

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Original Side

Present:- Hon'ble Mr. Justice I. P. Mukerji
And
Hon'ble Mr. Justice Aniruddha Roy

APD No.269 of 2018
WITH
CS No.524 of 1984
EC No.146 of 2017
IA No. GA No.2 of 2020
JYOTI BISWAS & ORS.
Versus
RAJ KUMAR GHOSH & ORS.

APD No.270 of 2018
WITH
EC/146/2017
CS/524/1984
CINE CLUB OF CALCUTTA & ANR.
Versus
RAJ KUMAR GHOSH & ORS.

APD No.271 of 2018
WITH
EC/146/2017
CS/524/1984
AMBAR ROY
Versus
RAJ KUMAR GHOSH & ORS.

APD No.272 of 2018
WITH
EC/146/2017
CS/524/1984
RANJIT KARUNAKAR
Versus
RAJ KUMAR GHOSH & ORS.

APD No.288 of 2018
WITH
EC/146/2017
CS/524/1984
BINA KOLEY
Versus
RAJ KUMAR GHOSH & ORS.

APD No.289 of 2018
WITH
EC/146/2017
CS/524/1984
RADIANT PHOTO SERVICE
Versus
RAJ KUMAR GHOSH & ORS.

APD No.290 of 2018
WITH
EC/146/2017
CS/524/1984

UMA ARORA & ANR.
Versus
RAJ KUMAR GHOSH & ORS.

APD No.291 of 2018
WITH
2 EC/146/2017
CS/524/1984
NIRMAL KUMAR JAIN
Versus
RAJ KUMAR GHOSH & ORS.

APD No.292 of 2018
WITH
EC/146/2017
CS/524/1984
PARSHU RAM CHOUDHURY
Versus
RAJ KUMAR GHOSH & ORS.

APD No.293 of 2018
WITH
EC/146/2017
CS/524/1984
SUSOVAN GHOSH
Versus
RAJ KUMAR GHOSH & ORS.

APD No.294 of 2018
WITH
EC/146/2017
CS/524/1984
KAMLA SIKCHI & ANR.
Versus
RAJ KUMAR GHOSH & ORS.

APD No.295 of 2018
WITH
EC/146/2017
CS/524/1984
NAUSHAD AKHTAR & ANR.
Versus
RAJ KUMAR GHOSH & ORS.

APD No.296 of 2018
WITH
EC/146/2017
CS/524/1984
KRISHNA PAUL & ANR.
Versus
RAJ KUMAR GHOSH & ORS.

APD No.297 of 2018
WITH
EC/146/2017
CS/524/1984
DEV KISHAN TAPADIA
Versus
RAJ KUMAR GHOSH & ORS.

APD No.298 of 2018
WITH
EC/146/2017
CS/524/1984

SNEHASIS COHWDHURY
Versus
RAJ KUMAR GHOSH & ORS.

APD No.310 of 2018
WITH
EC/146/2017
CS/524/1984
HARLALKA BROTHERS
Versus
RAJ KUMAR GHOSH & ORS.

APD No.311 of 2018
WITH
EC/146/2017
CS/524/1984
MOHAN LAL SINGHI
Versus
RAJ KUMAR GHOSH & ORS.

APD No.312 of 2018
WITH
EC/146/2017
CS/524/1984
SHAN HAIDER & ANR.
Versus
RAJ KUMAR GHOSH & ORS.

APD No.313 of 2018
WITH
EC/146/2017
CS/524/1984
PARNA MUKHERJEE
Versus
RAJ KUMAR GHOSH & ORS.

APD No.314 of 2018
WITH
EC No.146 of 2017
CS/524/1984
IA NO. GA 2 of 2020 (Old No. GA 766 of 2020)
SHADUDDIN AHMED
Versus
RAJ KUMAR GHOSH & ORS.

APD No.315 of 2018
WITH
EC/146/2017
CS/524/1984
SATYENDRA KUMAR JHUNJHUNWALA
Versus
RAJ KUMAR GHOSH & ORS.

APD No.316 of 2018
WITH
EC/146/2017
CS/524/1984
ASHOK KUMAR
Versus
RAJ KUMAR GHOSH & ORS.

APD No.317 of 2018
WITH
EC/146/2017

CS/524/1984
VISHAL SIKCHI & ORS.
Versus
RAJ KUMAR GHOSH & ORS.

APD No.318 of 2018
WITH
EC/146/2017
CS/524/1984
ALOKE KUMAR JANA & ANR.
Versus
RAJ KUMAR GHOSH & ORS.

APD No.319 of 2018
WITH
EC/146/2017
CS/524/1984
SIBAJI BHAUMIK
Versus
RAJ KUMAR GHOSH & ORS.

APD No.320 of 2018
WITH
EC/146/2017
CS/524/1984
SHASHI KANT SHAH & ANR.
Versus
RAJ KUMAR GHOSH & ORS.

APD No.321 of 2018
WITH
EC/146/2017
CS/524/1984
INDRA NATH ROY
Versus
RAJ KUMAR GHOSH & ORS.

APD No.322 of 2018
WITH
EC/146/2017
CS/524/1984
GOPENDRA NARAYAN CHATTOPADHYAY & ANR.
Versus
RAJ KUMAR GHOSH & ORS.

APD No.323 of 2018
WITH
EC/146/2017
CS/524/1984 SHABNAM HAIDER
Versus
RAJ KUMAR GHOSH & ORS.

APD No.324 of 2018
WITH
EC/146/2017
CS/524/1984
ANJAN CHATTERJEE
Versus
RAJ KUMAR GHOSH & ORS.

APD No.325 of 2018
WITH
EC/146/2017

CS/524/1984
SUPRIYO GHOSH
Versus
RAJ KUMAR GHOSH & ORS.

APD No.326 of 2018
WITH
EC/146/2017
CS/524/1984
V. RAGHAVAN
Versus
RAJ KUMAR GHOSH & ORS.

APD No.327 of 2018
WITH
EC/146/2017
CS/524/1984
JAYANTA SARKAR
Versus
RAJ KUMAR GHOSH & ORS.

APD No.328 of 2018
WITH
EC/146/2017
CS/524/1984
REYAZ AHMED KHAN
Versus
RAJ KUMAR GHOSH & ORS.

APD No.329 of 2018
WITH
EC/146/2017
CS/524/1984
SANJAY KUMAR SHAW
Versus
RAJ KUMAR GHOSH & ORS.

APD No.330 of 2018
WITH
EC/146/2017
CS/524/1984
RITA DEVI SINGHANIA
Versus
RAJ KUMAR GHOSH & ORS.

APD No.331 of 2018
WITH
EC/146/2017
CS/524/1984
IA No. GA 2 of 2021
BANDANA BASU
Versus
RAJ KUMAR GHOSH & ORS.

APD No.332 of 2018
WITH
EC/146/2017
CS/524/1984
ROADLINES INDIA PVT. LTD.
Versus
RAJ KUMAR GHOSH & ORS.

APD No.333 of 2018
WITH

EC/146/2017
CS/524/1984
KAMALENDU DHAR
Versus
RAJ KUMAR GHOSH & ORS.

APD No.334 of 2018
WITH
EC/146/2017
CS/524/1984
SWAPNA CHAKRABORTY
Versus
RAJ KUMAR GHOSH & ORS.

APD No.335 of 2018
WITH
EC/146/2017
CS/524/1984
MD. FAJAR ALI BISWAS
Versus
RAJ KUMAR GHOSH & ORS.

APD No.336 of 2018
WITH
EC/146/2017
CS/524/1984
DEBAPRASAD DAS
Versus
RAJ KUMAR GHOSH & ORS.

APD No.337 of 2018
WITH
CS No.524 of 1984
EC/146/2017
CHAMPA BISWAS
Versus
RAJ KUMAR GHOSH & ORS.

APD No.338 of 2018
WITH
EC/146/2017
CS/524/1984
BHABA SUNDAR PANDA
Versus
RAJ KUMAR GHOSH & ORS.

APD No.339 of 2018
WITH
EC/146/2017
CS/524/1984
MOHAN SINGH RAYET
Versus
RAJ KUMAR GHOSH & ORS.

APD No.340 of 2018
WITH
EC/146/2017
CS/524/1984
KELA BROTHERS & ORS.
Versus
RAJ KUMAR GHOSH & ORS.

For the appellants in APD 269 of 2018 : **Mr. Arindam Banerjee, Adv.,
Mr. Ashis Kumar Mukherjee,
Ms. Arpita Saha,
Mr. S. Prasad.**

**For the appellants in
APD 270 of 2018 to APD 272 of 2018, : Mr. Jishnu Choudhury, Adv.,
APD 288 of 2018 to APD 298 of 2018, Ms. Noelle Banerjee, Adv.,
APD 310 of 2018 to APD 313 of 2018, Mr. Sidhartha Sharma, Adv.,
APD 315 of 2018 to APD 340 of 2018. Ms. Shalini Basu, Adv.**

For the appellants in APD 314 of 2018 : Ms. Yahya Mosharaf Hussain,

**For the respondent/decree holders : Mr. Rohit Das, Adv.,
Mr. Aniruddha Bhattacharyya,
Mr. Niladri Khanra, Adv.,
Ms. Kishwar Rahman, Adv.**

Judgment on : 26.04.2022

ANIRUDDHA ROY, J .:

1. This cluster of appeals arose from a common judgment and order dated August 16, 2018 passed in Execution Case No. 146 of 2017 whereby and whereunder the occupiers of an immovable property were directed to be dispossessed. The said cluster of appeals involve same and common question of law for consideration before this Appellate Court and hence, by consent of the parties, the appeals are taken up together, heard and are being disposed of by this common judgment and order.

