an end by efflux of time and therefore, the plaintiff of Title Suit No. 347 of 1997 had no right to file any suit in its own name after the expiry of such period.

19. So far the dismissal of Title Suit No. 3099 of 1996 is concerned it is contended by the learned advocate for the appellants that the Khaitan Consultant Limited having taken specific plea in the written statement of Title Suit No. 3099 of 1996 that original tenancy in respect of the property was held by a partnership firm, namely, P.C. De & Company and on the death of the senior partner of the said firm, the tenancy devolved upon Prasanta Kumar De, the surviving partner, and such plea having been found to be wrong, the learned Trial Judge ought to have held that on the death of Prabhat Chandra De, the admitted tenant of the property, the tenancy devolved upon his all heirs and legal representatives and thus, the tenancy could not be changed in the name of Prasanta Kumar De on the basis of partnership deed.

20. According to the learned advocate for the appellants, so long the original tenancy held by Prabhat Chandra De is not extinguished, the said tenancy is continuing and as such, the plaintiffs of Title Suit No. 3099 of 1996 should be declared to be tenants in respect of the property along with other heirs of Prabhat Chandra De. According to the learned counsel for the appellants, the learned Trial Judge totally misconstrued law of limitation in holding that the Title Suit No. 3099 of 1996 was barred by limitation by overlooking the fact that plaintiffs prayed for recovery of possession on the basis of existing right of tenancy and therefore, the period of limitation for filing such a suit should be governed by Article 65 of the Limitation Act and in this case tenancy having been illegally changed from February 1985, suit filed in the year 1996 was well within the period of limitation. The learned advocate for the appellants, thus, prays for setting aside the judgment and decree passed by the learned Trial Judge and for passing a decree in Title Suit No. 3099 of 1996 thereby declaring the right of tenancy of the plaintiffs and for dismissal of the other suit filed by the Khaitan Consultant Limited for eviction of the licensees of the plaintiffs.

21. The aforesaid contentions of the appellants are seriously disputed by Mr. Mitra, the learned senior advocate appearing on behalf of Khaitan Consultant Limited.

22. According to Mr. Mitra, the plaintiffs of Title Suit No. 3099 of 1996 having accepted Khaitan Consultant Limited as landlord by admitting payment of alleged rent through Prasanta Kumar De, they are estopped from disputing the title of the Khaitan Consultant Limited in the suit property in view of Section 116 of the Evidence Act. Mr. Mitra further contends that the learned Trial Judge rightly held that the Title Suit No. 3099 of 1996 was barred by limitation as the plaintiffs did not claim or assert any tenancy right within 12 years from the date of death of Prabhat Chandra De. According to Mr. Mitra, it should be presumed that the old tenancy of Prabhat Chandra De extinguished by implied surrender from the conduct of his heirs and legal representatives even it is assumed for the sake of argument that Prabhat Chandra De, in his personal capacity, was the tenant.

23. Mr. Mitra, however, strenuously contends that by partnership deed, the sole tenant having transferred the tenancy right in favour of partnership firm and such transfer having been accepted by the landlord, the legal heirs of the original tenant are bound by the terms of the partnership deed created by their predecessor and they cannot dispute the contents of the partnership deed. Mr. Mitra contends that the plaintiff No. 1 of Title Suit No.3099 of 1996 has admitted that she was well aware of the existence of partnership deed and such being the position the plaintiffs now cannot dispute the genuineness of the deed. At any rate, Mr. Mitra contends, the plaintiffs of Title Suit No.3099 of 1996 are estopped from disputing the fact that by virtue of the terms of the partnership deed executed by their predecessor-in-interest, the tenancy stood transferred in the sole name of Prasanta Kumar De.

24. As regards the rights of other appellants, namely, Sambhunath Mitra, M/s.

Sambhu Nath De and Co. and Anil Kumar Roy Chowdhury, in the other two appeals arising out of the suit for eviction filed by the Khaitan Consultant Ltd., Mr. Mitra contends that they have admittedly no subsisting right in the property and as such, they have no locus standi to resist the suit for eviction filed by his client as they are claiming through persons who have no right of tenancy over the property.

