Jogendra Krishna Banerji and Another Vs Sm. Subashini Dassi

Court: Calcutta High Court

Date of Decision: Feb. 19, 1940

Judgement

Nasim Ali, J.
These two appeals arise out of a suit for declaration of Plaintiff''s mourasi mokarari tenancy right in the lands recorded in the

C.S. Khatians Nos. 425 and 178 of Mouza Punja Sahapur in the District of 24-Parganas.

The facts which are not in dispute in these two appeals are these :

1. (a) The lands recorded in C.S. Khatian No. 425 appertain to Touzi Nos. 159, 206 and 210 of the 24-Parganas Collectorate. Defendants Nos.

1 to 12 (hereinafter referred to as ""the Banerji Defendants"") are owners of 111/2 annas share and Defendants Nos. 13 to 19 (hereinafter referred

to as "" the Mondal Defendants"") are owners of the remaining 41/2 annas share of these 3 Touzis.

(b) In the year 1254 B.S. (1847) one Ram Chandra Dass was in possession of the lands of this Khatian as a tenant under the predecessor-in-

interest of Defendants Nos. 1 to 19 at an annual rent of 3 sicca rupees (Ex. D2). In 1275 B.S. (1868-1869) Digambar Das, son of Ram Chandra

Dass, was in possession of this tenancy at an annual rent of Rs. 3-3-4 pies (equivalent of 3 sicca rupees). See Exts. C2 to C3 (2). This rent was

thereafter enhanced to Rs. 4-8 and then to Rs. 8-2-131/4 gandas.

(a) The lands recorded in C.S. Khatian No. 178 appertain to Touzi No. 93 of the 24-Parganas Collectorate. Defendants Nos. 20 (ka) to 20 (ga)

(hereinafter referred to as "" Mitra Defendants "") are the proprietors of this Touzi.

(b) One Bhairab Chandra Banerji was in possession of 11/2 bighas of lands of this Khatian as a tenant under the proprietors of Touzi No. 93 at an

annual rent of 3 sicca rupees (Ex. G1). In 1260 B.S. this rent became Rs. 3-3-4 p. after conversion from sicca rupees to Company''s coins. The

remaining portion of the lands recorded in this Khatian was thereafter added to the original area of the tenancy and the total rent was fixed at Rs.

7-3-141/2 gandas [Ex. F (1), Ex. E (1) to Ex. E4 (1)]. In 1268 B.S. this rent was enhanced to Rs. 11 and in 1270 it was again enhanced to Rs.

16-8.

2. On January 15th, 1875, Digambar Dass mortgaged the lands of both these tenancies to Messrs. Lazarus & Co.

3. In 1881 Messrs. Lazarus & Co. sued Digambar Das on their mortgage and got a mortgage decree. In execution of this decree the mortgaged

properties were sold and were purchased by the mortgagee decree-holders. The mortgagee purchaser thereafter became insolvent and the Official

Assignee sold the right, title and interest of Lazarus & Co. in these two tenancies to one Madhusudan Dey (Ex. 2D).

4. On January 20th, 1891, Madhusudan executed a bainapatra, contracting to sell these two tenancies to one Gouri Pada (Ex. 2C). On February

2nd, 1891, he sold to Gouri Pada these two tenancies. On February 21st, 1891, Gouri Pada sold these tenancies to one Ganesh Chandra Nath

(Ex. 2).

5. Ganesh mortgaged his interest in these two tenancies to one Prasanna Addy on August 20th, 1900 (Ex. 2A). On March 10th, 1898, Ganesh

satisfied this mortgage and got a release from the mortgagee (Ex. 2E). On February 1st, 1908, Ganesh executed a bainapatra contracting to sell

the two tenancies to one Shama Charan Banerjee (Defendant No. 21) in the benami of Parbati Charan Naskar (Ex. 5) and on March 1st, 1908,

he sold these two tenancies to Shama Charan Banerji in benami of Parbati (Ex. 6). The latter executed a deed of release in favour of Shama

Charan on October 12th, 1909 (Ex. 18).

6. On May 27th, 1919, Shama Charan sold both these tenancies to the Plaintiff in this suit (Ex. 1) and Plaintiff entered into possession of these two

tenancies on the basis of his purchase.

