Manmohan Chowdhury Vs. Turner, Morrison and Co.

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Court : Kolkata

Decided On : Apr-22-1929

Reported in : AIR1930Cal69

Appellant : Manmohan Chowdhury

Respondent : Turner, Morrison and Co.

Judgement :

B.B. Ghose, J.

1. This is an appeal by the plaintiff against the judgment and decree of the Subordinate Judge, First Court, Chittagong, dated 14th February 1927, dismissing his suit in ejectment against the defendants. The plaintiff alleged that touzi No. 61 of the Chittagong Collectorato was purchased by the executor of the will of his father on behalf of his estate on 19th May 1913. The name of the executor was Jogendra Lal Choudhuri who is now dead. The plaintiff claimed that he was entitled to khas possession of the plots of land mentioned in the plaint by ejectment of the defendants under the provisions of Section 37, Revenue Sale Law as these did not fall within the exceptions mentioned under that section. The lands in suit were comprised in several dags of the Record-of-Rights the numbers of which are given in the plaint. The total area of these dags, according to the Record-of-Rights. would be 5.08 kanis. The estate No. 61 at one time belonged to two persons Paresh Mukherjee and Basanta Banerjee in equal shares. A seven and half annas out of Paresh's share was purchased by Jogendra Choudhury in his own name sometime prior to the year 1907 as it appears that in the land acquisition proceeding of February 1907 (Ex. M) the name of Jogendra Choudhuri appears as one of the owners of the touzi. The remaining half anna out of Paresh's eight annas share was purchased by one Rajani Karan.

2. The eight annas share of Basanta was purchased by one Ruhidas in 1911. Jogendra sold his seven and half annas share to one Sarat Pal in 1912 and Rajani sold the half anna share which he had purchased originally belonging to Paresh Mukherjee to one Paresh Nath Choudhuri. So before the revenue sale the recorded proprietors were Sarat Pal, Paresh Nath Choudhuri and Ruhidas; The plaintiff's father Aparna Choudhuri died about April 1912, when the plaintiff was only nine or ten years old. The present suit was brought in April 1923. The defence of the defendant company was mainly that the plaintiff's father Aparna himself was the owner of the' property before the revenue sale and the persons who were the ostensible recorded owners were the benamidars of Aparna. Therefore, on the basis of the alleged revenue sale on 19th May 1913, the plaintiff is on no account entitled to claim ejectment against the defendants. The further plea was that the defendants were holding the lands under a tenancy which was created from before the permanent settlement and it-fell within one of the exceptions under Section 37, Revenue Sale Law. In para. 6, of the

written statement it was stated that the defendant's tenancies were held under different persons who hold directly under the proprietor and their tenures are also of a similar nature and the suit is not, therefore, maintainable: which means that those tenures wore also permanent and were in existence from the time of the permanent settlement.

3. On the pleadings several issues were raised in the Court below. No attempt was made to establish that the tenancy of the defendants or the tenure under which the defendants claim to hold the lands was permanent or was held from, the time of the permanent settlement. The learned Subordinate Judge has stated the questions for decision in the case on the pleadings which may be shortly recapitulated thus: (1) Whether the plaintiff's father Aparna was himself the proprietor of the estate Taraf Asad Mosad Khan before the revenue sale of 1,913 and whether the recorded proprietors before the revenue sale were his benamidars as alleged by the defendants company; (2) Whether, as alleged by the-defendant, any deliberate default was made on the part o the previous proprietors acting in concert with the intending purchaser with a view to annul all incumbrances so as to deprive the auction purchaser of the rights and privileges of a purchaser at a revenue sale; (3) Whether the defendants' holdings are comprised within a taluk or tenure which must be annulled before the defendant can be called upon to vacate the lands; (4) Whether the land8 in suit are parts of holdings not comprising all the lands covered by the defendants' leases and if so, whether the suit is maintainable; (5) Whether the defendant or his predecessors-in-interest are raiyats having a right of occupancy at fixed rent; and (6) Whether there are manufactories or other permanent buildings and tanks on the lands in suit. The Subordinate Judge has decided the first question in favour of the plaintiff. He has held that it has not been substantiated that the plaintiff's father Aparna was the actual proprietor of the estate before the revenue sale. He has also held that it has not been established that the recorded proprietor were his benamidars. The Subordinate Judge has also found that there was no deliberate default made by the previous proprietors acting in concert with the auction purchaser. The second point has thus been decided in favour of the plaintiff.