The Appeal:

2. The appellants are occupiers of various portions of premises no. 2 Jawaharlal Nehru Road, Kolkata-700013 previously known as Chowringhee Road (for short, the suit property) and are the obstructionists resisting an eviction decree dated May 03, 2017, which was a compromise decree for eviction passed in suit no. 524 of 1984 (Raj Kumar Ghosh & Anr. vs. Jayashree Ghose & Ors.) (for short, the second suit). The appellants/obstructionists claimed to be the sub tenants under the predecessors of the first and the second defendants in the Bando's suit and are still in settled possession and occupation of various portions of the said property. The appellants came to know about the said compromise decree

for eviction dated May 03, 2017 (for short, the compromise decree) as and when the learned receiver appointed by the Executing Court went to take possession. Immediately then they applied before the Executing Court under the provisions of Order XXI, Rule 99 read with section 47 of the Code of Civil Procedure, 1908 (for short, the code) and resisted the said compromise decree for eviction principally on the grounds that, the appellants had independent rights in respect of their respective portions of the property in which they were in settled possession and the said compromise decree was a clear result of fraud, amongst others. By the said impugned judgment and order such applications filed by the appellants were dismissed and direction was made to handover possession to the receiver, hence, these appeals.

Facts:

3. One Debaprosad Gooptu was the owner of the suit property. Subsequently, the property after his demise was devolved upon his legal heirs and successors (for short, the Gooptus). One Probodh Chandra Mitra, since about 1940 was a monthly tenant under Debaprosad. Probodh during his lifetime carried out a hotel business from the said property under the name and style of “Bristol Hotel” as the sole proprietor thereof. Probodh, the original tenant, died on June 12, 1949, leaving a will with a bequeath in favour of his nephew Prafulla Kumar Mitra. Debaprosad accepted Prafulla as a monthly tenant in place and stead of Probodh at a monthly rent of Rs. 2,800/-. Since then Prafulla was continuing to carry out the said hotel business. The said monthly rent was varied by consent from time to time. Prafulla obtained the grant of probate in respect of the said will of Probodh.
4. On or about February 15, 1951 one Nibaran Mitra, another nephew of Probodh applied before the Learned District Judge, Alipur for the revocation of the grant of probate which was obtained by Prafulla being revocation case no. 8 of 1951. In the said proceeding Prafulla was appointed as the receiver in respect of the said hotel business. Prafulla was continuing as tenant under Debaprosad in respect of the said property even after he was

appointed as the receiver. Debaprosad on August 12, 1953 issued a notice to quit and sought to determine the tenancy of Prafulla on the sole ground of default in making payment of rent and called upon Prafulla to deliver possession immediately after expiry of the month of August, 1953. Since Prafulla did not make over the possession, Debaprosad on or about April 05, 1954 filed an eviction suit before this Court being suit no. 1059 of 1954 (for short, the first suit) seeking delivery of possession and recovery of arrear rents along with consequential reliefs.

5. By an order dated May 29, 1959 the District Judge, Alipur, revoked the probate in respect of the will of Probodh, though, inspite thereof Prafulla was in continuous and settled possession of the property and pursued the appeal from the said order of revocation.
6. On or about April 11, 1960 the said first suit was decreed ex parte and an appeal was carried out there from being appeal no. 109 of 1960. In the said appeal on September 11, 1963 a compromise was arrived at by which on certain terms and conditions as mentioned therein, the suit was remanded for further trial.
7. Meanwhile Prafulla inducted some of the appellants obstructionists in the various portions of the property as his tenants and was receiving rents.
8. By a will dated July 16, 1963 Debaprosad the original landlord, bequeath the said property in favour of his son Dhruba Gooptu.
9. On December 12, 1964 Debaprosad died. On April 03, 1965 Prafulla being the first defendant in the first suit died.
10. By an order dated August 04, 1965 this Court recorded the death of Debaprosad and substituted Dhruba as the plaintiff in the said first suit. Similarly on August 14, 1965 this Court by its order recorded the death of Prafulla who was the original first defendant in the first suit and substituted his legal heirs and successors in his place and stead, namely, Aruna Basu Malik, Promil Ghosh, Subarnabala Mitra. Since then, the cause title of the first suit was substituted as Dhruba Gooptu vs. Aruna Basu Malik & Ors. After the death of Prafulla his legal heirs and successors

namely Aruna Basu Malik were continuing in accepting rents from the appellants obstructionists acknowledging their tenancy in the property and issued rent receipts. The appellants had disclosed such rent receipts in their respective applications.

11. On October 14, 1974 the District Judge, Alipur granted probate in respect of the will of Prafulla dated March 31, 1965 in favour of Aruna, the sole executrix, which according to the appellants include the tenancy right of Prafulla. On October 07, 1977 probate was obtained by Dhruba in respect of the will of Debaprosad dated July 16, 1963.
12. After obtaining the grant of probate in respect of the will of Debaprosad by a registered lease dated February 06, 1978, Dhruba granted lease in favour of the seven individual partners of Bando & Co. during pendency of the first suit. On February 22, 1983 Dhruba died leaving a will appointing Shankar Narayan Gooptu and Naranarayan Gooptu as his executors. The probate is not yet obtained. The said two executors of the will of Dhruba acknowledged the Bando as alleged lessees of the property and informed them about the demise of Dhruba. On May 20, 1983 the Bando applied for recording the death of Dhruba and for the necessary substitution in the first suit, the same was rejected. The first suit was then abated in 1983 itself upon the death of the plaintiff and since there was no substitution.
13. In 1984 the partnership firm of the Bando namely Bando and Co. was reconstituted. On July 25, 1984 the Bando filed suit no. 524 of 1984 (for short, the second suit) before this Court claiming the following reliefs:

“(a) Declaration that the Indenture of Lease dated 6th February 1978 executed by Dhruba Gooptu, since deceased, in favour of the original plaintiffs is valid and subsisting and binding upon all the parties concerned and/or upon their agents, assign or representative,

(b) Declaration that the present defendant Nos.1 and original defendant no.2 have no right-title or interest to remain in possession of premises No.2, Jawharlal Nehru Road, Calcutta, in any capacity whatsoever

(c) Declaration that the present defendant Nos.1 and the original defendant no.2 have no right or authority or jurisdiction to collect any rents, issues and profits from the persons to whom they have wrongfully sublet the said premises,

(d) Declaration is also necessary that the tenancy created by Debaprosad Gooptu in favour of Profulla Kumar Mitra, both since deceased in respect of premises No.2, Jaharlal Nehru Road, Calcutta has duly been determined and/or been terminated and the same are binding upon the heirs of Prafulla Kumar Mitra,

(e) Declaration that the present plaintiffs by virtue of the Indenture of lease dated 6th February 1978 are entitled to immediate possession of the demised premises,

(f) Declaration that the present defendant no.1 and the original defendant no.2 to 4 are bound to make over peaceful vacant possession of the demised premises to the present plaintiffs.

(g) Possession of the said premises No.2, Jawaharlal Nehru Road, Calcutta described schedule 'X' hereto.

(h) Perpetual injunction restraining the present defendant no.1 and the original and/or each of the defendants and/or their agents or assigns or representatives from dealing with or encumbering the demised premises in any manner whatsoever to the detriment of the interests of the present plaintiffs,

(i) Injunction,

(j) Receiver,

(k) Costs,

(l) Such further order/orders as to this Hon'ble Court may deem fit and proper".

14. The plaint in the second suit was amended.
15. On or about August 24, 1984 an application was filed by the plaintiffs in the second suit for appointment of receiver on the premises to collect rent from the tenants/sub-tenants and an order of injunction was passed. On June 18, 1985 an order was passed by this Court appointing a Special Officer to cause an enquiry in the property and to file a report. Ms. Aruna Basu Malik, was directed to keep the amount collected from tenants/sub-tenants in a separate bank account and to pay regular maintenance in respect of the suit property. She was also directed not to induct any further tenant in the property. The Special Officer so appointed filed a report on July 15, 1985 recording the names of the occupants at the property.
16. By an order dated December 05, 1985 in the testamentary proceeding relating to the estate of Prafulla, Aruna Basu Malik, the first defendant in the second suit being the executrix was authorized and directed to collect rents, issues, profits and deposits and to maintain a separate account for this purpose and Aruna was further allowed to incur expenses and make the necessary disbursement out of such collections. The receiver so appointed on the property in December, 1985 submitted his second report mentioning the outstanding receivable out of the property. On April 06, 1985 the said second suit was dismissed on the ground of default.
17. On April 17, 1995 Aruna made her last will and testament naming Jayashree Ghose as the executrix and bequeathed the tenancy in the suit

premises in her favour solely. Jayashree is the first defendant at present in the amended plaint in the second suit.