7. The record-of-rights of Mouza Punja Sahapur was prepared and finally published under Chapter 10 of the Bengal Tenancy Act in 1930-1931.

In this record Plaintiff was recorded as the dakhalikar (possesser) of the lands of Khatian No. 425 on an annual rent of Rs. 8-5-10 (Rs. 2-8-7

gds. and Rs. 5-13-3 gds.) payable to Mondal Defendants and Banerjee Defendants respectively and as dakhalikar with permanent right of the

lands recorded in Khatian No. 178 on an annual rent of Rs. 16-8 as. payable to Mitra Defendants.

8. On August 16th, 1935, the Banerji Defendants obtained an ex parte decree for rent in respect of the lands recorded in Khatian No. 425 against

Plaintiff"s vendor (Defendant No. 21).

On June 17th, 1936, Plaintiff instituted the present suit for declaration of her mourasi mokarari tenancy right in the lands recorded in both these

Khatians.

The Mondal Defendants did not contest the suit. The Banerji Defendants and the Mitra Defendants contested the suit. Their defence in substance is

that the Plaintiff has no permanent interest in these two tenancies.

The trial Judge has arrived at the following findings:

(1) that the incidents of both these tenancies are governed by the Transfer of Property Act.

(2) that the Plaintiff has failed to prove that the tenancy recorded in Khatian No. 425 is a permanent tenancy.

(3) that the Plaintiff has acquired the limited interest of a permanent tenant by adverse possession for more than 12 years in the lands recorded in

Khatian No. 425.

(4) that the tenancy recorded in Khatian No. 178 is a permanent tenancy.

On these findings the learned Judge has decreed the suit.

Hence these two appeals--one by the Banerji Defendants (F.A. No. 17 of 1938) and the other by the Mitra Defendants (F.A. No. 50 of 1938).

9. The Appellants in this appeal assailed the finding of the trial Judge that the Plaintiff has acquired in the tenancy recorded in Khatian No. 425 the

limited interest of a permanent tenant by adverse possession. The Plaintiff Respondent in this appeal assails the finding of the trial Judge that this

tenancy in its inception was not a permanent tenancy.

10. The points for determination in this appeal, therefore, are:

(1) whether this tenancy from its inception is a permanent tenancy;

(2) whether the Plaintiff has acquired the limited interest of a permanent tenant in respect of the lands of this tenancy by adverse possession for

more than 12 years.

11. Ram Chandra Das was in possession of this tenancy in the year 1847. The evidence in this case shows that before Ram Chandra one Bhairab

Chandra Banerji was the tenant (Ex. D2, Ex. C2 and Ex. 3A). No evidence is now available to show when the tenancy was created, what the

incidents of this tenancy were and how Ram Chandra came to be in possession of this tenancy in 1847. The origin of this tenancy is, therefore,

unknown.

12. The evidence in this case further shows that the rent of this tenancy was twice enhanced before 1293 B.S. But the rent has remained

unchanged since 1293 although the price of the lands in the locality has admittedly gone up.

13. From the year 1875 to 1919 the successive holders of this tenancy transferred this tenancy on the footing that it is transferable.

14. The Mondal landlords have recognised the transferees as tenants and have stated the tenancy to be mokarari mourashi in the rent receipts

granted by them.

15. The Banerji landlords (Appellants) have received rent from the transferees stating these transferees to be marfatdars or sorborahakars in the

rent receipts granted by them to the transferees. In these rent receipts Bhairab Chandra Banerjee, the original tenant, has been mentioned as the

tenant of the holding.

16. The contention of the Appellants is that the Banerji landlords never recognised the transferees as their tenants inasmuch as the transferees were

stated in the rent receipts to be sorborahakars or marfatdars and not as tenants.

17. In Prabhabati Dasi v. Taibutenessa Chaudhurain 17 C.W.N. 1088 (1913), Jenkins, C. J., observed :

I am inclined to think that courts have yielded too freely to the temptation of being blinded to realities by the words Marfatdars and Guzratdars and

so the true facts have suffered. At the same time I am bound to admit that there are expressions in the cases which would suggest that where these

words appear no recognition can be inferred. I think, however, each case is to be determined on its own circumstances and the court should

determine in each case whether, on a consideration of all the facts, not merely by giving undue weight to words used, a legal inference is or is not to

be drawn that there has been a recognition establishing the relationship of landlord and tenant between one who has paid and another who has

received rent for a number of years.