4. The third point has been decided in favour of the defendant and it is mainly upon that ground that the suit has been dismissed. The Subordinate Judge has held that the defendants' holdings are comprised within a taluk and as the plaintiff has not annulled that taluk, he is not entitled to eject the defendants from the lands in suit.

5. The next point has also been decided in favour of the defendants, as the Subordinate Judge is of opinion that the suit is only for parts of holdings and in view of the authority of a case of this Court that parts of a holding cannot be annulled by a purchaser at an auction sale for revenue, he has decided the point against the plaintiff.

6. The next point has also been partly decided in favour of the defendants as the Subordinate Judge has held that with regard to some of the plots, the defendants' predecessors-in-interest were raiyats and, therefore, the plaintiff is not entitled to claim ejectment.

7. With regard to the last point, the Subordinate Judge has held that one plot consisted of a tauk but there are no manufactories or permanent buildings on the disputed land. On that ground he has held that the plaintiff is not entitled to ejectment with regard to the plot covered by the tank.

8. The main ground, as I have already stated, is whether the lands were comprised within a taluk which the plaintiff has not annulled and that being so, whether the plaintiff is entitled to maintain this action in ejectment.

9. Before I deal with that question, it is expedient to dispose of the minor points raised in the case, namely, whether the plaintiff has sued for ejectment from only portion of holdings and whether the defendants are protected from ejectment on the ground that their predecessors-in-interest were raiyats with regard to particular holdings. The plaintiff has mentioned, as I have already stated, the dag numbers of the Record-of-Rights which are the subject matter of the suit. After giving the dag numbers of the recent survey, ho has stated the area in dispute to be 3 kanis 15; gandas. The actual area, as I have already stated is Rs. 5.08 kanis. The question is whether the statement of the area is a mistake and not the guiding factor to be considered in the suit or if it a fact that the plaintiff wanted to eject the defendants from only a portion of the holdings. Our attention has been drawn to the Bengali expression in the plaint and, in my opinion, it only shows the construction of the word which means 'in all' before the word 'area.' In my opinion, it was a mere mistake in addition when the area was given as 3j kanias 15 gandas instead of 5 kanis odd and the suit cannot be defeated on the ground that the plaintiff wanted to eject the defendants from only a portion of the lands held by them. The guiding thing in the plaint is the number of dags given and it seems to me that it does not admit of any doubt that the plaintiff wanted to eject the defendants from the dags mentioned in the schedule to the plaint, and the area given is a misstatement which is not likely to mislead any one. I am, therefore, unable to agree with the view of the Subordinate Judge that the suit is liable to be dismissed on that ground.

