Privy Council Appeals Nos. 134 *and* 135 *of* 1923.

Bengal Appeals Nos. 22 *and* 23 *of* 1921.

Srimati Katyayani Debi - - - - - - *Appellant*

v.

Udoy Kumar Das - - - - - - - *Respondent*

Same - - - - - - - - - *Appellant*

v.

Same - - - - - - - - - *Respondent*

(*Consolidated Appeals.*)

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH DECEMBER, 1924.

Present at the Hearing :

LORD DUNEDIN.
LORD ATKINSON.
MR. AMEER ALI.
LORD SALVESEN.

[*Delivered by* LORD SALVESEN.]

This is an appeal from the High Court of Judicature in Bengal in two actions for arrears of rent brought by the respondent against the appellant. The respondent is the successor in title to a certain Tagore, who, on the 27th November, 1878, granted a reclamation lease of certain lands which were then lying waste and in a state of jungle, at a rate which fell to be calculated at 13 annas per bigha of the area embraced in the lease. Since the date of the lease the greater part of the area has been brought

under cultivation and has been in the possession of several successive tenants. The appellant acquired the tenant's rights in the lands as a purchaser at a sale in execution of a decree for arrears of rent due by the prior tenant.

For the purposes of this appeal, in which a single question of importance has been raised, it is only necessary to consider the state of matters at the time of the appellant's purchase, which took place in 1894. The appellant then obtained possession of the whole lands within the boundaries mentioned in the lease with two exceptions—(1) a small area of 61 acres or thereby to which her husband had established a paramount title dating from 1875 against the original lessor, and (2) a much larger area of which her husband had taken possession without any title some six years previously and of which he had continued to hold possession, notwithstanding certain efforts by the previous tenant to eject him.

From 1894 until the first of the two suits now under consideration was raised in 1917 the appellant paid without objection the rent of Rs. 4,300 which had been fixed as between the prior lessee and the then landlord, to be the rent due under the lease in question. In her defence to this suit the appellant contended that she was entitled to an abatement of rent in respect of such portions of the area embraced within the boundaries of the lease of which she was not actually in possession. It was conceded that she is entitled to an abatement of rent applicable to the 61 acres above referred to, and this has been allowed by the judgment under appeal. The controversy that still remains to be determined is whether she is entitled to a corresponding abatement in respect of the much larger area which her husband continued to possess and which is now possessed by his representatives.

The lease which is evidenced by the kabuliyat of 27th November, 1878, is of a kind which is familiar in the province of Bengal. As it expressly bears it is permanent and transferable and at a fixed rent. The tenant under such a lease virtually becomes the proprietor of the surface of the lands subject only to the payment of the stipulated rent, and the lessor and succeeding landlords have no interest in the lands except in so far as they form a security for payment of the rent. When the rent falls into arrear the landlord's only remedy is to bring the tenure to sale by public auction on the execution of a decree for payment of rent. The purchaser of the tenure, as has now been settled by a long series of authorities in the Indian Courts, which are enumerated in the learned and exhaustive judgment of Mr. Justice Mookerjee, acquires title to the lands on the terms of the original lease unaffected by any incumbrances created by previous tenants. An incumbrance is defined by Section 161 of the Bengal Tenancy Act, 1885, as any "right or interest created by the tenant on his tenure or holding or in limitation of his own interest therein, and not being a protected interest." There is no question in this case of any protected

interest but only of such right as the appellant's late husband may have acquired in respect of his possession of a portion of the lands embraced in the lease for a period exceeding 12 years.

At the date when the appellant acquired the lease by purchase only six years of adverse possession by her husband had run against the former tenant. It is admitted that she could immediately have put an end to this tortious possession by her husband on her purchasing the tenure. She did not do so, but allowed him to continue in possession, so that it may be assumed that he and his heirs have acquired by limitation an absolute right as against the present tenant to continue in possession.

The case for the appellant is that this right which her husband has acquired against her is also good against the respondent as in right of the landlord's interest under the lease. It was argued that the lessor had a title to eject the trespasser and that, if he did not do so, the trespasser obtained a title by limitation against him as well as against the tenant and that, as the latter is now deprived of the possession of the lands, she is entitled, in a question with the landlord, to an abatement of rent. There is a long and consistent body of authority to the opposite effect in India, and although the matter has not been made the subject of direct decision by this Board their Lordships see no ground for doubting the soundness of the decisions referred to in the judgment of the High Court.

The duty of a tenant under a perpetual tenure such as the one in question is to protect himself against illegal encroachments by others on the lands of which he has the exclusive possession. If he fails to do so he cannot prejudice the landlord's claim for rent. The considerations which appear to their Lordships to be conclusive are those stated by Peacock CJ. in *Womesh Chunder Goopto* v. *Raj Narain Roy* and connected appeal, 10 W.R., page 15, and which are quoted in the judgment of the High Court. It has also been pointed out in other judgments that the landlord cannot in the ordinary case know whether the possession of a particular area of land is adverse to the tenant or has taken place with his consent. He could not therefore safely sue an action at his own hand for ejectment of a trespasser, as he might always be met with the objection that the apparent trespass was acquiesced in by the tenant, who can deal with the lands as he pleases.

On the assumption that the High Court has correctly stated the law applicable, the appellant nevertheless maintained that, under the terms of the particular kabuliyat, she was entitled to succeed. The clause quoted is in the following terms :—

> "Should any dispute about the boundaries given below arise with any *malik* we will report it to you and you will investigate it. If through neglect we lose hold of any land, we will be answerable and will compensate you for the same."

The latter part of the clause, which in their Lordships' judgment is directly applicable to the present case, is adverse to the

appellant's contention. It was entirely through her own neglect that she lost possession of the lands now occupied for more than 12 years of her own tenancy by her husband. So far as these lands were concerned he was a mere trespasser, and it is of no consequence whether a trespasser is a *malik* or holds some inferior position. With regard to the earlier part of the clause it may be held to cover the dispute with regard to the 61 acres of land that have been duly investigated and in respect of which an abatement of rent corresponding to the area has been made. The further contention (which was but faintly maintained) that as this plot of land was originally embraced within the boundaries of the tenure and that the appellant has not been put in possession of same, she is entitled to suspend payment of the rent of the remaining area, was decided adversely to the appellant in all the lower Courts, and their Lordships see no reason for differing from their judgments. The doctrine of suspension of payment of rent, where the tenant has not been put in possession of part of the subject leased, has been applied where the rent was a lump rent for the whole land leased treated as an indivisible subject. It has no application to a case where the stipulated rent is so much per acre or bigha.

So far their Lordships are in entire agreement with the judgment of the High Court, and this is sufficient for the disposal of the case.

An alternative ground of judgment is based upon a settlement which took place between the former landlord and tenants of the lands in question, under which a compromise was arrived at to the effect that the tenants should not be entitled to apply for abatement of rent on any ground whatever in respect of the area of 4,300 bighas then found to be the measurement in their occupation. Their Lordships are not, at present, satisfied that such an agreement between the lessor and the former tenants would necessarily be binding on a purchaser of the tenure at an auction sale, but, as the point is unnecessary to the decision of the case, they refrain from expressing any opinion upon it.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be dismissed with costs.

In the Privy Council.

SRIMATI KATYAYANI DEBI

v.

UDOY KUMAR DAS

SAME

v.

SAME.

(*Consolidated Appeals.*)

DELIVERED BY LORD SALVESEN.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1924.