18. With these observations I respectfully agree.

19. Now what are the circumstances in this case?

20. Although the original tenant Bhairab ceased to have any connection with this tenancy before 1847 he was described as the tenant in the

dakhilas granted to the transferees. In Ex. B3/2 (Thoka of the years 1881-1882) we find the following words ""Mudafat (formerly held by) Bhairab

Chandra Banerji.

21. The dakhila which was granted on receipt of rent from Madhusudan mentions Madhusudan as the auction-purchaser. This dakhila clearly

indicates that the landlords received rent from Madhusudan inasmuch as he had purchased the tenancy at auction sale. Again, in Ex. A5/2,

(counterfoil of rent receipt, dated October 10th, 1893), the following statements appear:

Tenant--Bhairab Chandra Banerji

Ma (Marfat)--Ganesh Chandra Nath

Gu (Gujrat)--Self.

22. Ex. A6/2, Ex. A4/2, Ex. A2/2, Ex. A/2 and Ex. A7/2, the counterfoils of rent receipts make a similar distinction between marfatdar and

gujratdar.

23. In Ex. 3A, the plaint in a rent suit instituted by the Banerji landlords against Syama Charan for recovery of arrears of rent of this tenancy, it is

definitely stated that Bhairab was the original tenant and that Shama Charan who has been described in the rent receipts as marfatdar is

sarborahakar.

24. From these facts it seems to me that Bhairab"s name was mentioned as tenant in the rent receipts to indicate the identity of the tenancy with the

tenancy which was originally created in favour of Bhairab before 1847 and that the persons mentioned as marfatdars in the rent receipts were

recognised as tenants on the basis of their purchases.

25. There is nothing in this case to indicate that this tenancy was created for agricultural purposes.

26. The incident of non-transferability was common to tenancies of homestead lands and of agricultural lands before the passing of the Transfer of

Property Act in the absence of a custom to the contrary.

27. There is no evidence in this case to show that the tenancy in question was transferable by custom.

28. The right of enhancement of rent is not inapplicable to tenures which are perpetual [Shankar Rao Daga Dujirao v. Sambhu Wallad Nathu Patil

45 C.W.N. 57 (P.C.) 1940]

29 The successive transfers of this tenancy on the assertion that the tenancy is transferable and the recognition of these transfers by the landlords is

explicable only on the hypothesis that the tenancy is permanent.

30. I am, therefore, of opinion that the facts and circumstances disclosed in this case justify the inference that the tenancy in its inception was

permanent.

31. The trial Judge has found that the Plaintiff has acquired the limited interest of a permanent tenant by adverse possession for more than 12 years.

32. Admittedly, Plaintiff is in possession of the lands of this tenancy for more than 12 years.

33. The contention of the Appellants is that this possession of the Plaintiff is not adverse to the landlords" inasmuch as they have been receiving

rent from the vendor of the Plaintiff all along.

34. In support of this contention reliance was placed by the Appellants upon (a) Ex. 3A (the copy of a plaint which was filed in the year 1926 by

the Appellants for recovery of arrears of rent against the vendor of the Plaintiff) and (b) a plaint filed by the Appellants against the vendor of the

Plaintiff in the year 1934.

35. There is no evidence in this case to indicate that the Appellants recovered any decree for arrears of rent in the suit in which Ex. 3A was filed.

Ex. 4 was not filed within 12 years from the date of Plaintiff"s purchase. It is true that the Appellants obtained an ex parte decree for rent in this

suit, but there is nothing to show that the vendor of the Plaintiff satisfied this ex parte decree against him. There is no other evidence to indicate that

the vendor of the Plaintiff, after he had transferred the entire tenancy in favour of the Plaintiff in the year 1919 on the footing that it was transferable,

paid any rent in respect of this tenancy to the Appellants.