10. The next point is whether the defendants' predecessors-in-interest were raiyats or not. The Subordinate Judge has held that the defendants have a protected interest in respect of the cadastral survey plots Nos. 2316, 2321, 2322 and 2338. The defendant company base their right upon an indenture between Turner Morrison & Co., and. the defendants Turner Morrison and Co., Limited dated 3rd April 1914 Ex. G(4) the lands in question were previously in possession of a company called Visram Ebrahim & Co. That company became insolvent and the right to the lands in suit vested in the Official Assignee of Bombay from whom Turner Morrison & Co., purchased them and that company, in its turn, conveyed it to the defendants a limited company, Turner Morrison & Co., Limited. In the schedule attached to that document the cadastral survey plots 2338 and 2316, are in items Nos. 8 and 10 therein, are described as permanent raiyati and it is contended on behalf of the appellant that with regard to these two only, the defendants may possibly claim the right to resist the ejectment. The other two plots viz., 2321 and 2322, which are in item 1 of the document, are described as permanent taluka right. Therefore, it is contended that unless the defendants can prove that this permanent taluka right was in existence from the time of the permanent settlement, the defendants are unable to resist eviction. It is urged that the Subordinate Judge is wrong in any event in dismissing the claim to plots 2321 and 2322 on the ground that the right to those plots is protected. Then it is contended that Section 37, Revenue Sale Law (Act 11 of 1859), by its proviso only protects a raiyat having a right of occupancy from ejectment. We have to consider whether the defendant company is protected from eviction under that proviso. The proviso thus:

Provided always that nothing in this section contained shall be construed to entitle any such purchaser to eject any raiyat having a right of occupancy at n. fixed rent or

at a rent assessable according to fixed rules under the laws in force etc., etc.

11. Defendant company cannot be described as raiyats. They are a limited company carrying on business on a large scale and it would be really a misapplication of the term to say that they can possibly fall within the description of a 'raiyat.' The Subordinate Judge-has held with reference to the meaning of the word 'raiyat' that the predecessors-in-interest of Visram Ebrahim & Co., from whom that company had purchased those plots were raiyats and, according to the meaning of the expression 'raiyat' under Section 5, Sub-section (2), Ben. Ten. At, the term 'raiyat' includes the successor-in-interest of persons who have acquired a right to hold land for the purpose of cultivation. In my opinion, the meaning of the word 'raiyat' in this proviso of Act 11 of 1859 can hardly be the same as the meaning given to the term under Section 5, Ben. Ten. Act (8 of 1885). In my opinion it would not be right to construe the meaning of a word in an Act of 1859 with reference to an Act of 1885. The Rent Act 10 of 1859 which was passed immediately before the Revenue Sale Law did not give the same meaning to the term as in the Bengal Tenancy Act of 1885. The reasonable interpretation must, therefore, be that the term must be taken in its ordinary sense and that it means: 'a person who actually cultivates the land or has acquired it for the purpose of cultivation.'

12. In my opinion the object of the proviso is that actual cultivators who have acquired a right of occupancy should not be disturbed in their possession. I think, therefore, the defendants who were in possession at the time of the revenue sale in 1913 could not by any stretch of the meaning of the word 'raiyat' be described as raiyats and they cannot seek protection under the proviso of Section 37 of the Revenue Sale Law of 1859. I am therefore, unable to agree with the view of the Subordinate Judge that the defendants have a protected interest in plots 2316, 2321, 2322 and 2338 on this ground, apart from the contention of the appellant that two of the plots were not alleged to be raiyati in the document on which the defendants based their title.

13. The next question is with regard to plot 2312. Although it was contended on behalf of the appellant that the map prepared in this case shows that there was no tank in plot 2312, it is quite clear from the map that was attached to the conveyance (G-4) of 1914 that there was a tank at the time of that document and, therefore, at the time of the sale. Consequently the cadastral survey plot 2312 must be held to fall within the fourth exception under Section 37, Revenue Sale Law. The plaintiff is not entitled to ejectment of the defendants from this plot under any circumstance.

14. On behalf of the respondents it was urged that there were permanent structures on some of the plots in suit and those plots also should be held to fall within the exception under Clause 4, Section 37, Revenue Sale Law. Those two plots are described as 2316 and 2338 of the cadastral survey. There are, it is said, masonry structures on these plots which are of a permanent nature. But the exception is with reference to permanent 'buildings' and the rivetments cannot be considered to be buildings according to the meaning of the word. This contention, therefore, of the respondents in support of a portion of the decree of the Subordinate Judge cannot be accepted.

