

(2014) 11 CAL CK 0096

Calcutta High Court

Case No: A.P.D. 3 of 2014 and E.O.S. 18 of 1991

Sajjan Kumar Saraf

APPELLANT

Vs

Kaberi Private Limited

RESPONDENT

Date of Decision: Nov. 25, 2014

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 2 Rule 2
- Evidence Act, 1872 - Section 102
- Transfer of Property Act, 1882 - Section 53A
- West Bengal Premises Tenancy Act, 1956 - Section 13(6)

Hon'ble Judges: Ashis Kumar Chakraborty, J; A.K. Banerjee, J

Bench: Division Bench

Advocate: Malay Ghosh, Sr. Advocate, Sayantan Basu, Aditya Garodia and Aniruddh Poddar, Advocate for the Appellant; Goutam Chakravarti, Sr. Advocate, R.N. Junjhunwala, Jeevan Ballav Panda and Rishav Dutt, Advocate for the Respondent

Judgement

Ashis Kumar Chakraborty, J.

The instant appeal is at the instance of the appellants, who suffered a decree for eviction, passed by a learned Single Judge, in respect of Premises No. 8A, Burdwan Road, Alipore situate in the heart of the city of Kolkata comprising a plot of land of 13 cottahs together with a dwelling house (hereinafter described as "the suit property"). The appellants are the two sons of Shivrath Shroff, since deceased the original defendant No. 9 in the eviction suit (hereinafter referred to as "the original defendant No. 9"). The respondent No. 1, owner has also filed a cross-objection from the decree passed by the learned Single Judge. We shall first deal with the appeal of the appellants.

2. One Smt. Narayani Debi Bajaj since deceased (hereinafter referred to as "Narayani") was the owner of the suit property. By a registered indenture of lease dated August 10, 1951 Narayani demised the suit property in favour of Ila Basu

(hereinafter referred to as "Ila"), the proforma respondent No. 2 in this appeal, for a period of thirty years commencing from August 1, 1951. By a registered indenture dated June 26, 1954, Ila assigned her right and interest, under the said lease dated August 01, 1951, in respect of the suit property in favour of Amal Kumar Mukherjee, since deceased and the proforma respondent Nos. 3 to 6 in this appeal. After the death of Amal his right and interest in respect of the suit property, under said deed of assignment, devolved upon his legal heirs, the proforma respondent Nos. 7 and 8 in this appeal. For the sake of convenience Amal Mukherjees, the proforma respondent Nos. 7 and 8 and the proforma respondent Nos. 3 to 6 are hereinafter referred to as "Mukherjees". In the year 1962, Narayani, died intestate and the ownership of the suit property devolved upon her twelve legal heirs (hereinafter referred to as "the said co-owners"). In 1971, the original defendant No. 9 became a tenant in respect of the suit property, under the said Mukherjees and he obtained possession of the suit property.

3. On September 21, 1978 an agreement was entered into between the said co-owners and the original defendant No. 9, for transfer of the suit property in favour of the original defendant No. 9 and/or his nominees for a total consideration of Rs. 2 lacs. Out of the total consideration amount of Rs. 2 lacs, the original defendant No. 9 paid Rs. 20,000 to the said co-owners and the balance consideration amount was payable at the time of execution of conveyance. By an indenture dated April 21, 1981, Mukherjees assigned their right title and interest, in respect of the suit property, under said indenture of lease dated August 10, 1951 in favour of Vishanath Kapur, the proforma respondent No. 9 in this appeal. By four separate deeds of conveyance all dated July 6, 1981, all the said co-owners sold, transferred and conveyed their right, title and interest in the suit property to the respondent No. 1 in this appeal. On July 15, 1981, the original defendant No. 9 along with his nominees, namely, Triveni Devi Shroff, Indira Devi Saraf and Preamlata Saraf filed a suit being Suit No. 531 of 1981 (hereinafter referred to as the "said specific performance suit"), before this Court, against all the said co-owners claiming, inter alia, a decree for specific performance of the said agreement dated September 21, 1978. It is to be noted that in the specific performance suit, the plaintiffs therein, also made an alternative claim for damages for a sum of Rs. 10 lacs in lieu of specific performance. During the pendency of the said specific performance suit, the original defendant No. 9, came to know about the said four conveyances dated July 6, 1981 and prayed for, inter alia, impleadment of the respondent No. 1, in the said specific performance suit and for certain amendments in the plaint. By an order dated July 9, 1982 a learned Single Judge allowed the said prayer but, the necessary amendments of the plaint or the specific performance suit was not carried out. On July 31, 1981, the said lease dated August 10, 1951 expired by efflux of time. Thereafter, in December, 1981, the respondent No. 1 claiming to be the owner of the suit property filed, the eviction suit, before the learned Court at the first Subordinate Judge, Alipore, 24 Parganas (South) against the proforma respondent