36. The case of the Appellants is that the tenancy in question was created before 1892 and is therefore not transferable. If this is so, the transfer of

this tenancy by the vendor of the Plaintiff and the relinquishment of possession in favour of the Plaintiff in the year 1919 amounted to forfeiture or

abandonment of the tenancy. The possession of the Plaintiff, therefore, became adverse from 1919. No case under sec. 18 of the Limitation Act

was made by the Appellants. On the other hand the evidence in this case tends to show that the Appellants were aware of the purchase by the

Plaintiff. The trial Judge in my opinion was, therefore, right, in holding that even if the tenancy in its inception was not permanent, Plaintiff has

acquired limited interest of a permanent tenant by adverse possession for more than 12 years. [See Probhabati Dassi v. Taibutannessa

Chowdhurain 17 C.W.N. 1088 (1913) and Panchkari Chatterji v. Maharaj Bahadur Singh 19 C.W.N. 136 (1914).

37. The only point for determination in this appeal is whether the learned Judge was wrong in holding that the Plaintiff has permanent tenancy right

in the lands recorded in Khatian No. 178.

38. The contention of the Appellants is that the origin of this tenancy is not unknown and that the evidence in this case indicates that in its inception

this tenancy was not permanent.

39. In support of this contention reliance was placed by the Appellants upon Ex. G1. This document was written in the year 1290 B.S. by one

Tarini Charan Ghosh. It purports to be an extract from a Tumar (record of the investigations) of Mouza Punja made by one Ram Lal Basu, Amin,

in respect of lands and jamas of the years 1258 to 1289 B.S. In this document it is stated that the tenancy originally stood in the name of Bhairab

Chandra Banerjee and that after it was abandoned a paikast settlement of this tenancy was made with Digambar Das. In this document it is further

stated that the settlement had been made on the term that Digambar would give up possession of this tenancy if any resident tenant would come

forward.

40. The contention of the Appellants is that the statements in this document are admissible to prove the origin and the incidents of the tenancy

under sec. 32, cl. (2) of the Indian Evidence Act.

41. The original Tumar made by Ram Lal Basu has not been produced in this case. It is not clear from this document whether the statement that

the settlement with Digambar has been made on condition that he would have to give up the tenancy if any resident tenant would come forward,

appears in the original Tumar.

42. I am not, therefore, prepared to hold that this document proves the origin of the tenancy or its incidents. My finding, therefore, is that the origin

of this tenancy is unknown.

43. The evidence in this case clearly shows that the lands of this tenancy were used for residential purposes and that brick-built residential house

was built on it.

44. The rent of this tenancy was no doubt enhanced twice but there has been no enhancement of rent since 1270 although the price of the lands in

the locality has admittedly increased since then.

45. The evidence in this case shows that this tenancy was also transferred on the footing that the tenant had transferable interest in it. In the receipts

which were granted to the transferees, Bhairab"s name was no doubt mentioned as the tenant. But Mr. Bose appearing on behalf of the Appellants

conceded that Bhairab"s name was mentioned in these rent receipts in order to indicate the identity of the tenancy. The evidence in this case clearly

indicates that the Appellants in this appeal recognised the transferees of these tenancies as tenants.

46. It appears that on January 22nd, 1921, the Mitra Defendants instituted a suit for ejecting the Plaintiff from the lands recorded in Khatian No.

178 on the ground that Plaintiff"s vendor was a tenant-at-will and had no right to transfer this tenancy. The Mitra Defendants on receipt of Rs.

1,450 withdrew this suit. The suit was accordingly dismissed for non-prosecution on November 6th, 1922. The contention of the Mitra Defendants

is that Rs. 1,384 out of this amount was paid as selami for recognising the Plaintiff as a tenant and the balance for arrears of rent for this tenancy. In

support of this contention reliance was placed upon Ex. D(1), the entry in the jamakharach of the Mitra Defendants, dated October 30th, 1922,

and the dakhilas granted to the Plaintiff after the receipt of the said amount.

47. P.W. 6 in his evidence stated:

The Mitter Babus sued Subashini (Plaintiff) in ejectment. I did not take fresh settlement of the land in suit from the Mitter Babus, on behalf of

Subashini *** The suit for ejectment was dis missed for want of prosecution. The Manager of the Mitter Babus said "yon can not fight them-- they

are immensely rich people--the best plan was to compromise with them. I wrote to my brother Kishori and he wrote me back to purchase peace

by paying some money to the Mitras and I therefore paid Rs. 1,100 or 1,200 to the Mitras. I know Babu Sarat Chandra Mitra (Defendant No. 20

(Ka), eldest son of Monmotho Babu. I had talk with Sarat Babu. I had no talk with Monmotho Babu. A dakhila was granted in the name of

Subashini. The witness volunteers--Sarat Babu personally told me that Mitter landlords recognised the mourashi mokarari title of Subashini. I

requested him to enter it in the dakhila and he told me--""It is not our oustom to write it in the dakhilas you need not fear.