15. It now remains to deal with the principal question found against the plaintiff by the Subordinate Judge. He has held that the suit must fail on the ground that the intermediate taluk under which the disputed lands are held have not been annulled.

With reference to this point, the learned Advocate-General on behalf of the appellant drew our attention to the proceeding which took place in the Court below on 29th September 1926, that is, a few months before the delivery of judgment in this case. The defendants filed an application for adding two issues for trial in the case. The second of these issues was: Does the defendant hold the lands in suit under the holders of intermediate interest and can the plaintiff obtain khas possession without setting aside the holder's interest and can that be done partly? Among other things, the learned Subordinate Judge observed that it was not stated by the defendants to what intermediate tenure the lands in suit appertained and he was of opinion that at this late stage the prayer could not be allowed.' He held that the defendants sought to raise the issues by their petition, only because the learned Judge made an observation at the time the suit was about to be taken up for hearing, that the onus of proof was on the defendants. Upon that the defendants took time and made the application set forth above. On that ground the learned Judge rejected the application. The grievance made by the plaintiff is that although the learned Judge rejected the application of the defendants to raise this additional issue, he has decided the case against the plaintiff practically upon that issue alone and the fact that such an issue was not raised prevented the appellant from producing evidence for the purpose of showing that there was no intermediate tenure in existence. An application was presented to this Court on 11th August 1927 on which a Division Bench of this Court directed that it should be heard at the time of the hearing of the appeal and it was pressed before us that we should direct fresh evidence to be taken under the provisions of Order 41, Rule 27, Civil P.C., for rebutting the evidence of the defendants that there was a taluk under which they held the lands in suit immediately subordinate to the proprietors of the estate. It is true that the plaintiff has some grievance; but I do not think that sufficient ground has been made out for admission of fresh evidence on the question referred to by the appellant. It would appear from the plaint itself that the plaintiff was referring to the cadastral survey dags within which the lands in suit are included. By a reference to the Record-of-Rights of the cadastral survey the plaintiff must have known that a taluk has been mentioned within which these cadastral survey dags are situate. Although the statement is not very definite, the defendants took the plea in para. 6 of their defence that they held the lands under different persons whose tenures are permanent. The plaintiff might have asked for particulars from the defendants if he was in any doubt as regards the meaning of the plea set up in that paragraph.

16. But apart from that when the plaintiff had knowledge of the fact that there was an intermediate taluk according to the Record-of-Rights, he might have stated in his plaint that although there was that record of an intermediate taluk as a matter of fact there was no such taluk in existence and he might have adduced evidence in support if his allegation was challenged. On that ground I do not think that we should at this stage allow the plaintiff to adduce fresh evidence for shewing that Visram Ebrahim & Co., held the lands in question directly under the proprietors of the estate, Basanta Kumar Bandopadhya and others and not under any intermediate talukdar. I need only mention that the documents sought to be proved are purported to have been executed by either Paresh Nath or Basanta in favour of Visram Ebrahim & Co., or kabuliyats purported to have been executed by that company. The application, therefore, made by the appellant for taking fresh evidence should in my opinion be rejected.

17. The question, however, decided by the learned Subordinate Judge remains to be considered. From the facts referred to by him it cannot be disputed that there was a

subordinate taluk under the proprietors of the estate in question and the cadestral survey dags now in suit are included within that taluk. The question is whether the plaintiff is entitled to a decree for ejectment without annulling that taluk or making the owners of the taluk parties to this suit. The Subordinate Judge has held that as the superior tenure has not been annulled, the plaintiff is not entitled to possession of the lands under the provisions of Section 37, Act 11 of 1859. He refers to the case of Mafizuddin v. Ashutosh [1910] 14 C.W.N. 352 in support of his view. That case was decided under the provisions of the Bengal Tenancy Act. A purchaser having power to annul an incumbrance under the provisions of Sections 159 and 161, Ben. Ten. Act, desiring to annul the same has to present an application under the provisions t of Section 167 of the Act to the Collector in writing, requesting him to serve a notice upon the incumbrancer declaring that the incumbrance is annulled.