18. Between 1988 to April, 2005 the original plaintiffs in the said second suit died. The partnership firm namely Bando and Co. was reconstituted from time to time and the plaintiffs at present in the amended plaint had claimed to be the present partners of the Bando and Co.
19. By an order dated August 11, 2008 Jayashree was appointed as the administrator pendente lite in respect of the estate of Aruna.
20. By an order dated November 18, 2015 after about ten years of the second suit being dismissed for default, was restored, the amendment was allowed in the plaint and the original parties in the said second suit were substituted at the instance of the plaintiffs. None appeared on behalf of the second, third and fourth defendants. On or about December 12, 2016 Jayashree filed her written statement in the second suit. Issues in the suit were framed on January 11, 2017. On May 3, 2017 the second suit was decreed on compromise on the basis of a terms of settlement arrived at between the plaintiffs and the first defendant Jayashree. From the terms of settlement it appears that, the second, third and fourth defendants did not appear and contest the suit.
21. The plaintiff decree holders then in June, 2007 instituted the execution proceeding being EC 146 of 2017. An order was passed on June 13, 2017 appointing receiver to take actual physical possession of the portions of the premises from the occupants. By an order dated July 04, 2017 receiver was directed to put notice at the entrance of the property. There are fifty eight nos. of occupants who are resisting the said compromise decree. Such applicants in July, 2017 filed their respective applications under the provisions of order XXI, Rule 99 read with Section 47 of the code resisting the decree. Parties had exchanged their respective affidavits in such resistance applications including the supplementary affidavit by the decree holder and the counter thereto by the obstructing claimants.
22. On August 16, 2018 the judgment and order impugned was passed.

Arguments:

23. Mr. Jishnu Choudhury, learned counsel with Ms. Noelle Banerjee, Advocate appearing on behalf of the appellants, inter alia, in APD 269 of 2018 submitted that, Probodh was a monthly tenant under Deboprasad since prior to 1949 under the State Tenancy Law of 1950 then prevailing, which governed the relationship of land lord and tenant between Deboprasad and Probodh. After the demise of Probodh, Prafulla was occupying the suit property and carried out the hotel business of Probodh from the demised portion of the suit property and Deboprasad as the land lord regularly accepted monthly rent from Prafulla. Thus, Prafulla became a monthly tenant of Deboprasad in respect of the demised property. On the sole ground of default the eviction notice dated August 12, 1953 was issued to Prafulla under the relevant provision of the West Bengal Premises Rent Control Act, 1950 (for short, the said Tenancy Act of 1950). The first suit was then filed on the basis of the said eviction notice, which later had ripen to a consent decree of September 11, 1963 by which the suit was remanded for fresh hearing. Subsequently with the death of the plaintiff in the first suit no substitution had taken place and as a result, the first suit stood abated. In view of such abatement no adjudication took place in the said first suit which could bind the parties therein and the land lord tenant relationship between the Gooptus and Mitras had continued. According to Mr. Chowdhury, such jural relationship still continuing between the land lord of the property and the successor in interest of Prafulla. During the lifetime of Prafulla the appellants were inducted in the various portions of the suit property and since then they are in settled possession and occupation of their respective portions in the suit property. Thus, the Bando, plaintiffs in the second suit did not have and could not claim any privity or any jural relationship with the appellants. The appellants are continuing in possession at the suit property by virtue of their independent right being inducted by Prafulla in the property to the notice and knowledge of Deboprasad the original landlord. The appellant had acquired an

independent right, which was required to be adjudicated by the executing court, to which the executing court had erred in law and on facts by not doing so and erroneously directed dispossession of the appellants from the suit property.

24. He then submitted that, Deboprasad had issued the said eviction notice dated August 12, 1953 asking Prafulla to quit under the said Rent Act of 1950 solely on the ground of default. Then Deboprasad filed the first suit seeking eviction of Prafulla. The first suit ultimately stood abated. The notice, therefore, did not result in forfeiture. Issuance of eviction notice under the Rent Act does not result the tenant becoming a trespasser till the decree for eviction is pronounced by a jurisdictional civil court and such a tenant continues as a statutory tenant. In support of his contentions Mr. Chowdhury relied upon the following judgments:-

(i) In the matter of: Krishna Prosad Bose versus Official Assignee of the High Court of Judicature at Rangoon and others, reported at AIR 1936 Cal 505;

(ii) In the matter of: Damadilal and Others versus Parashram and Others, reported at (1976) 4 SCC 855;

(iii) In the matter of: V. Dhanapal Chettiar versus Yesodai Ammal, reported at (1979) 4 SCC 214.

25. Mr. Choudhury then submitted that, the lessor after divesting itself of possession in favour of the lessee, only retains a right of reversion and to collect rent. Reversion is used to forfeit and get back possession of the property from the lessee. This right can only be transferred by way of sale under Section 54 of the Transfer of Property Act. Therefore, during the currency of a lease or tenancy, no further lease can be created in respect of the self same property and such concurrent lease or tenancy is void and of no effect. In support of such contention Mr. Choudhury had relied upon the following decisions:-

(i) In the matter of: Swapan Kumar Dutta versus Dharam Chand Jaiswal & Anr., reported at (2002) 2 CHN 627;

(ii) In the matter of: Sambhunath Mitra and Others versus Khaitan Consultant Ltd. and others, reported at (2005) 2 CHN 519 [Reversed in (2015) 15 SCC 567];

(iii) *In the matter of: Prabhat Kumar Paul versus Shree Shree Lakshmi Janardan Thakur & Ors.*, reported at (2008) 2 CHN 445;
(iv) *In the matter of: Swapan Kumar Dutta versus Bimala Devi Shaw alias Jaiswal & Ors.*, reported at (2004) 3 Cal LT 414;

(v) *In the matter of: M. E. Moola Sons, Limited versus Official Assignee of the High Court of Judicature at Rangoon and Others*, reported at AIR 1936 PC 230.

26. Mr. Choudhury then submitted that, the status of the Mitras after the abatement of the first suit became that of a statutory tenant, since the notice of eviction. Since the notice of eviction dated August 12, 1953 was issued and the same did not culminate into any eviction decree as the first suit stood abated, in such situation, no suit for possession is maintainable against a statutory tenant as a trespasser. In support of such contention Mr. Choudhury relied upon a decision of the Supreme Court *In the matter of: R.S. Grewal and Others versus Chander Prakash Soni and Another*, reported at (2019) 6 SCC 216.

27. Mr. Choudhury on behalf of the appellants next argued that, an under lessee is not prejudiced by surrender of lease under Section 115 of the Transfer of Property Act, 1882. In case of such a surrender, the lease is obliterated and the direct privity is established between under lessee and the headlessor. In support of this contention Mr. Choudhury relied upon the following decisions:

(i) *In the matter of: Suleman Haji Ahmed Oomer versus Darashaw Pirojshaw Dubash*, reported at AIR 1939 Bom. 98= 1938 SCC Online Bom. 44;

(ii) *In the matter of: Tirath Ram Gupta versus Gurubachab Singh and Another*, reported at (1987) 1 SCC 712.

28. Mr. Jishnu Choudhury then proceeded to submit that, the compromise decree pronounced in the second suit on the basis whereof the execution proceeding was initiated and the appellants were sought to be dispossessed from the property, was not lawful and was obtained by practising fraud on Court as also on parties and as such the same is liable to be set aside and not tenable in law. Any steps taken or to be taken pursuant to such fraudulent decree would also be void. He then submitted that, in case of forfeiture of lease or tenancy, under lessee cannot get any right to resist the

same, except in case of fraud. To support such contention Mr. Choudhury relied upon the decision; *In the matter of: Sailendra Nath Bhattacharya versus Bijan Lal Chakrabarti, reported at AIR 1945 Cal 283=1944 SCC Online Cal 74.*

29. Mr. Choudhury then submitted that, a consent decree is nothing but an agreement between the parties thereto and the same is subjected to rights and liabilities which an agreement may enjoy or suffer. Having a stamp of Court affixed on a consent decree, which is otherwise a result of fraud, does not change the nature of the document and the same does not stand on a better footing than an agreement. Such a consent decree is obtained from Court of law by practicing fraud on Court and on parties is liable to be set aside. The consent decree is not a result of any adjudication but merely an agreement. Seal of Court cannot make it perfect, if it is a result of fraud. In support of such contention Mr. Choudhury relied upon the following decisions:

(i) *In the matter of: Ruby Sales and Services (P) and Another versus State of Maharastra and Others, reported at (1994) 1 SCC 531;*

(ii) *In the matter of: Baldevdas Shivilal and Another versus Filmistan Distributors (India) P. Ltd. and Others, reported at (1969) 2 SCC 201.*

30. It was then submitted that, a compromise decree under Order XXIII, Rule 3 of the Code requires to be a lawful contract and understanding between the parties. The seal of the court is given when the court is satisfied that, such an agreement is lawful. To support such contentions the learned counsel relied upon a decision of the Hon'ble Supreme Court *in the matter of: Rama Narang versus Ramesh Narang and Another, reported at (2006) 11 SCC 114.*
31. On the scope of the proceeding under Order XXI, Rule 99 read with Section 47 of the code and the jurisdiction of the Executing Court thereunder, Mr. Choudhury submitted that, an objection raised by a stranger to a decree can be gone into and has to be adjudicated lawfully by recording a finding in respect of the independent right of an obstructionist. It is the obligation of the Executing Court to determine the questions legally raised by an obstructionist and must be determined between the parties in the

execution, as provided under Rule 101 of Order XXI of the code. In support of such contention Mr. Choudhury relied upon a decision of the Hon'ble Supreme Court *in the matter of: Silverline Forum Pvt. Ltd. vs. Rajiv Trust and another, reported at AIR 1998 SC 1754.*

32. Mr. Arindam Banerjee, learned counsel with Mr. Arpita Saha and Ashis Kumar Mukherjee, Advocates appeared for the appellant in APD No. 269 of 2018. At the outset Mr. Banerjee specifically submitted that, he adopted the entire submissions of Mr. Jishnu Choudhury, learned counsel, as the defence of his client is also same and identical with that of Mr. Choudhury's clients in resisting the decree passed in the second suit and to oppose the impugned judgment and order under appeal.
33. Mr. Arindam Banerjee, learned counsel submitted few further points in addition to the submissions already made by Mr. Choudhury. Mr. Banerjee also accepted the facts already stated by Mr. Jishnu Choudhury, learned advocate.
34. Mr. Arindam Banerjee, learned counsel drew attention of this Court to the plaint filed by the Bando in the second suit, he placed the relevant paragraphs and the reliefs claimed therein. He submitted that, the basis of the alleged cause of action of the second suit was that, the Mitras were trespassers in the property and the Bando by virtue of their 1978 lease had stepped into the shoes of the land lords, namely, Gooptus and acquired all the rights of the Gooptus to proceed against Mitras for their eviction. The obstructionists being the appellants were not impleaded in the second suit as the defendants, though, Bando was aware of their settled possession at the suit property as the tenants under the Mitras. Drawing attention of this Court to the reliefs claimed in the said second suit filed by the Bando, he submitted that, a declaration was sought for, that the tenancy created by Deboprasad Gooptu in favour of Mitras in the suit premises be determined and/or terminated. Declaration was also sought for that, by virtue of the said 1978 lease the Bando was entitled to immediate possession of the demised premises.