48. Sarat Babu did not depose in this suit. In the record-of-rights which was published in 1930-1931, Plaintiff"s right in this tenancy was recorded

as permanent. It cannot be believed that Rs. 1,384 was paid as selami for recognition of the Plaintiff as a tenant liable to be evicted at any time by

a notice to quit. It seems to me that this amount was paid for purchasing peace.

49. The construction of brick-built residential house and the recognition of the successive transfers of this tenancy by the landlords are explicable

only on the hypothesis that this tenancy in its inception was a permanent one.

50. The trial Judge was therefore right in holding that the Plaintiff has got permanent tenancy right in the lands recorded in Khatian No. 178.

51. The trial Judge has declared that the rent of the two tenancies in question is not liable to be enhanced and that these two tenancies are

governed by the Transfer of Property Act of 1882. The learned Advocates appearing for the Plaintiff, the Banerjee Defendants and the Mitras

Defendants, asked us to leave these questions open in this litigation. We accordingly by consent set aside the judgment and decree of the trial

Judge so far as they declare that the rent of the two tenancies in question is not liable to be enhanced and that these two tenancies are governed by

the Transfer of Property Act, 1882.

52. The result therefore is that subject to the modifications made by this judgment, the judgment and the decree of the trial Judge are affirmed and

these appeals are dismissed.

53. Parties will bear their own costs in these appeals.

Pal, J.

54. I agree that this appeal should be dismissed, subject to the modifications as directed by my learned brother. The tenancy in question in this

appeal has been recorded in the C.S. record as in the possession of the Plaintiff without specifying whether the Plaintiff has any permanent right in

it.

55. The Plaintiff in her plaint prayed for a declaration of her maurashi mokarari tenancy right in the holding.

56. The learned Subordinate Judge held that on the facts proved in the case it could not be inferred that the tenancy in question was a permanent

one. He, however, held that the Plaintiff acquired permanent tenancy right by adverse possession and accordingly gave a declaration that the

Plaintiff has permanent tenancy interest in the lands of the tenancy in question. The learned Judge did not give the Plaintiff any declaration as to the

mokarari character of the tenancy and there has been no appeal by her in respect of this omission.

57. Mr. Sen, appearing for the Plaintiff Respondent, contends that on the facts proved in this case an inference as to the permanency of the

tenancy should have been drawn, and that as in some eventuality it may be a pertinent question as to whether the tenancy itself is a permanent one

or whether it is only the Plaintiff who has acquired in it a permanent tenancy right by prescription, Mr. Sen claims a decision on the point in this

appeal.

58. The origin of the tenancy is unknown. Consequently the factum probandum in the case will entirely depend upon some ""retrospectant

evidence. It will be necessary to look backward from the evidentiary fact to the alleged fact. Taking our stand on the fact offered we shall have to

see how far we are pushed towards the fact alleged.

59. The evidence offered in such a case will necessarily be circumstantial. Such evidence is often characterised as presumptive. But ""presumption

in the sense of a mere circumstantial inference is very different from ""presumption"" in the sense of a rule of procedure affecting the duty of proof.

60. From the evidence offered in the present case the following facts have been found:--

(1) The origin of the tenancy under the Banerjees and Mondals is unknown.

(2) It is a tenancy created before the Transfer of Property Act, and is not a tenancy under the Bengal Tenancy Act.

(3) There is an old tank upon it-- nobody knows who excavated it and when.

(4) There is no pucca building upon the land of this tenancy. The settlement Khatians show that the buildings all fall within the tenancy under the

Mitras.

(5) The rent has not been uniform-- but it has not been changed at least for the last 52 years--at least it has not changed since 1293 B.S.

(6) There have been many transfers of the tenancy--Sales by private treaty and sales by public auction, in Court, in execution of decrees and

mortgages. We have record of transfers from 1275 and the transferees have been recognised though the name of Bhairab Chandra Banerjee is

described as the tenant in all the papers, and the successive transferees as marfatdars.