18. Upon that application the Collector has to cause the notice to be served in a prescribed manner on the incumbrancer and the incumbrance (2 times)shall be deemed to be annulled from the date from which it is so served. This application for service of notice by the purchaser must be made within one year from the date of the sale or the date on which he first has notice of the ineumbrance. In the case of Mafizudin v. Ashutosh [1910] 14 C.W.N. 352 above referred to, what the purchaser did was to cause a notice to be served not on the incumbrancer immediately under him but on a person holding an interest subordinate to that incumbrancer and it was held by this Court that by service of such notice the purchaser could not annul the subordinate interest while the right of the superior incumbrancer remained unaffected. The anomaly of such a state of things if allowed was pointed out by the learned Judges. The purchaser at the rent execution sale could not eject a person from the land who was holding under a person whose right remained unaffected by the sale because the only method by which that right could be annulled was not followed. In my opinion, the position of a purchaser with power to annul an incumbrance under a sale in execution of a rent decree under the Bengal Tenancy Act is analogous to the right of a landlord who can terminate a lease by a proper notice to quit.

21. In the case of a landlord who has a terminable tenancy under him by service of notice if the landlord does not choose to serve any notice on his tenant but serves a notice on the sub-tenant, it is obvious that the landlord cannot eject the sub-tenant without determining the tenancy of the tenant holding directly under him. In my judgment this principle is illustrated by the case cited above. That case has been approved in the case of Monmotha Nath Mitter v. Anath Bhundhu Pal A.I.R. 1921 Cal. 754, where the learned Judges held that it was sufficient for a purchaser under a sale under the Bengal Tenancy Act with power to annul incumbrances to apply for notice being served on the immediate subordinate incumbrancer without serving any notice on his sub-tenant; and this I think also supports me in my view that the position of such a purchaser is analogous to that of a landlord under whom there is a tenancy which is terminable' by notice to quit. In such a case if the tenant sublets the land, it is sufficient for the landlord to serve a notice on his own tenant determining the tenancy in order to entitle him to recover possession and it is not necessary for him to serve notice on the holders of subordinate interests created by the tenant.

22. The question next to be considered is whether the right of a purchaser under the Bengal Tenancy Act with power to annul incumbrances is similar to the right of a purchaser under the Revenue Sale Law under Section 37, Act 11 of 1859. It is well settled that on a sale for arrears of revenue all incumbrances do not become ipso

facto void. They are voidable at the option of the purchaser, or in other words, the auction purchaser is entitled to continue the incumbrances, if he so chooses. This was laid down in the case of Titu Bibi v. Mahesh Chandra Bagchi [1883] 9 Cal. 683 (F.B.). The case of Ranee Surnovioyee v. Sutesh Chunder [1864] 10 M.I.A. 123, may also be referred to. In the case of Sahodora Mudiali v. Nabin Chandra [1915] 42 Cal. 338 the learned Judges affirmed this proposition and it was pointed out at pp. 646 and 647 that it is not necessary for the auction purchaser under the Revenue Sale Law to serve any notice on an incumbrancer for the exercise of the right to avoid an incumbrances. It is sufficient if he brings a suit in ejectment which it must be held is an unequivocal expression of the intention of the auction purchaser to take possession of the property by annulling incumbrances. The only thing necessary for him to do is, it may be repeated, to express his intention by word or deed to avoid the incumbrances. In my opinion the position of the auction-purchaser under the Revenue Sale Law is not analogous to the position of an auction purchaser under the Bengal Tenancy Act with power to annul incumbrances. But it may be compared with the position of a landlord whose tenant has incurred a forfeiture. When a tenant has incurred a forfeiture, the landlord must express his desire to take advantage of the forfeiture in order to obtain possession of the property. If he can peacefully obtain possession from the person in occupation, that is quite sufficient; if not, the institution of a suit would be a sufficient expression of his desire to take advantage of the forfeiture.