35. Mr. Banerjee submitted that, it was a tenancy granted to Mitras by the Gooptus under the said Rent Act of 1950 and not under the Transfer of Property Act. In absence of any decree for eviction passed by a competent Civil Court against the Mitras, the question of evicting the Mitras or their successors in interest from the property in the subject execution proceeding did not and could not arise. The client of Mr. Banerjee had an independent right by virtue whereof he is in a settled possession of the property, who could not be thrown out from its settled possession at the suit property in the subject execution proceeding.
36. Mr. Banerjee, drew the attention of this Court to the supplementary affidavit filed on behalf of the decree holders, affirmed by Raj Kumar Ghosh on November 09, 2017 filed in EC No. 146 of 2017. He drew attention of this Court to the relevant paragraphs and submitted that, Bando were aware of the abatement of the first suit filed by the Gooptus for the eviction of Mitras. The said first suit being abated there was no proceeding in the eye of law for eviction of Mitras. Therefore, question of evicting the sub-tenants under the Mitras did not and could not arise through the subject execution proceeding, in which the impugned order was passed.
37. Mr. Banerjee then, submitted that, the lessee can maintain a suit on his lease for possession against the lessor and against any third person who may be in possession. On the basis of such settled principle of law, he submitted that, the second suit is barred by law for not impleading the appellants/occupiers/obstructionists. The suit being bad, the compromise decree is also bad and is of no effect. Hence, the impugned judgment and order is also bad and is of no effect. In support of his contention Mr. Banerjee placed reliance on: *Mulla's Commentary on the Transfer of Property Act, 1882 (12th Edition, Page 852)*.
38. Mr. Banerjee then submitted that, if a decree is nullity, an obstructionist can raise such objection notwithstanding with the fact that, the obstructionist has no independent right of possession. Once such objection is raised the burden lies on the decree holder to establish that, the decree

put into execution is valid. Such an adjudication within the scope of Order XXI, Rule 101 of the Code even suggests for a detailed trial, if necessary, to adjudicate upon all the factual issues to come to a decision as to the right of the obstructionist, if any. In support of such contention Mr. Banerjee relied upon the following judgments:

(i) *In the matter of: Subhendu Gupta vs. Calcutta Vyapar Pratisthan Ltd., reported at (1995) 1 Cal LT 427;*

(ii) *In the matter of: French Agency vs. Smt. Jiwani Kumari Parakh, reported at (1999) 2 Cal LJ 513.*

39. Mr. Banerjee further submitted that, once the decree holder faces with obstruction/resistance by the obstructionist in the execution of decree for possession, the decree holders, the Bando in the instant case, were required to apply under Order XXI, Rule 97 of the code for removal of such obstruction. The decree holder cannot bypass or circumvent such obstruction. In support of such contention the learned counsel relied upon the decision of the Hon'ble Supreme Court *In the matter of: Anwarbi vs. Pramod D.A. Joshi, reported at (2000) 10 SCC 405.*
40. On the effect of abatement, the Learned Counsel, Mr. Banerjee submitted that, with the abatement of the said first suit filed by the Gooptus the entire cause of action as on the date of the filing of the suit became without of any further effect including the said notice to quit dated August 12, 1953. The said notice to quit was the basis of the cause of action in the said first suit which had come to a complete end and of no further effect immediately on the abatement of the suit. The Gooptus or anybody through them could not have taken any advantage of the said first suit or the said notice to quit dated August 12, 1953. In support, he relied upon a decision of a Co-ordinate Bench of this court *In the matter of: Naimuddin Biswas and Ors... defendant, appellants versus Maniraddin Laskar and Ors... plaintiffs, respondents, reported at 32 Calcutta Weekly Notes (CWN) 299.*
41. On the basis of the above arguments both Mr. Jishnu Choudhury and Mr. Arindam Banerjee, learned advocates appearing for the obstructionists appellants submitted that, the impugned judgment and order should be set

aside and/or reversed and rights of the appellant need to be determined first.

42. In addition to the submissions as recorded above, Mr. Arindam Banerjee, learned counsel, filed a detailed notes on argument, to which this Court had take note of. Upon due consideration of the said written notes on argument it appeared to this Court, that, certain additional judgments were referred to in support of the same and identical propositions already argued by Mr. Jishnu Choudhury, learned counsel and the same had already been adopted by Mr. Banerjee. To avoid repetition, this Court thought it fit, with due respect to Mr. Arindam Banerjee, learned Advocate, not to discuss the same, as the same would only multiply the volume of papers on record.
43. Mr. Rohit Das, Learned Counsel appearing for the decree holder (**Bando**) submitted that, the moment the said notice to quit dated 12th August, 1953 was served upon the Mitras by the Gooptus, under the said Rent Act of 1950, the status of the Mitras became that of a statutory tenant in the suit property. The first suit for eviction was filed by the Gooptus on the basis of the said notice to quit. Though the said first suit stood abated, the said notice to quit dated 12th August, 1953 did not cease its force and the status of the Mitras continued as a statutory tenant and the Mitras could not have claimed a better right. On February 06, 1978 the Gooptus demised the said suit premises on lease in favour of the Bando for ninety nine years. The Mitras accepted and acknowledged such lease. The Mitras accordingly acknowledged the Bando as their landlord in place and stead of Gooptus. It was contended on behalf of the decree holder that by virtue of the said lease dated February 06, 1978 the Bando had stepped into the shoes of the landlord Gooptus in the suit premises with a right of a landlord and lessor qua the Mitras. The Bando had a right to collect rent and also of reversion qua the Mitras. Accordingly the Bando became the beneficiary of the said notice to quit dated August 12, 1953 and enforced the same by filing the said second suit for eviction against the Mitras and/or their successors-in-interest in the suit premises along with the subsequent cause of action on

the ground of illegal and wrongful occupation in the premises. He then, submitted that, the lease dated February 06, 1978 granted by the Gooptus in favour of Bando was a valid lease and even if the same is to be construed as a concurrent lease, the same was valid and lawful. In support, the Learned Counsel for the decree holder had relied upon numerous judgements of various High Courts in his written notes and ultimately he selected the six best of such judgements according to him and formally cited before this court, which are:

(i) In the matter of: P.J. Irani versus State of Madras & Anr., reported at AIR 1961 SC 1731;

(ii) In the matter of: Jahar Lal Bhutra versus Bhupendra Nath Basu, reported at ILR (1922) 49 Cal 495: AIR 1922 CAL 412;

(iii) In the matter of: Shree Narayan Mansingha versus Durgadas Mishra, reported at 55 CWN 86;

(iv) In the matter of: Manikkam Pillar versus Rathnasami Nadar and Ors., reported at (1917) 33 MLJ 684;

(v) In the matter of: Munshi Lal Niyaria versus Kedar Nath & Ors., reported at MANU/ UP/ 0346/ 1970: (1970) 40 AWR 803 and

(vi) In the matter of: Bhagat Ram and Others versus Kesham Deo and others, reported at AIR 1965 Assam 55.

44. On the strength of the law as stated in the judgements, above, Mr. Das, Learned Counsel submitted that, since the concurrent lease is permissible in law and since the appellants had admitted their sub-tenancy under the Mitras and as such, they claimed their possession right being a derivative right from the Mitras, the eviction decree obtained by the Bando against the Mitras automatically bound the appellants and appellants were liable to be evicted as such, with the eviction of the Mitras. There was no requirement to make the appellants party defendants in the second suit nor any individual eviction suit was required to be filed by the Bando against the appellants for their respective eviction. To sum up on this point, the Learned Counsel for the decree holder submitted that, the compromise decree in the said second suit passed in favour of the Bando against the Mitras for eviction automatically bound the appellants and they were liable

to be evicted as such. In support, the Learned Counsel relied upon the following two decisions of the Hon'ble Supreme Court:-

(i) In the matter of: Biswanath Poddar versus Archana Poddar and Anr., reported at (2001) 8 SCC 187: AIR 2001 SC 2849;

(ii) In the matter of: Rup Chand Gupta versus Raghuvanshi Private Limited and Anr., reported at AIR 1964 SC 1889.