(7) There was no attempt to raise the rent for the last 52 years though during this period the price of land has jumped up.

(8) There has been at least one instance of succession in the history of the tenancy in so far as the evidence in the case takes us, viz., that Digambar

Das inherited it from his father Ram Chandra Das some time before 1875.

(9) The Banerjees have refused to recognise the Plaintiff"s tenancy right and did not take any rent from her though she has been in possession from

the time of her purchase on 27th May, 1919, and the present suit was instituted on 17th June, 1936.

61. These are the material facts evidencing the factum probandum in this case. It is needless to add that the strength of the inference from any

similar set of facts will, as with all possible inferences, vary in each case and that the fact to be taken into consideration in such a case need not be

one which yields an inference amounting by itself to the proof of the probandum. It need merely be something which has a possibility worth

considering.

62. Mr. Sen appearing for the Respondent"s claims to add two more items for our consideration, viz.:--

1. That there have been several transactions by which the right in question was asserted and in the documents evidencing these transactions there

are statements supporting the right now claimed.

2. That there are statements made by the co-sharer landlords (the Mondol Defendants) in several other documents amounting to admissions of the

right claimed.

63. For the first of the above two items Mr. Sen relies on Ex. 2 (h) of 1875, Ex. 16, Ex. 17 of 1881, Ex. 2C of 1891, Ex. 2d of 1891, Ex. 2 of

1900, Ex. 2 (e) of 1908, Ex. 5 of 1908 and Ex. 6 of 1908 and contends that these documents are relevant evidence under sec. 13 (a) of the

Evidence Act for the purpose of establishing the right in question (viz., the permanent tenancy right) as they are evidence of transactions by which

such right was asserted. He further contends that the statements as to the permanent character of the tenancy contained therein are also relevant

evidence under sec. 32(7) of the Evidence Act. In my view these contentions have much forge in them and must be given effect to. Sec. 13(a) of

the Indian Evidence Act runs as follows:--

Where the question is as to the existence of any right.....the following facts are relevant :--

(a) any transaction by which the right.....in question was.....asserted.....

65. In the present case the question is as to the existence of the Plaintiff"s permanent tenancy right. Any transaction by which this fight was asserted

would therefore be a relevant fact that can be proved in the case.

66. The tenancy in question having admittedly been in existence from long before the Transfer of Property Act it would be transferable only if it

were a permanent tenancy. Consequently every transaction of transfer will be a transaction by which this permanent right can be said to have been

asserted. Sec. 32 (7) of the Evidence Act lays down:--

Statements, written or verbal, of relevant facts made by a person who is dead.....are themselves relevant facts in the following cases :-- When the

statement is contained in any other document which relates to any such transaction as is mentioned in section 18, Clause (a)

67. The permanent character of the tenancy is certainly a relevant fact in the present case. Statements of such permanent character therefore are

themselves relevant facts if they are contained in any document which relates to any transaction of the nature mentioned in sec. 13 (a). As has

already been pointed out, the several transactions of transfer in the present case are such transactions. Consequently the statements as to the

permanent nature of the tenancy contained in the several documents relating to these several transfers are themselves relevant facts and will be

available for the purpose of proving the Plaintiff''s permanent tenancy right.

68. It seems therefore clear that the language used in the two sections referred to above amply support Mr. Sen''s contentions and there are

sufficient authorities to sustain the same: See Jnanendra Nath Dutt v. Nesa Dassi 39 C.L.J. 526 (1923). The cases that were cited in opposition do

not really detract from this view at all. In Banshi Sinh v. Mir Ameer Ali 11 C.W.N. 703 (1907) the right in question in the suit was whether a

tenant held lands under a nakdi or bhaoli system of rent. The decision was based on a statement contained in a deed of gift executed by the

deceased grandfather of the tenant. This statement in the deed of gift was not admissible in evidence because the transaction evidenced by it was

not one by which the right in question could be said to have been asserted at all. Geidt, J., pointed out that the nakdi nature of the holding was not

asserted by the deed of gift though it was asserted in the deed of gift. ""It makes no difference to the gift whether the land was nakdi or bhaoli; it

was equally effective in either case.