Nos. 2 to 9 in this appeal and the original defendant No. 9 claiming, inter alia, their eviction from the suit property and mesne profits. In September 1982, on a joint prayer of the parties, the eviction suit was transferred from the District Court at Alipore to this Court. In spite of service of the writ of summons none of the proforma respondent Nos. 2 to 9, being the defendant Nos. 1 to 8, filed written statement in eviction suit and the original defendant No. 9 alone contested the eviction suit. Although on June 26, 1982, the original defendant No. 9 entered appearance in the eviction suit, but he filed his written statement only in December 1996, that is, after fourteen years. In the mean time, by an order dated March 13, 1992, a learned Single Judge of this Court rejected the prayer of the original defendant No. 9 to extend the time to carry out the amendment of the plaint in the specific performance suit. Further by an order dated July 14, 1992, a learned Single Judge dismissed the said specific performance suit on the ground of non-service of the writ of summons on the defendants. Both the said decisions dated March 13, 1992 and July 14, 1992 were upheld by the Division Bench of this Court, as also the Supreme Court. Thus, the said original defendant No. 9 ceased to have any right to obtain specific performance of the said agreement dated September 21, 1978 or to claim title in respect of the suit property.

4. However, in the written statement filed in the eviction suit, in December 1996, the original defendant No. 9 made out two defences. He alleged that by a notice dated December 15, 1952, the said Narayani determined the said lease dated August 10, 1951 with effect from January 01, 1953 and, thereafter, the said Mukherjees became monthly tenants in respect of the suit property with a right to sublet. The other defence alleged by the original defendant No. 9 was that being already in possession under the Mukherjees, he continued in possession of the suit property in part performance of the said agreement dated September 21, 1978. On July 27, 1999, the original defendant No. 9 died and he was substituted, in the eviction suit, by his wife Tribeni Devi Saraf and his two sons, the appellants in this appeal. On August 21, 2004 the said Triveni Devi died leaving behind the appellants as her only legal heirs. In the eviction suit although as many as thirteen issues were framed, but for the decision of this appeal, only the following issues framed by the learned Single Judge are relevant.

"Issue No. 1. Was the lease dated 10th August, 1951 referred to in paragraph 2 of the plaint determined as alleged in paragraph 2 of the written statement?"

"Issue No. 5.(a) Did the original defendant No. 9 enter into a contract in writing to purchase the premises as alleged in paragraphs 6(a) and (d) of the written statement?

(b) Did the original defendant No. 9 continue in possession of the premises in part performance of the contract dated 21st September, 1978 and act in furtherance of the same as alleged in paragraphs 6(f) and (g) of the written statement?

(c) Had the original defendant No. 9 and after him, have his substituted defendants always been and are ready and willing to perform their part of the said contract as alleged in paragraph 6(q) of the written statement?"

"Issue No. 12. Is the plaintiff entitled to any mesne profits or damages of compensation as alleged in respect 15 of the plaintiff "?"

5. During the trial, before the learned Single Judge, both the respondent No. 1/plaintiff and the appellants/defendants adduced oral and documentary evidence through their respective witnesses. After considering the pleadings as also the oral and documentary evidence adduced by the respondent No. 1/plaintiff and the appellants respectively, the learned Single Judge rejected the aforesaid two defences of the appellants and passed the decree in favour of the respondent No. 1/plaintiff for recovery of khas possession of the suit property. The learned Single Judge further passed a decree for Rs. 24,000/- against the defendant Nos. 8, 9 and 10, in the suit, on account of mesne profit from August 01, 1981 until November 30, 1981 and appointed a Special Referee to determine the mesne profits from December 1981 till the date of decree.