25. Mr. Mitra further contends that there is no bar in creating concurrent lease even in accordance with the provisions contained in the Transfer of Property Act. As regards the decision of this Court in the case of Swapan Kumar Dutta v. Dharam Chand Jaiswal (supra), Mr. Mitra contends that the said decision cannot be cited as precedent in view of the Division Bench decision of this Court in the case of Sreenarayan Mansingka Vs. Durga Dutt Misra and Others . Mr. Mitra contends that the Privy Council decision relied upon by the learned Single Judge in the case of Swapan Kumar Dutta v. Dharam Chand Jaiswal (supra) never said that right to realise future rent could only be created by a deed of sale as pointed out by the learned Single Judge. He contends that all that the Privy Council held in that decision was that right to realise future rent can be made only by a registered document. Mr. Mitra, therefore, contends that in this case the admitted owner and the landlord of the premises having executed registered deeds of lease in favour of his client, the Privy Council decision relied upon in that decision rather approve the right of his client. He, thus, prays for dismissal of the appeals.

26. At the very outset, we propose to deal with the two appeals being F. A. T. No. 1195 of 2003 and F. A. T. No.798 of 2003 preferred against the judgment and decree passed in Title Suit No. 347 of 1997.

27. As pointed out earlier, the Title Suit No. 347 of 1997 was filed by Khaitan Consultant Limited claiming eviction of and mesne profits from the appellants by treating them as rank trespassers. In order to maintain a suit for eviction against an alleged trespasser, the plaintiff must either show that he is the owner of the property or at least he has better right than that of the defendant to claim immediate possession of the property involved in the suit. In the case before us, the plaintiff has alleged that Emerald Company Limited is the owner of the property and that by virtue of two successive lease deeds and after the expiry of the second one, with the aid of a letter written by Emerald Company acknowledging extension of the second lease, they have acquired right in the property and on the strength of such right, the suit has been filed for eviction of a trespassers.

28. Therefore, the first question that arises for determination in these two appeals is whether by virtue of a lease deed, Emerald Company Limited, the admitted owner of the property, could create any interest in the property so as to enable the plaintiff to file a suit for eviction of a trespasser. There is no dispute that when such lease deed was executed in favour of plaintiff, the selfsame property was already subject-matter of various existing leases and by virtue of

the further lease executed between the Emerald Company Ltd. and the plaintiff, the latter was authorised to realise future rents from the existing tenants and also to evict those tenants in accordance with law. There are decisions of this Court where it has been held that creation of tenancy over an existing tenancy is recognised under the English Law and such lease is commonly described as concurrent lease. According to those decisions, if in a document it is simply mentioned that a lease of land which was also subject-matter of a prior lease is being granted, that would in law without anything more operate as an assignment of reversion and enable the lessee under the latter lease to recover the rent due and payable under the former one. According to those decisions, there is always a distinction between the assignment of rent and profit and a lease of a reversion. In the case of an assignment of rent and profit, all that the assignee will be entitled is to realise rent and profit by virtue of assignment in his favour. But in the case of lease of reversion, it is not merely the right to recover rent and profit that had been transferred to him but also the right which the lesser had on the date of reversion, for example, his right to recover the possession immediately on expiry of previous terms and before expiry of terms, by virtue of any forfeiture the lessee had the right to enter, the right to such re-entry. The aforesaid view has been recognised by a Division Bench of this Court in the case of *Jahar Lal Bhutra v. Bhupendra Nath Basu*, reported in ILR (49) Cal 495. In a subsequent decision in the case of *Sreenarayan Mansingka Vs. Durga Dutt Misra and Others*, the aforesaid principle has been followed. At this juncture it may not be out of place to mention here that in the case of *Sheikh Songsor Ali Vs. Jagannath Pal and Others*, another Division Bench of this Court, however, raised doubt as to the correctness of the law relating to concurrent lease and according to the said decision, in England the law relating to concurrent lease was still unsettled.