69. In Narendra Nath Mandal v. Sannyasi Charan Das 54 C.L.J. 353 (1929) the right in question was whether a certain tenancy was of a

permanent nature or not. A statement as to the permanent character of the tenancy contained in a deed of partition was sought to be given in

evidence. It was held that the statement was not admissible in evidence. The partition was not a transaction in which the question of the

permanency or otherwise of the tenancy was in any way involved. Consequently the said partition was rightly considered as not to be a transaction

by which the right in question was asserted. That being so, the statement contained in the deed of partition could not go in. In Brojendra Kishore

Roy Chowdhury v. Mohim Chandra Bhattaeharjya 31 C.W.N. 32 (1926) again the transaction did not satisfy the requirements of the sections.

There the right in question was a niskar right. The transaction was one of sale of the tenancy. Though the terms of the sale might have been

influenced by the assertion of the niskar right, the sale as a transaction did not itself depend upon this right. It was held that the right in question (the

niskar right) could not be said to have been asserted by the transaction of sale and consequently the statements as to the niskar right contained in

the deed of sale was not relevant evidence.

70. In Kanta Mohan Mallik v. Basudeb Ghora 39 C.W.N. 311 (1934) also the right in question was the niskar right and the transaction to which

the deed in question related was a sale.

71. In all the above cases, therefore, the transactions to which the documents in question related were transactions not of the nature mentioned in

sec. 13 (a) of the Evidence Act and so the very initial requirement of sec. 32 (7) was wanting in them all. The decisions in all these cases turned on

this ground.

72. On the other hand, in Jnanendra Nath Dutt v. Nesa Dassi 39 C.L.J. 526 (1923) the right in question being the permanency of the tenancy

right, the statement in the sale deed by the tenant in favour of his transferee that it was a permanent one was held admissible in evidence.

73. On a proper construction of the above relevant provisions contained in the Evidence Act I am of opinion that the statements as to the

permanency of the tenancy contained in the documents relied on by Mr. Sen will be relevant facts. Of course these may not be relevant to the

establishment of the Mokarari character of the tenancy. None of the transactions are such as can be said to be transactions by which this part of

the right claimed was asserted within the meaning of sec. 13 (a) of the Evidence Act.

74. As to the statement made by the co-sharer landlords (the Mondal Defendants) admitting the permanency of the tenancy I am of opinion that

these are admissions available to the Plaintiffs under sec. 18 (1) of the Evidence Act, though their evidentiary value may be very little in the

circumstances of the present case.

75. Coming now to the main question, the principal factum probandum, in this case, I agree with due respect with my learned brother in the

conclusion arrived at by him.

76. Peculiar dangers indeed are attendant upon the application of the method of inferences to be adopted necessarily in cases like the present.

There may be loopholes for error and opportunities for false inferences. There always are the dangers of overlooking the plurality of causes, of the

possibility of unknown antecedents or of neglecting to exclude alternative possibilities. The Judicial Committee in the recent case of Shankar Rao

Daga Dujirao v. Sambhu Wallad Nathu Patil 45 C.W.N. 57 (P.C.) (1940) has, therefore, emphasised that ""the inference of permanence is an

inference which it is difficult to make and which requires the presence of circumstances explicable, when taken as a whole, only on the hypothesis

of permanence. ""Each separate evidentiary fact may operate persuasively on the mind towards or against the factum probandum. But proof is the

ultimate persuasive operation of the total mass of such evidentiary facts as to the probandum.

77. Keeping all this in mind we have arrived at the conclusion that the tenancy in question is a permanent one and that the Plaintiff should be given a

declaration to that effect.

78. It is now well settled that non-permanent tenancies created before the passing of the Transfer of Property Act were not transferable.

Consequently, if in the case of a tenancy of unknown origin we find that there have been several successive transfers of the same, and the

transferees have always been accepted as tenants without anything more, it will not be unreasonable to infer that by such transactions the tenant

kept himself within his rights and that the circumstances indicated the permanent character of the tenancy. In this particular case the circumstances

are much stronger. We have for our consideration not only the several instances of transfer and the recognition thereof as of right, but we have

unimpeachable documentary evidence of these transactions showing that on each such occasion there was an express assertion in unequivocal

terms of the permanence of the tenancy. These were not mere empty assertions but were always followed by the transactions based on them which

were justifiable only if such assertions were true. To add to this, we find that the landlord, with full knowledge of all these, always accepted the

transferee as the next tenant, sometimes expressly recognizing how he comes in,--whether by private purchase or by purchase at an auction sale.