6. With regard to the defence of the appellants/defendants that they are entitled to claim protection of part-performance under Section 53A of Transfer of Property Act, the learned Single Judge accepted the contention of the respondent No. 1/plaintiff that the pleadings filed the original defendant No. 9 would clearly show that such defendants accepted that they are in possession of the property as tenants even after 1978 and not under any other capacity. The learned Single Judge refused to accept the plea taken by the appellants/defendants under Section 53A by the Transfer of Property Act as the same was unmeritorious.

7. With regard to the other defence of the appellants that the said lease dated August 10, 1951 stood determined by Narayani, the learned Single Judge considered the various agreements and draft agreements, which were exhibited in the suit, as also pleadings/affidavits of the original defendant No. 9. The learned Single Judge found, there was nothing on record to show that, Ila (the proforma respondent No. 2) had been evicted from the premises or a monthly tenancy had been created between Narayani and Ila and the appellants herein failed to discharge their onus to establish such monthly tenancy.

8. While assailing the judgment and decree passed by the learned Single Judge, Mr. Moloy Ghosh, learned Senior Advocate representing the appellants urged only two grounds, before us. Mr. Ghosh submitted that the original defendant No. 9 in part performance of his said agreement for sale dated September 21, 1978 (Ext.-14), continued in possession the suit property and that the original defendant No. 9, during his life time, performed and the appellants are still ready and willing to perform the said agreement dated September 21, 1978. Thus, according to Mr. Ghosh, in spite of the dismissal of the said specific performance suit, purely the

technical ground, the appellants were entitled to defend their possession in respect of the suit property under Section 53A of the Transfer of Property Act, 1882. In support of such contention Mr. Ghosh, the learned Senior Counsel placed before us the provisions in Section 53A of the Transfer of Property Act. He also placed reliance on two decisions, the first one was of the Supreme Court in the case of [Shrimant Shamrao Suryavanshi and Another Vs. Pralhad Bhairoba Suryavanshi by Lrs. and Others](#), and second one was of the Full Bench of the Bombay High Court in the case of [Mahadeo Nathuji Patil Vs. Surjabai Khushalchand Lakkad and Others](#),. Mr. Ghosh further relied on a document, being Ext.-16 of the proceeding, the requisition on title of the suit property, exchanged between the advocates of the said original defendant No. 9 and the said co-owners respectively, in connection of the said agreement for sale dated September 21, 1978. According to Mr. Ghosh, the reply against query No. 10 of the said requisition, would ex-facie substantiate that the original defendant No. 9 was continuing in possession of the suit property in part performance of the said agreement dated September 21, 1978.

9. The second ground urged by Mr. Ghosh was that it was a case of the original defendant No. 9 in paragraphs 2 and 5 his written statement, that said lease dated August 10, 1951 in favour of the Ila, was forfeited with effect from January 1, 1953 and thereafter, the Mukherjees became monthly tenants in respect of the suit property. Thus, according to Mr. Ghosh, the original defendant No. 9 was a subtenant of the Mukherjees and in absence of a notice under Section 13(6) of the West Bengal Premises Tenancy Act, 1956 the respondent No. 1/plaintiff could not maintain the eviction suit. In support of such contention Mr. Ghosh relied upon a decree dated September 13, 1955 passed by the learned first Court of Sub-Judge at Alipore in Title Suit No. 21 of 1953 filed by Narayani against Ila and the Mukerjees and the decision dated May 18, 1961 of the appellate Court (both collectively marked as "Ext.-3" of the proceeding). From the said decisions (Ext.-3) it appears that the said Narayani forfeited the said lease dated August 10, 1951 and claimed eviction of the said Ila and the said Mukherjees. However, both the trial Court and the appellate Court, relieved Ila and the said Mukherjees from forfeiture subject to payment of the outstanding amount to Narayani, failing which the Narayani would execute the decree for eviction against the said defendants.

10. In support of his contention, Mr. Ghosh also relied on two affidavits, the first one affirmed by the original defendant No. 9 himself on August 06, 1996 (being Ext. "II"), in the application of the respondent No. 1/plaintiff claiming summary decree for eviction, under Chapter-XIIIA of the Original Side Rules of this Court, alleging determination of the said lease dated August 10, 1951 by Narayani and the said Mukherjees becoming monthly tenant in respect of the suit property. The second affidavit was affirmed by the Mohanlal Singhanian, the grandson of Narayani on August 04, 1954 stating, the said lease dated August 10, 1951 of Ila Basu was forfeited. According to Mr. Ghosh, under Section 102 of the Evidence Act, 1872, the burden of proof was in the respondent No. 1/plaintiff that the said lease dated

August 10, 1951 was not determined and the same was subsisting till July 31, 1981. Thus, the finding of the learned Single Judge that the burden was on the defendants to establish any monthly tenancy between Narayani Devi Bajaj and Ila Basu which burden was not discharged, was erroneous.