23. The question, therefore, is, where a tenancy has been created and the tenant has created a subordinate interest and a forfeiture has been incurred by the tenant, is it necessary for the landlord to regain possession of the land demised to express his intention to take advantage of the forfeiture to his tenant, or is it sufficient if he brings an action in ejectment as against the person whom ho finds in possession of the land demised, although he may be a person claiming under a sublease from the tenant? This question has been decided in the case of Commissioners of Works v. v. Hull [1922] 1 K.B. 205. At p. 209, after reciting, the following observations of Parke B. in the case of Jones v. Carter 15 M. & W. 718.

We think that the bringing of an ejectment for a forfeiture and serving it on the lessee in possession, must be considered as the exercise of the lessor's option.

24. Shearman, J. says:

I think that the whole meaning of that is, that it is sufficient if you servo it, not on the original lessee but on the under-lessee who claims to be in possession under the lessee, because it is simply a peaceable means of effecting re-entry.

25. It seems to me, therefore, that in order to enable the auction-purchaser at a revenue sale to get possession of the property on which there is an incumbrances which he is entitled to annul, it is sufficient for him to bring a suit against the person in actual possession, by which act he expresses his unequivocal intention to avoid all subsisting1 rights which he can annul as he seeks to take direct possession of the property, sued for. It is simply a peaceable means of seeking direct possession. It is not necessary for him to find out if there is any other person under whom; the defendant in possession claims to hold. The defendant, however, can resist the plaintiff by showing that he holds under a third person whose interest the plaintiff cannot annul. But the suit cannot be defeated merely on the ground that the defendant claims under a third person who has not been made a party to the suit or

on whom the plaintiff did not serve any notice. I am, therefore, unable to agree in the view of the Subordinate Judge that the plaintiff's' suit must fail, because he has not expressly annulled the taluk; within which the lands are situate previous to the suit.

26. In this case, however, there is an admission of the talukdar from which it may be clearly inferred that the auction purchaser did actually express his intention not to keep any incumbrance intact. The talukdar Jatra Mohan Chaudhury has been examined on behalf of the defendants as witness 2. He stated:

After the sale the moharir of the plaintiff demanded nazar from us and asked us to take a fresh settlement but 1 refused. Since then no rent is taken from us. I offered Rs. 50 as nazar for a re-settlement. Plaintiff demanded' Rs. 300.

27. This is a clear indication of the intention not to continue the previous taluk after the revenue purchase, when the talukdar was asked to take a fresh settlement on payment of nazar and this demand was followed by refusal to accept rent from him. It is, however, contended on behalf of the respondent that the plaintiff himself stated that he did not know anything about the existence of the taluk, and therefore, it cannot stand to reason to say that he expressed an intention to avoid the taluk. Now, it should be remembered that at the time of the revenue sale the plaintiff himself was about 10 or 11 years of rage. His affairs wore conducted by the executor of his father's will.

28. That executor must have sent the moharir of the plaintiff asking the talukdar to take a re-settlement on payment of a nazar. That was a sufficient expression of the intention on the part of the auction purchaser to avoid the taluk. On both these grounds I hold that the opinion of the Subordinate Judge that the plaintiff cannot seek to eject the defendants on account of the existence of the taluka right of Jatra Mohan cannot be maintained.