45. The learned Counsel for the decree holder then referred to Sub-Section 1 to Section 13 of the Rent Act of 1950, Section 16 of the West Bengal Premises Tenancy Act, 1956 (for short, the 1956 Rent Act) and Section 26 of the West Bengal Premises Tenancy Act, 1956 (for short, the 1997 Rent Act) and submitted that, to create an independent right in favour of the sub-tenants the twin conditions must be satisfied simultaneously, firstly, a notice must be served upon the landlord by the tenant and sub-tenant informing creation of sub-tenancy within the specified period and secondly, the landlord must issue his/her consent in writing for creation of such sub-tenancy. Any one of the said twin conditions would not suffice even. In the present case, the said twin conditions were never satisfied neither anyone of them. There was no such notice served by the Mitras by the appellants upon the Gooptus informing creation of the sub-tenancies in favour of the appellants nor did the Gooptus issue any written consent for the same. Therefore, there was no independent right, created in favour of the appellants. Thus, the appellant sub-tenants, in absence of their independent right were bound by the compromise decree for eviction against the Mitras passed in the said second suit. The Bando being the decree holder were entitled to execute the said decree against the Mitras to have the premises vacated and no independent proceeding was required to be initiated against the appellants sub-tenants.

46. Mr. Das, learned Counsel submitted that, the Mitras could be termed at best tenants at sufferance which is different from a trespasser. A tenant at sufferance is merely a fiction of law to avoid continuance in possession operating as a trespasser. The act of holding however after expiration of the

term does not necessarily create a tenancy of any kind. If the lessee continues to remain in possession after the determination of the lease, the law is that, a tenant at sufferance akin to a trespasser having no independent right to continue with possession. Since Prafulla Kumar Mitra had already lost the protection from eviction under the said Rent Act of 1950 the appellants could not get any protection with any independent right. On this score, he distinguished the judgements *In the matter of: Krishna Prosad Bose (supra)* and *Calcutta Credit Corporation Limited (supra)*. He further submitted that, since the Mitras lost protection under the Rent Act of 1950, no independent right was created in favour of the sub-tenants neither any direct tenancy took place between the appellants and the Gooptus. On this score, he had distinguished the judgements *In the matter of: Damadi Lal and Ors. (supra)* and *V. Dhanapal Chettiar (supra)*.

47. To counter the argument of the appellants that the concurrent lease is not permitted in law, he submitted that, all the cases relied upon on behalf of the appellants on this issue, when there was a valid and subsisting lease in favour of the lessee then the second lease was considered to be invalid. However, in the facts of this case, the tenancy in favour of the Mitras be it contractual or be it statutory had already been determined and the first suit was instituted on the basis of the said notice to quit dated August 12, 1953 by the Gooptus against the Mitras. During pendency of the said first suit, the second lease dated February 06, 1978 was executed in favour of the Bando. On this score, he distinguished the judgements relied upon on behalf of the appellants *In the matter of: Swapan Kumar Dutta (supra)*; *Sambhunath Mitra (supra)*; *Prabhat Kumar Paul (supra)*; *M.E. Moola Sons Limited (supra)*. He further submitted that, the judgement of the Co-ordinate Bench of this court *In the matter of: Sambhunath Mitra and Ors. (supra)* was over-ruled and reversed by the Hon'ble Supreme Court ***In the matter of: Khaitan Consultant Limited versus Sulata De & Ors., reported at (2015) 15 SCC 567*** on a technical point and the subsequent judgements of this Hon'ble High Court proceeded on the basis of treating

the said over-ruled judgement as a precedent. It was submitted that, the Co-ordinate Bench of this court *In the matter of: Sambhunath Mitra* proceeded by disregarding the other previous division bench judgements of this point and by treating the judgement of Privy Council *In the matter of: M.E. Moola Sons Limited (supra)* as precedent on the proposition that concurrent lease was not valid. The Privy Council *In the matter of: M.E. Moola (supra)* has nowhere stated or even dealt with the issue whether a concurrent lease is valid or not. In the said decision, the question was whether a deed authorising somebody to realise future rent and profit was compulsorily required to be registered under the provisions of Section 17 of the Registration Act, 1908. In the context of such a case, the Privy Council 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 is akin to a sale and should be by a registered instrument in accordance with Section 54 of the Transfer Property Act, 1882. There is nothing in the judgement which states, even by way of obiter dicta, that if such future right to rent and profits along with right of reversion is transferred for a fixed term makes it akin to a lease instead of any perpetuity. The case in *M.E. Moola (supra)*, made it akin to a sale, such transfer through a registered instrument of lease, instead of a registered instrument of sale, would be invalid. Moreover, the judgement *In the matter of: Sambhunath Mitra (supra)* proceeded on the basis that since actual possession had already been transferred by the landlord to the first lessee, there remains nothing to be transferred in the second lease and, therefore, the same is invalid. However, he submitted that, this Court in *Sambhunath Mitra (supra)*, with respect, failed to appreciate that it is a well-established law that in a lease, though the lessee is in actual possession, the landlord is always deemed to be in constructive possession through the lessee and such constructive possession can also be assigned by way of a second lease under Section 109 of the TP Act.

48. Referring to Rule 97 to 103 under Order XXI of the Code, the learned Counsel for the decree holder submitted that, such provisions itself is a complete code. The rights, if any, of the appellants in the facts of this case had already been adjudicated upon under the impugned judgement. The Executing Court had jurisdiction to decide whether the obstructionists appellants had any right to resist the compromise decree for eviction. Such right of the appellants had duly been adjudicated upon. The appellants found to be sub-tenants under the Mitras and was bound by the said compromise decree arrived at between the Bando and the Mitras for eviction of Mitras and, therefore, were appellants are also bound by the said decree and were rightly directed to vacate the premises in due process of law. A detailed inquiry was made by the Executing Court on the available materials on record and upon considering the affidavit evidence. From the materials available on record would clearly show that the impugned judgement was just and proper and could not have been otherwise, even if a trial on evidence would have taken place. It is not a mandatory rule with every such proceeding that calls for trial on evidence. If the Executing Court is satisfied by application of mind on the available materials on record and on the basis of the affidavit evidence it can come to its logical conclusion, as it happened in the present case. The inquiry must be summary and the proceeding must be disposed of expeditiously, bearing in mind its scope and the limited question arises for adjudication. For this, trial on evidence is not mandatory. In support, the Learned Counsel for the decree holder relied upon the following decisions:

(i) *In the matter of: Silverline Forum Private Limited versus Rajiv Trust and Anr., reported at (1998) 3 SCC 723; AIR 1998 SC 1754;*

(ii) *In the matter of: Dilip Nag versus Smt. Lilabati Garai, reported at (1991) SCC OnLine Cal 276, AIR 1992 Cal 219;*

(iii) *In the matter of: Bool Chand and Ors. versus Rabia and Ors., reported at (2016) 14 SCC 270;*

(iv) *In the matter of: Shamsher Singh and Ors. versus Nahar Singh (D) thr. L.Rs. and Ors., reported at (2019) 17 SCC 279;*

(v) In the matter of: Rabi Sen versus Basanti Shaw (Gupta) and Ors., reported at (2019) SCC OnLine Cal 8280; (2019) 4 Cal. LT 503 (HC).

49. Mr. Das then submitted that, the compromise decree was perfect, lawful and valid. The Executing Court had also applied its mind and found it to be so. The Executing Court could not go behind the decree, hence, the Executing Court in passing the impugned judgement acted within its domain and jurisdiction as permitted in law. In support, he relied upon the following decisions:

(i) In the matter of: Vasudev Dhanjibhai Modi versus Raja Abdul Rehman & Ors., reported at (1970) 1 SCC 670;

(ii) In the matter of: Rafique Bibi (Dead) by LRs versus Sayed Waliuddin (Dead) by LRs & Ors., reported at (2004) 1 SCC 287.

50. In reply to the submissions made on behalf of the decree holder, both the learned counsels appearing for the appellants in support of their respective appeals made a composite submission. They submitted that, the said compromise decree was a result of fraud and collusion. Attention of this court was drawn to the written statement filed on behalf of Jayashree Ghose, the first defendant in the suit. Reliance was placed specifically on paragraph 3 and 6 thereof, wherein, it was specifically denied that the said notice to quit dated August 12, 1953 was served upon the said Prafulla Kumar Mitra, since deceased or that Deboprasad Guptoo, since deceased had called upon the said Prafulla Kumar Mitra to quit, vacate and deliver up quiet and peaceful possession of the suit premises on the expiry of the month of August, 1953. It was also contended that, the said Probod Chandra Mitra since deceased was permitted by the then land lord Deboprasad Guptoo to sub-let the suit premises. When the compromise was arrived at, the Mitras sifted from their said stand and defence taken in the written statement and admitted the service and receipt of the said notice to quit. According to the learned counsel for the appellants, this would definitely show that the consent decree was obtained by practising fraud and

collusion by and between the parties thereto to suit their purpose. Once such consent decree is vitiated by fraud and collusion the same would immediately loose its binding force and effect. Thus, the said collusive and fraudulent consent decree would not bind the appellants. Both the learned counsels submitted that, the decision relied upon by them *In the matter of: M.E. Mulla Sons Limited (In liquidation) (supra)* is still holding the field on the subject of concurrent lease, deciding the same to be invalid. The said decision was not considered in any of the judgments relied upon by the learned counsel for the decree holder Bando on the issue of concurrent lease. The Bando did not receive any valid title and interest from the Guptoos under the said lease of 1978.