11. However, Mr. Gautam Chakravarti, learned Senior Counsel, appearing for the respondent No. 1/plaintiff submitted, the learned Single Judge rightly passed the eviction decree against the appellants/defendants. Mr. Chakravarti, relied upon the same decisions relied upon by Mr. Ghosh, on behalf of the appellants; the first one is the decision of the Supreme Court in the case of Shrimant Shamrao Suryavanshi (Supra) and the second one is the decision of the Full Bench of the Bombay High Court in the case of Mahadeo Nathuji Patil (supra); According to Mr. Chakravarti, in both the said decisions, it has been held that even a transferee's right to sue for specific performance is barred by the laws of limitation, still in a suit for eviction by the transferor, the transferee can defend his possession in respect of the suit property by invoking part performance under Section 53A of the Transfer of Property Act, provided the transferee can substantiate that he/she is put in possession or when already in possession he/she is continuing in possession of the suit property, in part performance of the contract, and the transferee has performed and is ready to perform the contract. According to Mr. Chakravarti from the various documents exhibited during the trial of the suit, it is evident, the original defendant No. 9, all along continued in possession of the suit property under the said lease dated August 10, 1951. In support of such contention, Mr. Chakravarti relied upon the following documents.

"(i) Review petitions of the said original defendant No. 9 before the Supreme Court, affirmed by himself on August 09, 1996 (Exts.-"L" & "M")), expressly stating "The petitioner was already in possession of the said premises No. 8A, Burdwan road as a tenant of the assignee of the original lessee under the Deed of lease dated 10th August, 1951."[para -4].

(ii) Rent receipt dated May 01, 1981 (Ext.-"O") by the estate of Amal Kumar Mukherjee & Ors for Rs. 1,201 in favour of the original defendant No. 9.

(iii) The said agreement for sale dated September 21, 1978 (Ext.-"14") wherein it is expressly stated that said property is free from all encumbrances and liabilities whatsoever but subject to the lease created by a Deed of lease dated 10th August, 1951 made between Narayani Devi Bajaj and Smt. Ila Basu and that possession of the suit property shall be delivered to the purchaser or his nominee(s) simultaneously with the payment of purchase money and execution of the conveyance (cls. 1 and 6)

(iv) The plaint filed by the said original defendant No. 9 in the said specific performance suit (Ext.-"S") where there is no averment that the said original defendant No. 9, being the plaintiff, continued in possession of the suit property, in

part performance of the said agreement dated September 21, 1978.

(v) The said four conveyances all dated July 06, 1981 (Exts. "G", "H", "I" and "J") executed by the said co-owners in favour of the respondent No. 1/plaintiff expressly stating that the transfer of the suit property is subject to the existing lease dated August 10, 1951.

(vi) Copies of the three draft conveyances annexed to the plaint filed in the said specific performance suit as Annexures "F", "G" and "H" thereto (being Exts. "22", "23" and "24" of the proceeding) also expressly stated that the same are subject to the existing lease dated August 10, 1951 and assignment dated June 26, 1954. These draft conveyances were prepared by the advocate of the original defendant No. 9."

12. According to Mr. Chakravarti, from the aforesaid exhibited documents it is evident that the appellants have failed to fulfil the condition laid down by the Supreme Court in the said case of Shamrao Suryavanshi (Supra) requiring the said original defendant No. 9 to prove that he continued possession of the suit property only, in part performance of the said agreement dated September 21, 1978 (Ext.-14). Mr. Chakravarti further pointed out, in that case the Supreme Court allowed the transferee/defendant to take the plea of part performance as the court found that the transferee took possession over the property in part performance of the contract (para 21), but in the instant case the appellants could not substantiate that the original defendant No. 9 continued possession of the suit property in part performance of the said agreement dated September 21, 1978. Thus, according to Mr. Chakravarti, the said decision of the Supreme Court relied by the appellants does not lend any support to the plea of appellants under Section 53A of the Transfer of Property Act.