29. It now remains to discuss one important point found by the Subordinate Judge against the defendants but which it was argued by the learned advocate for the defendants, that, the Subordinate Judge has wrongly decided on that ground he sought to support the decree made by the Subordinate Judge. That point is that plaintiff's father Aparna Choudhury was the real owner of the estate and the three recorded proprietors just before the revenue sale were his benamidars. The Subordinate Judge has dealt with the question with sufficient elaboration. But it is argued on behalf of the defendants that the circumstances show very strongly that all those persons were really benamidars of Aparna. The learned advocate for the respondents cited the case of Promode Kumar Roy v. Modan Mohan Saha A.I.R. 1923 Cal. 228, wherein at p. 402, (of 36 C.L.J.) most of the cases relating to benami transactions have been recited. It is hardly necessary to point out that each case must be considered with regard to the evidence adduced by the parties. The question is first, whether Jogendra Chowdhury was a benamidar for Aparna, when he purchased the 71/2 annas interest, or, as is alleged by the defendants, the whole 8 annas interest of Pareshnath. This. purchase was made, as I have already said, before February 1907. Nothing has been shown why Aparna should purchase this property in the benami of Jogendra. It is in evidence and is found by the learned Judge below that Jogendra had property of his own and as a matter of fact he had some joint properties with Aparna and the plaintiff himself brought a suit, when, he fell out with Jogendra, for partition and accounts as against Jogendra. It is suggested that Aparna purchased this property in the benami of three different persons with the object of defaulting in

the payment of revenue and repurchasing the property himself, and thus to acquire the property with the right to annul all incumbrances. If Aparna had purchased the property in the benami of Jogendra with that intention why was there such a long delay after the purchase in making a default in payment of revenue?

30. It will be remembered that there was no default in payment or revenue before 1912. Aparna died some time in April 1912. Jogendra sold his share to Sarat Pal. This sale is also said to be benami because the deed was executed in Akyab and a man said, whom the Subordinate Judge has disbelieved, that no money passed. Sarat Pal was a partner with Aparna in his business at Akyab. It appears that Sarat was a man of substance and that he was in a position to pay the price of the property. The mere fact that Sarat was a partner of Aparna cannot lead to the conclusion that Sarat was a mere benamidar; nor does it appear that the sale by Basadia in 1912 to Ruhidas was a sale to Aparna in the benami of Ruhidas. The first thing that would occur to one with reference to the allegation of this elaborate benami is there was no necessity for such a series of benami purchases when a benami purchase by one person would have sufficiently served its purpose. If the property had stood in the name of Jogendra and if it was the intention of Aparna to purchase the property at a revenue sale, Jogendra might have defaulted in payment some time between 1907 and 1913 and Aparna might have purchased the property in that interval, Instead of doing that, it is suggested that he asked Jogendra to execute a benami kabala in 19.12 and Basanta to execute another benami kabala in favour of Ruhidas in 1911, and got a third kabala from Rajani in the name of Paresh Chowdhury. It scams to be a large assumption to make that all these transactions were benami in the absence of positive evidence or any circumstance which would lead to that clear inference. Suspicion is cast upon these transactions by one important circumstance. One Ram Lochan, a talukdar under the estate, who had deposited the revenue on two previous occasions in order to save his own taluk, asked for permission to deposit the revenue in this instance also, which permission was granted by the Collector on 1st May 1917. On 15th May 1913, however, a kabala was executed by Ram Lochan in favour of one Tripura of his taluk.

31. It may be conceded that Tripura was actually purchasing it in order to help Jogendra the executor of the estate of Aparna to purchase the property at the revenue sale although the learned Subordinate Judge has held otherwise it is admitted by the learned advocate for the respondents that there would be nothing wrong in a third person who wants to purchase an estate at a revenue sale to buy off a talukdar who wanted to deposit the revenue in order to prevent the sale. If such a person then purchases the property himself at the revenue sale this does not amount to any fraud or underhand dealing but it is argued that the plaintiff fights shy of the sale and instead of saying 'yes, Tripura purchased the property for my interest', endeavours to prove that Tripura purchased the property four days before the revenue sale in his own interest. This method of hide and seek adds good ground for the inference that the whole transaction was an outcome of elaborate machinations which amount to fraud. The answer to this lies in the fact that the plaintiff himself was then quite an infant and was not aware what the executor had done; and it may be added that if the defendants thought it necessary to clear up the matter, they might have called Tripura as a witness and put the whole matter to him as to why he purchased the property only four days before the sale and then allowed the estate to be sold for arrears-of revenue. I do not think that in the absence of any clear evidence that all the three recorded proprietors prior to the revenue sale were benamidars of Aparna, it can be held as a matter of fact that Aparna was the real owner of the