29. Mr. Mitra, the learned counsel appearing on behalf of the plaintiffs-respondents has strongly relied upon the aforesaid two decisions in the cases of *Jahar Lal Bhutra*, and *Shree Narayan Mansingka* and has contended that by virtue of the said concurrent lease his client is entitled to maintain the suit for eviction.

30. In our opinion, the decision of the Division Bench in the case of *Jahar Lal Bhutra* (supra), is no longer good law, in view of subsequent decision of the Privy Council in the case of *M.E. Moolla & Sons Limited v. Official Assignee of the High Court of Judicature at Rangoon and Ors.*, reported in 65 CLJ 275 (PC); similarly the subsequent decision of the Division Bench in the case of *Narayan Mansingka* (supra), cannot be treated as a valid binding precedent as the said Division Bench failed to take note of the earlier existing Privy Council decision.

31. In the case of *M. E. Moolla & Sons Limited* (supra), the question was whether a deed authorising somebody to realise future rent and profit was compulsorily required to be registered under the provision of Section 17 of the Registration Act. In the context of such a case, the Privy Council through Sir George Rankin

held that right to future rent is a right in immovable property and if such right is transferred in favour of a third person, such transfer must be effected in accordance with the provision of sale contained in Section 54 of the Transfer of Property Act. In other words, Their Lordships were of the opinion that a right to realise future rent and profit from immovable property can be created only in accordance with the provisions contained in Section 54 of the Transfer of Property Act, meaning "by sale". Therefore, if the effect of a concurrent lease is to authorise second lessee to realise rent in future and permitting him to sue for eviction of the first lessee, such right must be created in accordance with the provisions contained in Section 54 of the Transfer of Property Act. If we accept the contention of Mr. Mitra that such right can be transferred also by creating a concurrent tenancy, we shall be acting contrary to the decision of the Privy Council in the case of M. E. Moolla & Sons Limited (*supra*). According to Section 107 of the Transfer of Property Act, for the purpose of creation of a lease of an immovable property other than from year to year or for any term exceeding one year or reserving a yearly rent, oral agreement accompanied by delivery of possession is sufficient. Therefore, if a property is already the subject-matter of a tenancy, during continuance of such tenancy the landlord cannot create another monthly tenancy over the self-same property by taking advantage of "doctrine of concurrent lease" in violation of the provisions contained in Section 54 of the Transfer of Property Act.

32. We are, therefore, of the view that a third party can get the right to realise rent from existing tenant or to sue the existing tenant for eviction only by transfer of such right in accordance with the Transfer of Property Act. We are quite alive to the provisions of Section 109 of the Transfer of Property Act according to which where a lessee transfers not the property leased or part thereof but any of his interests therein, any third party acquiring such interest therein can become landlord of the property. In our view, the phrase "any of his interest therein" appearing in Section 109 of the Transfer of Property Act means those interest which the lessor was capable of transferring after execution of the first lease. Once a lease has been executed and the lessee has been given right to enjoy the property, landlord cannot have such right any more; the only right that he is capable of transferring at that point of time is the lessor's right. However, even during the substance of a lease, a lessor can execute usufructory mortgage and by virtue of such mortgage, the mortgagee will step into the shoes of the lessor and will be entitled to realise rent or evict the existing lessee by virtue of the provisions contained in Section 58(d) of the Transfer of Property Act. But there is no scope of execution of further a lease deed by such lessor for conveying such right to a third party.