13. So far as the second ground urged by Mr. Ghosh, Senior Advocate on behalf of the appellants, that the said lease dated August 10, 1951 stood determined on the ground of forfeiture and Ila and Mukherjees became monthly tenants in respect of the suit property, Mr. Chakravarti first submitted that no such case was pleaded by the said original defendant No. 9 either in his plaint filed in the said specific performance suit or in the proceedings before the Division Bench of this Court or before the Supreme Court, when the said co-owners were contesting the said proceedings. Such defence was for the first time alleged in the affidavit filed by the said original defendant No. 1 on August 6, 1996 to defend the application of the respondent No. 1/plaintiff praying for summary decree for eviction against him. Mr. Chakravarti, relied on a decision of the Division Bench of this Court in the case of Ila Basu v. Narayani Bajaj reported in 59 CWN 102 where the Division Bench held that the said Narayani did not have the right to terminate the said lease dated August 10, 1951. However, Mr. Ghosh, the learned senior counsel appearing for the appellants, rightly points out that the said decision of the Division Bench was passed on August 16, 1954 in an inter locutory proceeding in the said Title Suit No. 21 of 1953 before the said decree was passed in the said Title Suit No. 21 of 1953 on September 13,

1955 by the learned Sub-Judge at Alipore.

14. Mr. Chakravarti, learned Senior counsel further submitted that the said appellants had utterly failed to prove that either they themselves or the said original defendant No. 9 had ever been willing to perform their part of the said agreement for sale dated September 21, 1978.

15. We have considered the rival contentions of both the appellants/defendants and the respondent No. 1/plaintiff as also the voluminous records of this appeal. Although during the trial of the suit before the learned Single Judge various issues were framed, before us, Mr. Ghosh, in his usual fairness, restricted his challenge to the impugned judgment and decree with regard to two issues only first, as to whether the appellants could protect their possession of the suit property by taking plea of part performance under Section 53A of the Transfer of Property Act, 1882 and secondly as to whether the said lease dated August 10, 1951 stood determined by Narayani.

16. There cannot be any doubt that the aforesaid two defences raised by the appellants/defendants are mutually destructive. We are conscious of the principle of law that even when a transferee has lost the right to sue the transferor for specific performance of a contract of sale of an immovable property, on technical grounds, such as the law of limitation or as in this case when the said specific performance suit of the original defendant No. 9 was dismissed under the procedural law, the transferee can successfully resist eviction proceeding brought by the transferor or his representative and protect his/her/its possession by invoking the defence of part performance subject to the fulfillment of the conditions laid down by the Supreme Court in paragraph 16 of the decision in the said case of Shrimant Shamrao Suryavanshi & Anr. (supra). The said conditions were also laid down by the Full Bench of the Bombay High Court in paragraph 10 of his decision in the case of Mahadeo Nathuji Patil (supra).

17. From paragraph 16 of the said decision of the Supreme Court, it is evident in order to avail of the protection under Section 53A of the Transfer of Property Act the transferee must prove to be in possession of the property in question in part performance of the contract. From a reading of Section 53A of the Transfer of Property Act it is evident that a transferee can protect his/her possession of the immovable property of, under the said section only if he/she obtained possession of the property in part performance of the contract and in a case where he/she is already in possession of the property, he/she must continue possession of the property in part performance of the contract.

"10. Is the property intended to be. The purchaser is in possession of conveyed in occupation of any person the property."

other than the recorded occupier Srimati Ila Basu? If so, please let us know the name of such person and particulars of the right under which he is in occupation of

the property?

18. Now, let us consider if, in this case, the appellants can claim that their father, the said original defendant No. 9, continued in possession of the suit property in part performance of the said agreement dated September 21, 1978. Mr. Ghosh, the learned senior counsel representing the appellants argued that the answer against query No. 10 of the requisition on title (Ext.- "16") substantiates that the original defendant No. 1 had continued possession of the suit property in part performance of the said agreement dated September 21, 1978. In this connection, the query No. 10 of the said requisition and the answer thereto are set out hereunder:

19. The said requisition was raised by the advocate of the said original defendant No. 9 on November 11, 1978 and replied by the Advocate of the original defendant No. 9. It is evident that the aforesaid query in the requisition was not as to whether the vendor/purchaser was put in possession in performance of the said agreement dated September 21, 1978. There is no doubt that as on November 11, 1978, the said original defendant No. 9, being purchaser described in the said requisition on title, was in possession of the suit property. Now, the appellants themselves have relied on the rent receipt dated May 1, 1981 (Ext.- "O") issued by the estate of the said Amal Mukherjee and Ors. for Rs. 1201/- in favour of the said original defendant No. 9. This substantiates only one thing, that is, even in the year 1981, long after the said requisition dated November 11, 1978, the said original defendant was possessing the suit property as a tenant of the said Mukherjees, the assignees of the said lease dated August 10, 1951. Further, Clause 6 of the said agreement dated September 21, 1978 (Ext. 14) of the original defendant No. 9 expressly states that the vendors shall deliver possession of the suit property to the purchaser or his nominees simultaneously with the payment of the purchase money and the execution of the conveyance of the said property. Moreover, in the plaint filed in the said specific performance suit there is no averment that the original defendant No. 9 continued in possession of the suit property in part performance of the said agreement dated September 21, 1978. We cannot ignore the fact that in the said specific performance suit the original defendant No. 9 together with the other plaintiffs obtained leave under Order II Rule 2 of the Code of Civil Procedure to file suit before the appropriate court, to claim possession of the suit property. In the proceedings arising out of the dismissal of the said specific performance suit, the original defendant No. 9 filed two review applications (being exhibits - "L" and "M") before the Supreme Court. The said original defendant No. 9 himself affirmed both the said review applications and in paragraph 4 of both the said applications the following averments were made.

"The petitioner was already in possession of the said premises No. 8A, Burdwan Road, Calcutta as a tenant of the assignee of the Original lessee under the deed of lease dated 10th August, 1951."

20. The original defendant No. 9 affirmed statements made in paragraph 4 above to be true and correct. Thus, once again the original defendant No. 9 admitted that he continued in possession of the suit property as a tenant of the assignee of the original lessee under the said lease dated August 10, 1951 and not in part performance of the said agreement dated September 21, 1978.

21. In view of the aforesaid facts, we are afraid that we are unable to accept the contention of the appellants that the answer against the query No. 10 of the said requisition being Ext. 16 of the proceeding can be construed to indicate that the original defendant No. 9 continued in possession of the suit property in part performance of the said agreement dated September 21, 1978. Thus, we are of the view that the appellants failed to prove that the original defendant No. 9 continued in possession of the suit property in part performance of the said agreement dated September 21, 1978 and as such the defence put up by the appellant in the eviction suit based on the principle of part performance under Section 53A of the Transfer of Property Act, 1882 is devoid of any merit. Since we found that the original defendant No. 9 was not in possession of the suit property in part performance of the said agreement dated September 10, 1978, we do not find any reason to deal with the contention of the appellants that the original defendant No. 9 and they have done acts in furtherance of the said agreement of their performance or willing to perform the said agreement.

22. Now, we proceed to deal with the second ground urged by Mr. Ghosh, on behalf of the appellants that the said lease dated August 10, 1951 stood forfeited by the Narayani with effect from January 01, 1953. From the documents, relied by the appellants, being Court records (Ext.-3) of the proceeding it is, no doubt, evident that both the learned Court of the Sub-Judge at Alipore and the Appellate Court held that the Ila and her assignees, being the said Mukherjees suffered forfeiture of the lease dated August 10, 1951 but both the learned Courts granted relief against forfeiture to Ila and her assignees, the Mukherjees subject to the payment of outstanding rent to Narayani. However, according to Mr. Ghosh, since, there is no document to substantiate any payment in terms of the said or the appellate court decree, either by the lessee or her assignees the said lease dated August 10, 1951 stood determined and thereafter the said Ila and the said Mukherjees became monthly tenants and sub-tenants respectively in respect of the suit property, under the West Bengal Premises Tenancy Act, 1956 with the right to induct the original defendant No. 9. As stated above, Mr. Ghosh urged that in the absence of a notice under Section 13(6) of the West Bengal Premises Tenancy Act, 1956 the instant suit filed by the respondent No. 1 is not maintainable.

23. The above second defence was pleaded by the original defendant No. 9 in paragraph 2 of his written statement. Hence, the very first issue of the suit was framed as "was the lease dated 10th August, 1951 referred to in paragraph 2 of the plaint determined as alleged in paragraph 2 of the written statement?" Thus, there

cannot be any doubt that in this case the burden was on the original defendant No. 9 and after his death upon the appellants to substantiate the necessary facts for obtaining an affirmative answer in respect of this issue.