Decision:

51. The relevant facts are admitted. Such facts once again are required to be looked into chronologically. Since before 1949, the said Probod Chandra Mitra, since deceased was a monthly tenant in the Suit Premises under Deboprasad Guptoo, since deceased and was running a hotel business under the name and style “Bristol Hotel” as the sole proprietor thereof. On June 12, 1949 Probod died. Prafulla Kumar Mitra the nephew of Probod started running the hotel business from the said suit premises and he was accepted by Deboprasad Guptoo as a tenant. On August 12, 1953 the notice to quit was issued by the Deboprasad upon Prafulla seeking possession of the suit premises by the end of August, 1953 on the sole ground of default in paying rent. Since Prafulla failed to deliver up possession of the suit premises, Deboprasad on April 05, 1954 filed suit no. 1059 of 1954 (the first suit) against Prafulla seeking possession of the property and for recovery of arrear rent. On December 12, 1964 Deboprasad died leaving behind his only son, Dhruba Guptoo. On March 11, 1965 Dhruba filed an application for his substitution in place and stead of his father Deboprasad in the first suit. Prafulla died on

April 08, 1965, Smt. Aruna Basu Mullick claiming to be the sole executrix of the purported will of Prafulla filed an application for substitution in the first suit. During November/December, 1977 Aruna Basu Mullick paid occupation charges for the last time to Dhruba, the substituted plaintiff, in the first suit under the order of court. On February 06, 1978 the registered lease was executed by Dhruba in favour of Bando whereby the suit premises was demised for a period of 99 years. On February 22, 1983 Dhruba died who was the substituted plaintiff in the said first suit. On May 20, 1983 an application was made by the Bando for recording of death of Dhruba and for necessary substitution by them. Such application was dismissed and the first suit being suit no. 1059 of 1954 stood abated. On July 25, 1984, CS No. 524 of 1984 (the second suit) was filed by the Bando against the Mitras seeking their eviction on the strength of their said registered lease dated February 06, 1978. No subsequent notice to quit after the said notice dated August 12, 1953 was issued for filing the said second suit. On May 03, 2017 the said second suit was decreed on the basis of a terms of settlement signed by the decree holder Bando and Jayashree Ghose the successor-in-interest of the Mitras. On the basis of the said compromise decree the Bando instituted the execution proceeding EC No. 146 of 2017 in which the impugned judgment and order was passed.

52. Following the chronological admitted facts stated above, this Court first would consider the effect of the said notice to quit and the said first suit filed by the Guptoos against the Mitras. It is settled that, the moment a suit stands abated, by fiction of law, everything under the said suit including the cause of action therein immediately loses binding force, and is without any effect and further effect. With such an abatement the entire cause of action in the first suit stood extinguished.

53. A Coordinate Bench of this Court *In the matter of: Naimuddin Biswas* (*supra*) had observed as under:-

“Babu Prafulla Kamal Das for the Respondents:- Raise a preliminary objection. The heirs of the deceased Appellant No.4 not having been brought on the record within three months from the date of death, the appeal has automatically abated so far as Appellant No.4 is concerned. Or. 22, r. 3, sub-r.(2), read with Or. 22, r.11, C.P.C. In view of the nature of the suit the result of the partial abatement is to make the appeal an imperfectly constituted appeal which the Court cannot proceed to hear. Cites Pulin Behary v. Mahendra Chandra and Kali Dayal Bhattacharjee v. Nagendra Nath Pakrasi.

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Or. 41, r. 4, C.P.C., cannot apply.(1) It does not empower an Appellate Court to reverse or vary a decree in favour of all the Defendants where the appeal which was preferred by all of them cannot be continued by all on account of the death of one of them during the pendency of the appeal.(2) Persons who have not joined in the appeal but in whose favour the Appellate Court may reverse or vary a decree must be either Plaintiffs or Defendants. The terms “Plaintiffs” and “Defendants” can refer only to persons who are alive. The deceased Appellant No.4 has by reason of his death ceased to be a Defendant. His heirs who have not been brought on the record are not Defendants. (3) The discretionary power conferred upon an Appellate Court by Or. 41, r. 4, C.P.C. ought not to be exercised so as to frustrate the imperative provision of Or. 22, r.3, sub-r (2), C.P.C.

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As pointed out by Sargent, C.J., in the case of Bhikaji v. Purshotum an order of abatement is virtually a decree as it disposes of the Plaintiff's (in the case the Appellant's) claim as completely as if the suit has been dismissed. This view was followed by the Madras High Court [Subbayya v. Saminadayyar]. So long as the order of abatement remains it must be considered to have determined the rights between the parties. To allow an Appellant whose appeal as abated to gain the advantage of Or.41, r. 4 would result in the same suit in existence at the same time; one is his favour and one against him. The conclusion to which I have no difficulty in coming is that Or. 41, r. 4 cannot be applied to the case of an Appellant whose appeal has abated by his death.

No doubt there are decisions to the contrary [Chinta Shah Nilkant v. Gangabur and Samasundaram Chatterji v. Durga Charan Ghose]. Clearly the appeal as it now stands is incompetent. The Respondent is entitled to his costs. Hearing-fee one gold mohur”.

54. The cause of action of the said first suit was on the basis of the said notice to quit dated August 12, 1953 seeking eviction against the Mitras on the ground of default in paying rent. As the said first suit stood abated the entire cause of action in the said first suit lost its life forever.
55. Without determination of the tenancy or lease no subsequent tenancy or lease could be granted to a subsequent tenant/lessee in respect of the self same suit premises. Right to future rent is a right in the immoveable 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, a right to realise future rent and profit from an immoveable property can be created only in accordance with the provisions contained in Section 54 of Transfer of Property Act, meaning thereby, by sale. Therefore, if the effect of a concurrent lease is to authorize the second lessee, as contended by the decree holder Bando, to realise rent in future and permit them 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.

Thus, if a property is already a subject matter of a tenancy, during continuance of such tenancy the land lord cannot create another monthly tenancy over the self same property by taking advantage of the *Doctrine of Concurrent Lease* in violation of the provisions contained in Section 54 of the Transfer of Property Act. Moreover, under Section 60(e) of the Transfer of Property Act, the mere right to sue cannot be transferred without creating any interest in the property.

56. *In the matter of: M.E. Moolla & Sons Ltd.(supra)*, which still stands to be a good law and had settled the issue thereunder. The question was whether a deed authorizing a person to realise future rent was required to be registered in terms of the provision of Section 17 of the Registration Act. On this issue, the Privy Council through Sir George Rankin held that, right to receive future rent is a right attached to and runs with the immoveable property and if such right is transferred in favour of a third person, the same should be followed in accordance with Section 54 of the Transfer of Property Act, which defines the sale of an immoveable property. Thus, as contended on behalf of the decree holders in the present case, the concurrent lease authorised them being the second lessee to realise future rent and reserves a right of reversion against the first lessee Mitras, such right must be created strictly in terms of Section 54 of the Transfer of Property Act. Therefore, the contention of the decree holders that all such rights were transferred to the Bando and the Bando had stepped into the shoes of Gooptus as the land lord by virtue of the said 1978 instrument required a detail adjudication. In view of the law settled by the Privy Council. It is true that pursuant to Section 107 of the Transfer of Property Act, for the purpose of creation of a lease of an immoveable property other than from year to year or for any term exceeding one year or reserving a yearly rent, even an oral agreement coupled with delivery of possession of the property is sufficient. Therefore, if a property is already a subject matter

of an existing tenancy, during the currency of such tenancy the land lord cannot create second monthly tenancy in respect of the self same property by taking advantage of the *Doctrine of Concurrent Lease* in contravention of the provisions laid down under Section 54 of the Transfer of Property Act.

57. Under Section 109 of the Transfer of Property Act, where a lessor transfers the property leased or part thereof or any of his interest therein, a third party acquiring such interest in the immoveable property can become land lord of the property subject to the lessee's **election**. The expression **“any of his interest therein”** contained in Section 109 of the Transfer of Property Act means those interest which the lessor was entitled to transfer after execution of the first lease existing on the same property. Once a lease has been executed and the lessee has acquired a right to enjoy the property, the land lord cannot have any such right further; the only right that he is entitled to transfer at that point of time is the then existing right of a lessor. It is true that, even during the subsistence of a lease the lessor can execute usufructuary mortgage and by virtue of such mortgage, the mortgagee acquires a right to step into the shoes of the lessor and would also acquire the right to realise future rent or the right of reversion as against the existing first lessee in terms of the provisions laid down in Section 58(d) of the Transfer of Property Act.

58. ***In the matter of: Khaitan Consultants Limited vs. Sulata De & Ors., reported at (2015) 15 SCC 567 (supra)***, the Hon'ble Supreme Court had observed:-

*“1. Being aggrieved by the common judgment delivered in Sambhunath Mitra v. Khaitan Consultant Ltd. by the High Court of Calcutta dated 1-4-2005, these appeals have been filed.
2. We have heard the learned counsel appearing for both sides at length. Upon hearing the learned counsel for the parties, we are of the view that the High Court ought not to have constrained one of the parties to amend the plaint. On this short ground, we are setting aside the judgment delivered by the High Court.
3. It is directed that the appeals shall be restored to their original numbers and it would also be open to the party concerned to seek permission to amend the plaint by making an appropriate application before the High Court, if thought proper, and the High Court shall decide the application in accordance with law”.*

59. Only to the extent stated above, the judgment of a coordinate bench of this court *In the matter of: Sambhu Nath Mitra vs. Khaitan Consultant Limited* (*supra*) was set aside and the concerned party was granted liberty to seek permission to amend the plaint before this Court. Thus, the *ratio decidendi* except to the extent as observed by the Hon'ble Supreme Court mentioned above, still is a good law and holds the field on the issue of concurrent lease.

60. *In the matter of: Sambhu Nath Mitra (supra)* a coordinate bench of this court had observed as follows:-

“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 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 the 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* reported 2002 (2) Cal HN 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 authorized 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*, (AIR 1936 PC 230) 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 FC 124: 1949 FCR 262, *Kai Khurshroo Bezoniee Capadia v. Bai Jerbal Hirjibhoy Warden*) 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 deed of sale. Moreover, by the lease deeds, the lessee was authorized 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.