33. Therefore, we are of the view that the lessor can create a third party's interest in the leasehold property either by creating sale deed or deed of exchange conveying lessor's right or making gift or creating mortgage but having himself divested of the right of the enjoyment of the property and reserving only lessor's right, the lessor cannot further create any lease. Lease is

a peculiar doctrine of separation of title and possession. On execution of a lease, the title remains with the lessor but the possession goes to the lessee and once such document is executed, the lessor is capable of only transferring his title to the property by executing deeds of sale, exchange, mortgage, or gift but cannot transfer the right of enjoyment over again as he is already divested of such right at the time of creating the first lease. Therefore, we agree with the view taken in the subsequent case of Swapan Kumar Dutta v. Dharam Chand Jaiswal and Anr., reported 2002(2) CHN 627 relied upon by Mr. Basu. We, consequently, find that Emerald Company Limited could not create any interest in favour of Khaitan Consultant Limited in the suit property by virtue of lease deeds executed by it and such being the position, the Khaitan Consultant Ltd, the plaintiff, could not file any suit for eviction of the alleged trespasser on the basis of right conferred by the lease deeds executed in its favour.

34. It further appears from record that after the expiry of period mentioned in the first lease deed of 1979, Emerald Company Ltd. executed another lease deed for five years and that too expired and thereafter by merely writing a letter authorised the plaintiff to continue with the earlier tenancy. Therefore, even assuming for the sake of argument, that by virtue of registered lease any right was created in favour of plaintiff, such right could not continue after the expiry of the period contained therein, unless a fresh lease deed was executed. It appears that in the second lease deed, there is a specific clause that after the expiry of the terms of the lease deed namely, April 30, 1989, the lessee will have no right. Such being the position, by mere writing a letter to the lessee, fresh right in immovable property cannot be created. Although Mr. Mitra strenuously contended that his client is entitled to the right created under the earlier registered deed by invoking the principles of "holding over", in our view, even then, the aforesaid Privy Council decision in the case of M. E. Moolla & Sons Limited will stand in his client's way inasmuch as, the effect of a holding over under law being creation of a new monthly tenancy and not continuation of the old tenancy. (See AIR 1949 124 (Federal Court)) and such new tenancy being not brought into existence by a registered deed, cannot convey a fresh right to realise future rent if we accept for the sake of argument the contention of Mr. Mitra that the Privy Council in the aforesaid decision merely stated that such right could be created by "any registered document" and that there is no necessity of making a deed of sale. Moreover, by the lease deeds, the lessee was authorised to file suit for eviction of the existing tenants in accordance with law but no right was conferred upon the plaintiff to file suit for eviction against a trespasser.

35. We are also quite alive to the provision contained in Section 6(e) of the Transfer of Property Act which does not recognise transfer of "a mere right to sue" without creating any interest in the immovable property. We, therefore, find that at the time of institution of the suit, the plaintiff namely, Khaitan Consultant Limited, had no right to get recovery of possession from the defendants even if they are assumed for the sake of argument to be rank trespassers.

36. The next question in these two appeals is whether the original tenancy created by Emerald Company Limited in favour of Prabhat Chandra De extinguished and whether heirs of Prabhat Chandra De could permit the two appellants to remain as licensee under them.

37. We have already indicated that specific case of the plaintiff, namely, Khaitan Consultant Limited is that the tenancy stood transferred to P C De & Company by virtue of partnership deed of 1966 and in terms of deed of partnership, on the death of Prabhat Chandra De, the surviving partner, viz. Prasanta Kumar De became the sole tenant and he having surrendered the tenancy, the possession of the defendants in the property, if any, is no better than that of a trespasser.

38. It appears from the evidence adduced by parties that till the death of Prabhat Chandra De, rent receipts were granted in his personal name by Emerald Company and those rent receipts were never granted in the name of P. C. De & Company. Therefore, Prabhat Chandra De, an existing tenant, although created a deed of partnership by transferring tenancy right in favour of partnership firm, such transfer was not recognised by the landlord and landlord continued to grant rent receipt in the name of Prabhat Chandra De not only till his death but even thereafter up to January, 1985. It appears from the letter produced by the plaintiff itself that Prasanta Kumar De in his letter to plaintiff dated 25th July, 1984 mentioned that after death of Prabhat Chandra De he informed Emerald Company about the existence of partnership deed but notwithstanding such fact the Emerald Company did not change the lessee's name in the rent receipt from Prabhat Chandra De to his name.