24. While dealing with the said issue, it is very important to note that either in the plaint filed in the said specific performance suit, or in the proceedings before the Division Bench of this Court and before the Supreme Court, where all the said co-owners were parties, the original defendant No. 9 did not even allege that the said lease dated August 10, 1951 stood forfeited/determined by Narayani, the original owner. It is further important to note that in paragraphs 3 and 4 of the review applications affirmed by the original defendant on August 09, 1996, (Exts - "L" and "H") the original defendant No. 9 admitted the subsistence of the said deed of lease dated 10th August, 1951 and his continuance of possession in respect of the suit property as a tenant of the assignee of the original lessee under the deed of lease dated 10th August, 1951. In August 09, 1996 the same original defendant No. 9 affirmed his affidavit in the application of the respondent No. 1/plaintiff, in the eviction suit, for summary decree wherein for the first time he alleged that the lease in favour of the said Ila Basu was determined and forfeited on the expiry of December 01, 1952.

25. In the mean time, the original defendant No. 9 entered into the said agreement dated September 21, 1978 (Ext.-14) with the said co-owners. The original defendant No. 9 even sought for specific performance of the said agreement dated September 21, 1978, though unsuccessfully. However, once again Clause 1 of the said agreement dated September 21, 1978 expressly states that the suit property was free from all encumbrances or liabilities whatsoever, but subject to the lease created by a deed of lease dated August 10, 1951 made between Narayani and Ila. The said specific performance suit was filed by the original defendant No. 9 along with his nominees. In the plaint filed in the said specific performance suit, three draft conveyances prepared by the Advocate of original defendant No. 9 being Annexure - "F", "G" and "H" (Exts.- "22", "23" and "24") in favour of the said nominees of the original defendant No. 9 were relied upon. The plaintiffs in the specific performance suit also claimed a decree directing the defendants to execute and registrar the conveyances. All the said three draft conveyances (Exts. "22", "23" and "24") contained the identical clauses stating that the same are subject to the existing lease dated August 10, 1951 and the assignment dated 26th June, 1954. Further the four conveyances all dated July 6, 1981 executed by the said co-owners in favour of the respondent No. 1/plaintiff (Exts. "G", "H", "I" and "J"), also state that the said transfer is subject to the said existing lease dated 10th August, 1951. Each of these conveyances conferring title on the respondent No. 1/plaintiff in respect of the suit property remain unchallenged by the appellants. Thus, as would be evident from the aforesaid exhibited documents, the said co-owners, the said Mukherjees and even the original defendant No. 9 were all along consistent with their stand that the said deed or lease dated August 10, 1951 subsisted. At this juncture, we may point

out that the affidavit of Mohanlal Singhanian, relied upon Mr. Ghosh was affirmed on August 4, 1954, before the said appellate court decree dated September 13, 1955 granting relief against forfeiture to Ila and her assignees the Mukherjees, subject to payment of certain amount to Narayani.

26. Thus, in view of preponderance of the aforesaid exhibited documents overwhelmingly disclosing the consistent stand of all the concerned parties that the said lease dated August 10, 1951 continued to exist, we are of the view that the appellants have failed to discharge their burden to prove determination of the said lease by Narayani, the original owner with effect from January 01, 1953. We find nothing to interfere with the decision of the learned Single Judge that burden was on the appellants to prove determination of the said lease dated August 10, 1951 and creation of monthly tenancy as alleged by them and that the appellants have failed to discharge such burden.

27. In view of the aforesaid facts, we find no merit in the appeal and same is rejected. However, there shall be no order as to costs.

28. So far as the cross objection filed by the respondent No. 1, we find the same has been preferred on the ground that by the judgment under appeal, the learned Single Judge upheld the claim of the respondent No. 1/plaintiff on account of mesne profits but while appointing the special referee for determination of such mesne profit, the learned Judge has restricted the period from December, 1981 till the date of decree. We find merit in the cross-objection filed by the respondent No. 1 and we hold, the special referee appointed by the learned Single Judge shall determine the mesne profits payable by the appellants on and from December, 1981 till the date they held possession of the suit property.

Ashim Kumar Banerjee, J.

I agree.