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”.

61. It is the trite law that, even in absence of notice to quit against a monthly tenant, the institution of an eviction suit is sufficient notice but the plaintiff must have a right to sue. In the present case in view of the abatement of the first suit, following the effect of abatement in terms of Rule 9 under Order XXII of the code, after the abatement of the first suit no fresh suit

could be brought on the same cause of action. When a suit abates, a substantive and valuable right is created in favour of the parties who can take benefit of the same unless specifically set aside by the Court as provided under the Code. Such a right cannot be taken away from a party automatically. In other words, after the abatement of the said first suit in the instant case, the status of the Mitras was required to be adjudicated qua the Gooptus. The right of the Bando was also required to be adjudicated on the strength of its 1978 instrument in the light of the abatement of the said first suit. All these give rise to an important question for adjudication after a detail fact finding enquiry qua the suit property. Even if it is seen from an angle that the appellants being admittedly inducted by the Mitras when the tenancy of the Mitras was in survival, what could be the status of the appellants obstructionists qua the Bando and whether the Bando could evict the obstructionist through the said execution proceeding as a due process of law. This is also an important question needs to be decided by the Executing Court after a detail fact finding enquiry and by applying the law prevailing on the issue.

62. In the facts of this case the decree holder Bando contended that, the Bando is a contractual tenant/lessee under the land lord Guptoos by virtue of the said 1978 lease. By virtue of such contractual right they could maintain the said second suit for the eviction of Mitras and accordingly they obtained an eviction decree thereunder, which binds the appellants. Such contention of the Bando needs to be adjudicated in the light of the discussion made in the preceding paragraphs after conducting a detail fact finding enquiry. The appellants were inducted in the suit property from time to time by the Mitras and/or their successor-in-interest. Whether the appellants have any independent right or not in view of the discussions made in the preceding paragraphs are also required to be adjudicated upon on a detail fact finding enquiry.

63. *In the matter of: Biswanath Poddar (supra)*, there was no previous consent of the land lord as also any intimation in writing in the manner prescribed

under the 1956 Rent Act by the tenant as well as sub-tenant within the time stipulated thereunder, being a mandatory statutory requirement. As such, in absence non compliance of such mandatory statutory requirement under the act, no independent right had accrued in favour of the sub-tenant and thus, the eviction decree against the tenant was held to be binding on sub-tenant, in view of the provision of Sub-Section (3) to Section 13 of the 1956 Rent Act. The Hon'ble Supreme Court in this fact situation, thought it fit not to go into the question of fraud, if any, was practised in obtaining the eviction decree against the tenant. Such is not the case in the facts and circumstances of the instant appeal, as a cloud had been casted on the right of the decree holder Bando. Therefore, the ratio decided in this judgment has no application in the facts of the instant case under appeal, as against the appellants.

64. The facts as summarised above and the applicable legal provisions as discussed above, it appears to this Court that, the adjudication with regard to the right of the appellant was required a more detailed fact finding enquiry, by holding a proper evidence action. In view of the amended provisions of Order XXI Rules 97 to 103 of the Code, the extent and the scope of investigation, which admittedly were summary in nature, prior to such amendments, had continued to remain the same. However, the Court should not be unmindful as to the nature and scope of the amendment which had altered the status of the order passed by an Executing Court, in exercise of its aforesaid powers to that of a decree and filing of separate suit had been excluded. The decree again had been made appealable on the same terms as in other decree stands. Rules 101 and 103 under Order XXI of the Code confirm the force and impact of the decree and its conclusiveness. It is also to be noted that, alteration of the language made in the Rules under Order XXI of the Code clearly brings out the change in the legislative intent. Pursuant to Rule 35 under Order XXI of the Code, it is to be necessarily implied that the right, title and interest of an obstructionist, who is not bound by the decree, would have to be

determined by the Court and possession can be directed to be delivered, even by removing a party who was not impleaded in a suit, wherein the decree was passed, if he is bound by such decree and refuses to vacate the property. Furthermore, the expressions used in Rule 58 under Order XXI of the Code, which substituted the **‘investigation of claims and objections’** by **‘adjudication of claims and objections’** denotes the legislative intent is to give a go-by with the summary nature of investigation as was expressed prior to the amendment of the Rules. The expression **‘adjudication’** brings finality after conducting a detailed process of adjudication, which necessarily involves production of evidence, oral and documentary and upon a meaningful consideration thereof, and then the application of mind by the Court. Similar linguistic alteration was made by substitution of Sub Rule (2) to Rule 97 under Order XXI of the Code, by bringing in the word **‘adjudication’** in place and stead of **‘investigation’**. Pursuant to Rule 101 under Order XXI of the Code, the scope of adjudication extends to all questions including the questions relating to right, title or interest in the property arising amongst the parties to a proceeding on an application under Rule 97 or Rule 99 and expressly forfeited the right of filing a separate suit for determination of such questions. Thus, the provisions laid down under Rules 97 to 101 under Order XXI of the Code is a complete and a self contained Code by itself.

65. In the event where facts are complicated and require a complete adjudication through a proper and detail fact finding enquiry, the Executing Court has no option but to go for a detailed trial on evidence for complete adjudication of right, title and interest of the obstructionist in a property.
66. In view of the foregoing discussions and reasons, this Court is of the firm view that, whether the appellants have or have no independent right as to their occupation in the suit property, needs a detail adjudication upon proper evidence action and in appreciation thereof. Accordingly the *impugned judgment and order dated August 16, 2018 passed in execution*

case no. 146 of 2017 stands set aside and reversed. The respective applications filed in the said execution case no. 146 of 2017 by the individual appellants shall be adjudicated upon afresh on trial on evidence, on their own merit.

67. The learned receiver already appointed by the executing Court shall remain in symbolic possession of the suit property and the appellants shall continue to pay their occupation charges at the rate at which they had paid last to the Learned Receiver, as a temporary arrangement, till the time the applications of the appellants are disposed of by the executing Court. The Learned Receiver upon receipt of such occupation charges shall issue necessary receipts in favour of the respective appellant occupants. It is, however, made clear that payment of such occupational charge is a temporary arrangement and shall not create any right or equity in favour of the appellants in any manner whatsoever. Such occupational charges must be paid by the appellants to the Learned Receiver by seventh day of every calendar month commencing from April 01, 2022. The Learned Receiver shall open an account with any nationalised bank of to his choice and shall deposit the said sum therein and shall furnish necessary statements for every three months with the Registrar Original Side of this Court.
68. Since this Court had dealt with the principle contentions of the parties which had gone into the roots of the matter, the other ancillary contentions had not been addressed. However, the parties will be at liberty to urge all their points and raise all their issues before the Executing Court.
69. The appeals mentioned in the cause title of this judgment and order, preferred from the said impugned judgment and order dated August 16, 2018 stand allowed.
70. There shall, however, be, no order, as to costs.

(Aniruddha Roy, J.)

I. P. MUKERJI, J.:-

I have had the privilege of reading in draft the judgment proposed to be delivered by my brother. I fully agree with the conclusions reached by his lordship. I also agree in principle with the reasons advanced by him in reaching them. Nevertheless, I am tempted to add a few observations of my own.

Concurrent Lease

When a lessor grants a lease, he transfers to the lessee the right to enjoy the demised property for a certain period of time on payment of rent or other consideration periodically. The interest in the property which remains with the lessor after grant of a lease, is the reversion. This reversion is considered as immovable property (See **Shree Narayan Mansingka vs. Durgadas Mishra**) (1951) 55 CWN 86 (Division Bench). This right in the reversion is capable of transfer. The lessor may assign it to another person. This transfer is also known as and is the same as concurrent lease. (See **Woodfalls Law of Landlord and Tenant**, 27th Edition, Vol. I, Pg. 54.) On assignment of the reversion, the assignee becomes entitled to the rent paid to the lessor by the lessee and acquires the rights and the benefits of the covenant between them. The assignee becomes an intermediate lessor between the lessor and the lessee, for the entire term of the assignment which may be shorter or greater than the term of the original lease.

This kind of a transfer is recognized in Section 109 of the Transfer of Property Act, 1882 in the following terms:-

“109. Rights of lessor’s transferee.—*If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part transferred so long as he is the owner of it; but the lessor shall not, by reason only of such transfer cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him:*

Provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee, not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee.

The lessor, the transferee and the lessee may determine what proportion of the premium or rent reserved by the lease is payable in respect of the part transferred, and, in case they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased.”

Considering the nature of the interest transferred in a concurrent lease, the Privy Council in ***M. E. Moola Sons, Limited vs. Official Assignee of the High Court of Judicature at Rangoon and Ors.*** reported in **AIR 1936 PC 230** held that this kind of a transfer being “a benefit to arise out of land” was akin to a sale under Section 54 of the Transfer of Property Act, 1882 and required registration under the Indian Registration Act, 1908. Since the document in that case was not so registered, it was held to be invalid. In that context, the Division Bench judgment of our court in ***Prabhat Kumar Paul vs. Shree Shree Lakshmi Janardan Thakur & Ors.*** reported in **(2008) 2 CHN 445** is to be seen. It held following the above decision of the Privy Council and its earlier decision in ***Sambhunath Mitra and Ors. vs. Khaitan Consultant Ltd. and Ors.*** reported in **(2005) 2 CHN 519** that a concurrent lease or assignment of the reversion could only be created by a registered instrument similar to a deed of sale under Section 54 of the Transfer of Property Act, 1882.