Besides transfers by private treaties we find transactions through Courts equally describing the tenancy as a permanent one and equally justifiable

only on the footing of the permanent character of the tenancy. The landlord always accepts the position and never protests. These facts in our

opinion can lead to only one conclusion and that conclusion is irresistible, viz., that the tenancy in question is a permanent one having transferability

as one of its incidents.

79. As regards the acquisition by the Plaintiff of the permanent tenancy right by adverse possession, I need not add anything to what my learned

brother has just now said on the point. With due respect I agree with him in the conclusion arrived at in this respect also.

80. I agree that this appeal also should be dismissed.

81. In this case the tenancy in question has been recorded as permanent in the C.S. record.

82. Mr. Basu, appearing in support of this appeal, contends that this entry as to permanence does not raise the statutory presumption under sec.

103B (5) of the Bengal Tenancy Act.

83. The C.S. record was finally published in this case in 1931. We do not know when the survey in respect of this local area was directed by the

Local Government under sec. 101 of the Bengal Tenancy Act. Mr. Basu proceeded on the footing that sec. 101, as amended by the Amending

Act of 1928, applies to this case.

84. After this amendment the section authorizes the Local Government to make an order directing that a survey be made and a record-of-rights be

prepared by a Revenue Officer in respect of all lands in any local area, estate or tenure or part thereof.

85. The fact that the tenancy in question in the present case is not one coming within the Bengal Tenancy Act would not therefore make it

incompetent for a Revenue Officer to survey and prepare a record-of-rights in respect of these lands. The jurisdiction of the Revenue Officer in this

respect depends upon the scope of the order made by the Local Government under sec. 101 and we are proceeding on the assumption that such

order in this case was comprehensive enough to include this particular tenancy.

86. The survey and the preparation of record-of-rights in respect of this tenancy was therefore within the jurisdiction of the Revenue Officer

concerned.

87. Mr. Basu contends that sec. 103B (5) raises a statutory presumption in favour of those particulars only that are authorised to be entered in a

record-of-rights under sec. 102 of the Bengal Tenancy Act. He contends that in case of the land of a tenancy, not coming within the classes of

tenancies governed by the provision of the Bengal Tenancy Act, the particular regarding the permanency or otherwise is not authorised to be

recorded by sec. 102 of the Bengal Tenancy Act. The only clause in sec. 102 which authorises an entry in this respect is cl. (b) and that clause is

confined to certain particular classes of tenancies not covering the present case. According to him there is no other clause authorising an entry as to

the permanency or otherwise of any other tenants. He then points out that the newly added proviso to sec. 102 of the Bengal Tenancy Act makes

it clear that such particulars are not authorised to be recorded for a tenancy of the kind in dispute in the present case.

88. The proviso simply says that in case of lands not used for purposes connected with agriculture or horticulture, ""it shall be sufficient to record

that fact together with the prescribed particulars relating to the occupant, the landlord and the tenancy."" This proviso does not take away the

authority otherwise conferred by the section. It simply empowers the Revenue Officer to omit the particulars otherwise given in the section but it

does not take away the jurisdiction to enter those particulars.

89. In my opinion cl. (h) of sec. 102 authorising an entry as to the special conditions and incidents of a tenancy does include the authority to record

the particulars as to the permanency or otherwise of a tenancy of the kind involved in the present case. As a matter of fact that entry has been

made in C.S. record and in my opinion in making this entry the Revenue Officer was within his authority under sec. 102 of the Bengal Tenancy

Act.

90. In my opinion, therefore, the statutory presumption under sec. 103B (5) of the Bengal Tenancy Act would arise in this case.

91. In any event it is a piece of evidence and, in my opinion, a strong piece of evidence in support of the permanent character of the tenancy. Our

conclusion that the tenancy in this case is a permanent one is not in the least affected by any consideration of the burden of proof. Placing the

burden fully on the tenant, we have arrived at the conclusion that he had discharged his burden satisfactorily and has succeeded in placing such

circumstantial evidence before us as would lead to one conclusion, viz., that the tenancy is a permanent one. My learned brother has in his

judgment discussed this evidence in detail and I respectfully agree with him in the final conclusion.