39. From the aforesaid fact it is clear that Prabhat Chandra De, the existing tenant, sublet the property in favour of a partnership firm of which he was one of the partners but the landlord did not accept such sub-tenancy. Such being the position, on the death of Prabhat Chandra De, the original tenancy was inherited by all his heirs including the plaintiffs of Title Suit No.3099 of 1996. Once it is established that Emerald Company did not recognize P. C. De & Company as tenant but all along recognised Prabhat Chandra De as a tenant in his personal capacity and even did not act on the basis of request of Prasanta Kumar De to change the tenancy in his sole name as it appears from the letter dated 25th July, 1984 exhibited by the respondent No. 1 itself, Khaitan Consultant Limited having no right in the property could not accept Prasanta Kumar De as sole tenant on the basis of partnership deed and thereafter, could not accept possession of part of the tenancy on the basis of surrender of the alleged tenancy by Prasanta Kumar De.

40. We, therefore, find that original tenancy of Prabhat Chandra De was continuing even after his death and such tenancy has not been lawfully terminated by the landlord, namely. Emerald Company Limited. We have already pointed out that Khaitan Consultant Limited has not acquired any right by virtue of the two lease deeds and even assuming for the sake of argument if they acquired such right, after expiry of the second lease they cannot file a suit for

eviction of a trespasser as it has no right in the property.

41. Mr. Jiban Ratan Chatterjee, the learned advocate appearing on behalf of one of the appellants rightly pointed out that even the lease deed did not authorise Khaitan Consultant Limited to file a suit for eviction against a rank trespasser and the present suit having been filed by treating the defendant as rank trespasser, the suit at the instance of the plaintiff was not maintainable unless it can show that it has acquired any title to the property. We have already held that title to the property still remains with Emerald Company Limited and as such, Khaitan Consultant Limited having no title to the property cannot maintain a suit for eviction of trespassers.

42. Therefore, the learned Trial Judge erred in law in passing a decree for eviction in Title Suit No.347 of 1997 in favour of Khaitan Consultant Limited. Therefore, the judgment and decree impugned in F.A.T. No. 1195 of 2003 and F. A. T. No. 798 of 2003 are liable to be set aside as the plaintiff has failed to prove right to file suit and at the same time it had no better title than that of defendants in the suit.

43. So far the other appeal namely, F. A. T. No. 1132 of 2003 is concerned, the said appeal is preferred against the judgment and decree passed in Title Suit No. 3099 of 1996 by which the learned Trial Judge dismissed the suit for declaration of tenancy right of the plaintiffs therein.

44. It appears from the plaint of the said suit that the plaintiffs therein have prayed for declaration of their tenancy right jointly with other heirs of Prabhat Chandra De under Khaitan Consultant Limited. In this suit Emerald Company is not a party. We have already found while deciding the other two appeals that Emerald Company Limited is the owner of the property and the lease executed by Emerald Company in favour of Khaitan Consultant Limited did not create any right. In this suit the defendant No. 1, namely, Khaitan Consultant Limited has practically reiterated its plaint case of the other suit in defence. The learned Trial Judge, it appears from record, has dismissed the suit on the ground that the suit is barred by limitation as the plaintiff did not claim their tenancy right after the death of Prabhat Chandra De. While deciding the other two appeals, we have already held that even after death of Prabhat Chandra De, till January, 1985 rent receipts were granted in the name of Prabhat Chandra De and prayer of Prasanta De for transferring the tenancy in his name was not accepted till February, 1985. Therefore, the plaintiff had no cause of action to file any suit so long landlord had not accepted Prasanta Kumar De as sole tenant thereby jeopardising the right of the plaintiffs. It appears that such right was clouded from February, 1985 when fresh rent receipt was granted in favour of the Prasanta Kumar De alone and the suit has been filed in the year 1996 when possession of the part of tenanted property was taken by Khaitan Consultant Limited. Therefore, the plaintiffs really prayed for getting back possession of the property by way of mandatory injunction on the basis of their right of tenancy as heirs of Prabhat Chandra De. Therefore, the suit is governed under Article 65 of the Limitation Act and as such,

the suit filed in the year 1996 could not be held to be barred by limitation.