It cannot be doubted that the relationship between the Gooptus and the Mitras was that of landlord and tenant or lessor and lessee. It was a monthly tenancy. It was sought to be put to an end by the Gooptus by the notice to quit dated 12th August, 1953. Whether this had the effect of determining the lease or tenancy or after this notice the Mitras continued as statutory tenants cannot be answered because complete and conclusive arguments were not made on this point.

The suit which the Gooptus instituted (Suit no.1059 of 1954) for eviction of the Mitras, further to this notice, continued to remain in the file of the court for several decades.

Now, it is possible that some of the appellants or their predecessors-in-interest were inducted by the Mitras prior to 12th August, 1953. It is also possible that some of them were inducted after that date.

On 6th February, 1978 the Gooptus executed and registered a concurrent lease in favour of Bando and Company. Clause 1 of this registered indenture of lease stated that the lessor “doth hereby demise unto the lessee”..... “all rights, liberties, privileges and benefits” of the demised premises. Prima facie, this grant or disposition for 99 years, in my opinion, satisfied the requirement of Section 54 of the Transfer of Property Act.

On 20th May, 1983 this court declared that the 1954 suit had abated. In what way the Mitras continued from 1954 to 1983 is not proved. Whether they continue as trespassers after determination of their lease or as statutory tenants or had abandoned their tenancy is not clear from the evidence.

On 20th May, 1983 this court by an order recorded abatement of the first suit (Suit No. 1059 of 1954). Now, on abatement of the suit all rights of the Gooptus arising out of the notice to quit dated 12th August, 1953 appears to have been extinguished, as no fresh suit on that cause of action could be filed.

Very astonishingly, Bando and Co., as assignee of the reversionary interest of the Gooptus or as concurrent lessee on 25th July, 1984 instituted a suit against the Mitras claiming inter alia a declaration that the tenancy created by Deba Prasad Gooptu in favour of Prafulla Kumar Mitra “has duly been determined and/or being terminated and the said are binding upon the heirs of Prafulla Kumar Mitra.”

Bando & Co. in the second suit founded their cause of action on the notice to quit dated 12th August, 1953. By abatement of the first suit it became a

dead letter. Still the Bandos contended in the plaint in that suit that the lease of the Mitras stood determined. Prima facie, it is on the face of it a farfetched case.

Prima facie, the subsequent developments that took place in the suit, is a perfect example of a collusive suit, if not at the time of institution but certainly at a later point of time.

On 3rd May, 2017 the lessor and lessee obtained a consent decree on the basis of a terms of settlement whereunder the Mitras would deliver up vacant and peaceful possession to Bando. Bando would be entitled to evict “the persons in possession and occupation through her or her predecessors-in interest (Mitras) by executing a decree to be passed.”

Promptly, on 5th June, 2017 an execution application was filed (EC No. 146 of 2017) for eviction of the appellants on the ground that they were sub-tenants under the Mitras.

The net result of all this is that the subject premises has a lot of occupiers. They may have been occupying the premises as tenants, subtenants, trespassers or licensees or simply as occupiers for a very long time. There is, however, no assertion by any occupier of title by adverse possession. The appellants have questioned the title of Bando & Co. to the property on the ground that the “concurrent lease” in their favour by the Gooptus was non-est and did not convey any title or interest in the property. They claim to be sub-lessees under the Mitras. Just because an occupier asserts himself to be a sub-lessee under the Mitras does not make him so. Let me give my reason. The lease of the Mitras should have been subsisting for induction of a sub-tenant. If the lease stood determined by the notice to quit of 1953, the Mitras became trespassers. The persons inducted by the Mitras after such termination may not have qualified as sub-lessees. If they were not sub-lessees they could not have been bound by the decree against the Mitras. To evict an occupier a paramount title holder has to take recourse

to the due procedure of law recognized under Section 6 of the Specific Relief Act, 1963. Only sub-lessees can be evicted without making them a party to the suit, in execution of a decree for eviction by the lessor against the lessee. Otherwise, the decree against the lessee does not bind any other party. Another possibility is that the appellants were sub-lessees under the Mitras and were bound by the decree of eviction against the lessees.

There is another issue.

In **Rupchand Gupta vs. Raghuvanshi (Private) Ltd. and Anr.** reported in **AIR 1964 SC 1889**, the point arose whether the sub-lessee could be evicted by virtue of a decree against the lessee for eviction in a suit between the lessor and the lessee, when the suit was not properly defended because of collusion or fraud between the lessor and the lessee. The Supreme Court opined that collusion had to be established to resist the decree so as to make it not binding on the sub-lessee. Short of that, even if the decree was made ex-parte against the lessee, the sub-lessee was bound by it. The following passages from that judgment are important and are set out below:-

“9. One of the simplest definitions of collusion was given by Mr. Justice Bucknill in Scott v. Scott. “Collusion may be defined”, said the learned Judge, “as an improper act done or an improper refraining from doing an act, for a dishonest purpose”. Substantially the same idea is expressed in the definition given by Whatron's Law Lexicon, 14th Edn., p. 212, viz. “Collusion in judicial proceedings is a secret arrangement between two persons that the one should institute a suit against the other in order to obtain the decision of a judicial tribunal for some sinister purpose”. This definition of collusion was approved by the Court in Nagubai Ammal v. B. Shamma Rao.

10. Thus the mere fact that the defendant agrees with the plaintiff that if a suit is brought he would not defend it, would not necessarily prove collusion. It is only if this agreement is done improperly in the sense that a dishonest purpose is intended to be achieved that they can be said to have colluded.

12. Taking the last action first viz. Raghuvanshi's omission to implead the appellant, it is quite clear that the law does not require

that the sub-lessee need be made a party. It has been rightly pointed out by the High Court that in all cases where the landlord institutes a suit against the lessee for possession of the land on the basis of a valid notice to quit served on the lessee and does not implead the sub-lessee as a party to the suit, the object of the landlord is to eject the sub-lessee from the land in execution of the decree and such an object is quite legitimate. The decree in such a suit would bind the sub-lessee. This may act harshly on the sub-lessee; but this is a position well understood by him when he took the sub-lease. The law allows this and so the omission cannot be said to be an improper act.”

In **Burmah Shell Oil Distributing Now known as Bharat Petroleum Corporation Ltd. vs. Khaja Midhat Noor and Ors.** reported in **AIR 1988 SC 1470**, the Supreme Court remarked that when a valid notice of termination of the lease was issued to the lessee, there was no need to give a fresh notice to the sub-lessee. It also reaffirmed the dicta pronounced by the court in **Rupchand Gupta vs. Raghuvanshi (Private) Ltd. and Anr.** reported in **AIR 1964 SC 1889**.

Applying the above dicta to the facts of this case, another important fact needs to be established at the trial. It is whether the decree of 3rd May, 2017 was obtained by collusion between the Bandos and the Mitras. Unless the Bandos are able to clear themselves of this allegation or suspicion, they cannot use the decree to evict the appellants from the premises, even if they are considered as sub-lessees.

Furthermore, Section 115 of the Transfer of Property Act conceptualizes a situation when the lessor and lessee enter into an agreement for surrender of the lease by the lessee to the lessor. In that event, the sub-lessee is conferred a right to pay rent to the lessor, thereby becoming a direct tenant under the lessor. Now, a consent decree is nothing but an agreement between the parties which receives the sanction of the court under Order 23 Rule 3 of the Code of Civil Procedure. It is not a decree as defined by Section 2(2) of the Code of Civil Procedure which is “the formal expression of adjudication.”

(see **Ruby Sales and Services (P) Ltd. & Anr Vs. State of Maharashtra & Ors.** reported in **(1994) 1 SCC 531**) and (**Baldevdas Shivilal & Anr. Vs. Filmistan Distributors (India) Pvt. Ltd. & Ors.** reported in **(1969) 2 SCC 201**).

Ordinarily, a decree against the lessee binds the sub-lessee. With the lessee the sub-lessees may be evicted. Was the 3rd May, 2017 decree more of a surrender by agreement described in Section 115 of the Transfer of Property Act than a decree in the true sense? If the answer is in the affirmative, even if the appellants are considered to be sub-tenants, they are not bound by that decree. To answer this question, both questions of fact and law need to be gone into by the court.

The proceedings before the court below were under Order 21 Rules 97 to 103 of the Code of Civil Procedure. Order 21 Rule 101 provides that all questions “relating to right, title or interest in the property between the parties” in such a proceeding shall be dealt with by the court. It is not to be decided in a separate suit. The court would be deemed to have jurisdiction to decide the issues. Under Rule 103 such orders are to be treated as decrees.

The right, title and interest of the appellants in the property have to be decided on a case to case basis. While deciding this right all the issues discussed above have to be determined by the court. If we were to relegate the parties to the ordinary remedy of institution of a suit to determine the questions involved, it could result in a multiplicity of proceedings before the court. After so many years of litigation, this proceeding would neither be practicable nor sub-serve the ends of justice. I am of the opinion that the status of each of the appellants should be decided through trial on evidence in the Order 21 Rules 97 to 103 proceeding in this court by admission and

consideration of substantial evidence and legal arguments on all the above issues.

The right, title and interest of the appellants are to be decided de novo by the learned trial judge in the above proceedings under Order 21 Rules 97 to 103 of the Civil Procedure Code. After trial on evidence and hearing of legal arguments, a decree is to be pronounced against each of the appellants. The decree dated 3rd May, 2017 is inexecutable against each of the appellants. It is set aside. The learned single judge is requested to dispose of the Order 21 Rules 97 to 103 proceedings as early as possible.

Urgent certified copy of this judgment, if applied for, be given to the appearing parties as expeditiously as possible upon compliance with all the necessary formalities.

(I. P. Mukerji, J.)