property before the revenue sale. I, therefore, agree with the Subordinate: Judge in the view he has taken on the, question. It was urged on behalf of the, defendants that Sarat, Ruhidas and Tripura are all alive and that the plaintiff has not called them as witnesses, and that it is a circumstance which goes against the bona fides of the plaintiff's case. It may, however, be pointed out that Sarat was cited as a witness for the defence. It does not appear that Sarat, Ruhidas and Tripura are now in any way under the influence of the plaintiff and it was quite open to the defendants to examine: them and to establish the fact whether Aparna was really the owner and they were only the benamidars. This the defendants omitted to do.

32. There remains now to deal with the, affidavit of the plaintiff on which great, reliance was placed on behalf of the respondents. The plaintiff, it appears, brought a suit against the executor of his father's will, and in that suit he filed an affidavit which it must he admitted contains many strange and scurrilous allegations against the executor who also, happened to be his maternal uncle. In answer to the allegation of the plaintiff' that the executor had mismanaged the estate, the executor had stated in his affidavit that he had purchased this valuable estate for the plaintiff during the course of his management and that the charge of mismanagement was untenable. In para. 38 of plaintiff's affidavit in reply he says:

My paternal property, Taraf Asad Masadkhan was purchased benami in the name of the executor. For better management the said Mahal was again put up to auction sale under Act 11 of 1859 and was purchased simply in the name of the executor. It is not a new property acquired by him. If ho has appropriated the surplus sale proceeds of that auction sale, that amounts to criminal misappropriation.

33. It is urged on behalf of the respondents that this statement should be used against the plaintiff. Taken with all the other circumstances it should be held that the allegation is true. The plaintiff, however, stated in his evidence that he made the statement at the instance of two persons, one Saroda Kripa Lalaanda pleader named Mohim Chandra Guha. Saroda is a person who held certain taluks under the estate. In para. 30 of the plaintiff's affidavit, he charges the executor with making spiteful statements against the pleader Babu Mohim Chandra Guha; and this affidavit in other particulars contains statements quite irrelevant against the moral character of the executor. It is quite clear that this plaintiff who was then about 18 or 19 years of age made his statements at the instigation of some person or other. It was made he says at the instance of Saroda. It was quite possible that it was the object of Saroda to get a statement from the plaintiff which would prevent him from annulling the taluk which Saroda had under the estate. No finding can be based upon this statement of the plaintiff under such circumstances. The Subordinate Judge is, therefore, right in holding that Aparna was neither the real owner of the property before the revenue sale, nor was there any conspiracy by his executor with the proprietors in order to bring about the sale of the property and to purchase it in order to avoid incumbrancers.

34. As there is no other ground upon which defendants can resist ejectment, as they have not been able to prove that the lands fell within any of the exceptions under Section 37, the plaintiff would be entitled to ejectment. But we are informed that the land has already been acquired during the pendency of the suit under the Land Acquisition Act. The question is now only with reference to the compensation money.

35. The plaintiff is entitled to a decree in this suit and also for mesne profits which

should be assessed in proceedings subsequently under Order 20, Rule 12, Civil P.C., that is for three years before the date of the suit until the acquisition of the property in this case. The appeal and the suit is, therefore, decreed. The decree of the Subordinate Judge ig affirmed only to this extent that the plaintiff's claim to cadastral survey plot 2312 should stand dismissed and the rest of his decree is set aside and a decree made in favour of the plaintiff. As the plaintiff has succeeded in the main portion of his claim, he will get his costs both in this Court as well as in the Court below.

Panton, J.

36. I agree.