45. Although, Mr. Mitra appearing on behalf of the respondent tried to convince us that it should be presumed that original tenancy was surrendered by the heirs of Prabhat Chandra De, we are not impressed by such submission as the specific defence of the Khaitan Consultant Limited in this suit was that at the time of death of Prabhat Chandra De, he was not a tenant but it was P. C. De & Company who was a tenant and such defence has been falsified from the rent receipts granted by landlord itself. No alternative plea was even taken by the Khaitan Consultant Ltd. in the written statement that the original tenancy of Prabhat Chandra De was surrendered by his heirs and thereafter, a new tenancy was created in favour of Prasanta Kumar De. Therefore, such plea is not available to the defendant in this suit. Mr. Mitra, however, contended that his client having taken a plea that the suit is barred by the principles of waiver, estoppel and acquiescence, it should be allowed to raise such plea when on the question of waiver, estoppel and acquiescence, already an issue has been framed and parties led evidence. We are quite conscious that even if a specific plea is not borne out by pleadings, if such specific issue is framed on a particular point and if the parties led evidence on such issue without raising any objection and cross-examined the witnesses of the adversary, such party is precluded from raising objection before the Appellate Court about acceptance of evidence. In this case, no issue has been framed whether the tenancy of Prabhat Chandra De was surrendered by his the heirs; on the contrary, the issue No. 7 was framed as follows:

Was the acceptance of Prasanta Kumar De as sole tenant of the suit premises by defendant No. 1 without the consent of the plaintiffs and defendants Nos. 2 to 9 legal, valid and binding upon the plaintiffs?

46. The framing of the aforesaid issue rather suggests that no case of surrender by the heirs of Prabhat Chandra De was ever made by the defendant and the issue No. 10, whether the surrender of tenancy by Prasanta is legal, valid and binding upon the plaintiffs, itself indicates that no case of surrender by all the heirs of Prabhat Chandra De was neither expressly nor implicitly taken in the pleadings of the defendant. We therefore find no force in the aforesaid contention of Mr. Mitra.

47. Mr. Mitra further strenuously contended that the plaintiff in this suit having accepted Khaitan Consultant Limited as landlord by tendering rent through one of the co-sharers they are estopped from disputing the title of Khaitan Consultant Limited as their landlords. We, however, find that there are legal obstacles in accepting such contention for the reasons set forth below:

First, Khaitan Consultant Limited in the suit has not accepted the plaintiffs as its tenants but it is its specific case that P C De and company was the tenant and the plaintiffs and their licensees are all trespassers and according to it, even Prabhat Chandra De, in his personal capacity was not the tenant at the time of

his death. Therefore, no question of estoppels arises as Khaitan Consultant Limited was never induced to do any thing on the basis of the representation of the plaintiffs.

Secondly, it is now settled law that a tenant is estopped from disputing the title of his landlord at the time of induction but he is not precluded from disputing the derivative title of a third party who claims title on the basis of transfer from inducing landlord and even if, the tenant erroneously pays rent to such derivative title-holder, once it is proved that according to the law no title has really been conveyed in favour of such third party. [See Ketu Das Vs. Surendra Nath Sinha and others); Chengtu Sarkar Vs. Jaheruddin Mondal and Another,]. The fact that the tenant due to ignorance of law, paid rent to such third party will not stand as estoppel against the tenant from denying the derivative title of the third party and from re-tendering rent to the real landlord. Therefore, the plaintiffs cannot be prevented by the principles of estoppel from disputing the title of the third party even if they erroneously thought that the said third party acquired right to the property and consequently, paid rent. At this stage it will be profitable to refer to the following observation of the Apex court in the case of Subhash Chandra Vs. Mohammad Sharif and Others, while considering the applicability of Section 116 of the Evidence Act to a case of a landlord who claims to be derivative title holder from the inducing landlord:

"It is true that the doctrine of estoppel ordinarily applies where the tenant has been let into possession by the plaintiff. Where the landlord has not himself inducted the tenant in the disputed property and his rights are founded on a derivative title, for example, as an assignee, donee, vendee, heir, etc., the position is a little different. A tenant already in possession can challenge the plaintiffs claim of derivative title showing that the real owner is somebody else, but this is subject to the rule enunciated by Section 116 of the Evidence Act. The Section does not permit the tenant, during the continuance of the tenancy, to deny that his landlord had at the beginning of the tenancy a title to the property. The rule is not confined in its application to cases where the original landlord brings an action for eviction. A transferee from such a landlord also can claim the benefit, but that will be limited to the question of the title of the original landlord at the time when the tenant was let in. So far claim of having derived a good title from the original landlord is concerned, the same does not come under the protection of the doctrine of estoppel, and is vulnerable to a challenge. The tenant is entitled to show that the plaintiff has not as a matter of fact secured a transfer from the original landlord or that the alleged transfer is ineffective for some other valid reason, which renders the transfer to be non-existent in the eye of law."

48. After the conclusion of hearing of the appeal, in the written note of argument, the respondent No. 1 relied upon the decision of Supreme Court in the case of Anar Devi (Smt) Vs. Nathu Ram, in support of the proposition of law that the plea of Section 116 of the Evidence Act will be available to the derivative title-

holder from the original landlord if any rent is paid to such derivative title-holder by the tenant. In the said decision the Supreme Court at paragraph 13 of the judgment made the following proposition of law:

"The Judicial Committee in *Kumar Krishna Prasad Lal Singha Deo v. Baraboni Coal Concern Ltd.*, when had occasion to examine the contention based on the words "at the beginning of the tenancy" in Section 116 of the Evidence Act, pronounced that they do not give a ground for a person already in possession of land becoming tenant of another, to contend that there is no estoppel against his denying his subsequent lessor's title. Ever since, the accepted position is that Section 116 of the Evidence Act applies and estops even a person already in possession as tenant under one landlord from denying the title of subsequent landlord when once he acknowledges him as his landlord by attornment or conduct. Therefore, a tenant of immovable property under landlord who becomes a tenant under another landlord by accepting him to be the owner who had derived title from the former landlord cannot be permitted to deny the latter's title, even when he is sought to be evicted by the latter on the permitted ground."

49. We find that while making the aforesaid observation, the Supreme Court took no notice of its earlier decision in the case of *Subhash Chandra v. Mohammad Sarif* (supra), where another Bench of the Supreme Court specifically took a contrary decision by holding that "so far claim of having derived a good title from the original landlord is concerned, the same does not come under the protection of the doctrine of estoppel, and is vulnerable to a challenge."

50. We are therefore unable to follow the subsequent decision of the Apex Court in the case of *Anar Devi* (supra), given by a co-ordinate Bench as a binding precedent.

51. Mr. Mitra, ultimately made a desperate submission by contending that in this case, the Emerald Company Ltd. gave a letter of attornment to the heirs of Prabhat Chandra De asking them to pay rent to Khaitan Consultant Ltd. and on the basis of such letter of attornment, the plaintiffs having paid rent to Khaitan Consultant Ltd., they are estopped from disputing the right of the Khaitan Consultant Ltd. We are however not prepared to accept such submission for the following reasons:

First, no document has been produced by the Khaitan Consultant Ltd. showing that any such letter was issued or served. Secondly, it is apparent that at the time of creation of first lease in favour Khaitan Consultant Ltd. the Emerald Company Ltd. was not aware of death of Prabhat Chandra De as would appear from the fact that rent receipts were all along issued in the name of Prabhat Chandra De and Khaitan Consultant Ltd. also continued to grant rent receipts in the same name up to January, 1985. Therefore, it is impossible to believe that any such letter of attornment was addressed to the heirs of the deceased tenant. If any such attornment letter was really issued, the subsequent rent receipts

would also have been granted in the names of the heirs of the deceased tenant. No valid attornment letter, it is needless to mention, could be given to a tenant who is admittedly dead at the time of issue of such letter. Therefore, it is apparent that on the basis of the first lease deed, the Khaitan Consultant Ltd. claimed rent from the heirs of the deceased tenant and on that basis rent was paid on their behalf. It is now a settled law that attornment does not create any new tenancy but by virtue of attornment the old tenancy continues. (See Uppalapati Veera Venkata Satyanarayanaraju and Another Vs. Josyula Hanumayamma and Another, . If the old tenancy continues, notwithstanding attornment the tenant can always contend that the plaintiff who claims to be landlord has not really derived title from the original inductor by taking aid of the decision of the Supreme Court in the case of Subhash Chandra v. Mohammad Sarif (supra).

Moreover, in our opinion, the doctrine of estoppel can be applied only to a litigation where the status of tenant is admitted by the other side of the litigation and in such a case, having once obtained the benefit of tenancy from the other side of the litigation, a tenant is estopped from disputing the title of the landlord in legal proceedings involving right of lawful claim of rent, eviction or breach of agreed terms for use and occupation arising out of the agreement of tenancy. But in a given case, if the other side of the litigation contends that the so-called tenant was never accepted as tenant by him nor did he accept rent from such person and that such person is a rank trespasser, it is permissible for such person to contend that other side of the litigation has no title to the property. The doctrine of estoppel is essentially based on mutuality. In this case, it is the definite case of the respondent No. 1 that the appellants had at no point of time acquired any tenancy right as their predecessor viz. Prabhat Chandra De was not a tenant at the time of death and as such, the plaintiffs are also entitled to contend that the respondent No. 1 acquired no title to the property from Emerald Company Ltd. Therefore, the decision of the Supreme Court in the case of Anar Devi (supra), relied upon by the respondent, even if is treated to be a binding precedent, is not applicable to the facts of this case as in that case the respondent admitted the appellant to be a tenant and sought for eviction as tenant on permissible ground as prescribed in the statute.

52. As we have in the other appeals arising out of the suit for eviction filed by Khaitan Consultant Ltd. where Emerald Company is a party held that Emerald Company is the lawful owner and that the original tenancy of Prabhat Chandra De is subsisting under Emerald Company, we cannot grant a decree inconsistent with the same in this appeal arising out of the Title Suit No. 3099 of 1996. But as in this suit, Emerald Company Ltd. is not a party no effective decree for declaration of tenancy right of the plaintiffs can be passed so long the real landlord is not made a party.

53. We, accordingly, remand the matter back to the learned Trial Judge for giving an opportunity to the plaintiff to amend the plaint by adding Emerald Company

as party defendant and making consequential amendment of the plaint.

54. We, thus, set aside the judgment and decree passed in Title Suit No. 3099 of 1996 and remand the matter back to the learned Trial Court for permitting the plaintiffs to amend the plaint by adding Emerald Company Ltd. as a party and for seeking consequential amendment of plaint. Such application of amendment be filed within a fortnight after the arrival of the lower Court records. The learned Trial Judge is directed to dispose of the suit as expeditiously as possible in accordance with law. If no application is filed within the aforesaid period, the suit will stand dismissed for want of necessary party.

55. We, thus, allow F. A. T. No. 1195 of 2003 and F. A. T. No. 798 of 2003 and set aside the judgment and decree passed in Title Suit No. 347 of 1997 and also allow the other appeal being F. A. T. No. 1132 of 2003 by setting aside the judgment and decree passed in Title Suit No. 3099 of 1996 and sending the suit back on remand in the light of the observations made in the body of this order.

56. In the facts and circumstances, there will be, however, no order as to costs.

Rajendra Nath Sinha, J.

57. I agree.