furnished by the Registrar, which shows that there has been no uniform course of practice ; that in some cases exceptions have been heard on notice of motion to vary or discharge the report, and that in other cases exceptions have been set down for disposal on requisition, and heard, although no notice to vary or discharge had been given under Rule 565. As it is desirable that there should be a uniform practice, I thought it right to consult my learned colleague, Mr. Justice Jenkins, and our opinion is that the procedure laid down in Rule 565 and followed in suits No. 197 of 1887 and 221 of 1893 should be strictly adhered to. It is necessary that notice should be given within the time required by the Rule, or such further time as the Court may allow, and that such notice should be accompanied with the grounds of exception relied on by the party objecting to the report.

In the absence of any such notice, given in the manner now indicated, the report will be regarded as confirmed by efflunion of time. The Rule should not be applied strictly to exceptions already filed. As regards such exceptions the alternative course may, I think, be permitted, namely, the hearing and disposing of them merely on the requisition of the parties.

Attorneys for the plaintiffs : Messrs. *G. C. Chunder & Co.*

Attorney for the defendant : Babu *G. C. Dhur.*

S. C. B.

"*Suit No. 544 of 1891.*

"Exceptions were filed by one of the parties and were set down for argument on requisition, and were heard and disposed of without notice of an application to discharge or vary the report being given under rule 565.

"*Suit No. 591 of 1892.*

"In this case further time to file exceptions was obtained, on summons, and the exceptions were set down for argument on requisition, and were heard and disposed of without notice of an application to discharge or vary the report being given under Rule 565.

"*Suit No. 221 of 1893.*

"Exceptions were filed, and notice of an application to vary the report" on the ground set forth in the exceptions, was given under Rule 565.

Suit No. 374 of 1894.

"Exceptions were filed and were set down for argument on requisition and were heard and disposed of without notice of an application to discharge or vary the report being given under Rule 565."

Before Mr. Justice Jenkins.

1897 *February* 12.

KALLY DASS AHIRI *v.* MONMOHINI DASSEE.*

Landlord and tenant—Denial of title—Permanent Lease—Forfeiture—Transfer of Property Act (IV of 1882), sections 105, 108, 111.

A lease notwithstanding that it is permanent is liable to forfeiture under the provisions of the Transfer of Property Act if the tenant denies the title of the landlord.

Leases which are permanent and which came into existence before the passing of the Transfer of Property Act are governed by the general rule that a tenant who impugns his landlord's title renders his lease liable to forfeiture, which rule is only a particular application of the general principle of law that a man cannot approbate and reprobate.

THE plaintiff, in his own right as heir and as executor and *shebait* under the will of his ancestor Sumbhoo Chunder Aheeri, sued the defendant for a declaration that he was entitled to possession of the premises No. 173, Ahereetolah Street in Calcutta as against the defendant, for ejectment and for mesne profits. The plaintiff set out his title to the said premises and alleged that when he became entitled thereto the said premises had been for some twenty-five or thirty years and were still let out to the members of the joint family of one Ram Chunder Dey, deceased, who through their *kurta* or managing member for the time being, regularly paid rent and municipal taxes in respect of the premises to the plaintiff and his predecessors in title down to some time in the month of April 1888. In or about the month of August 1888 the lease of the said premises was amongst other property allotted on partition to the defendant as one of the members of the said joint family, and the defendant became tenant of the said premises under the plaintiff. It was further alleged that the defendant regularly paid the rent and taxes in respect of the premises down to May or June 1888, but that thereafter she failed to pay the said rent and taxes, and a suit was brought for arrears on the 31st of March 1892 by the plaintiff and his mother, who acted as his guardian during his minority, in the Presidency Small Cause Court. The defendant appeared in that suit, and for the first time asserted that the premises belonged to her and that the plaintiff had no title thereto, and in consequence of such defence the plaintiff with-

* Original Civil Suit No. 260 of 1894.

drew the said Small Cause Court suit with liberty to institute such further suit as he might be advised. The plaintiff submitted that the lease of the said premises had determined by forfeiture at and from the date of the defendant's denial of the plaintiff's title, and her possession had become adverse, and she ought accordingly to be ejected from the said premises. The plaintiff further prayed for the recovery of the arrears of rent and taxes and for mesne profits from the date of denial until delivery of possession.

The defendant alleged in her written statement that she had never asserted that the plaintiff had no title to the said premises, and that she had done nothing to forfeit the lease, and she offered to pay the arrears of rent and taxes due to the plaintiff. With the leave of the Court she filed a supplemental written statement, in which she raised various pleas, all of which were abandoned at the hearing, except that she had received no notice to quit. At the trial the issues as stated in the judgment were raised.

The records in the Small Cause Court suit and the defendants' evidence taken on commission therein were put in on behalf of the plaintiff. On behalf of the defendant the pleadings and decree in suit No. 410 of 1869, brought by the plaintiff's predecessor in title against the defendant's predecessor, for arrears of rent alleging a monthly tenancy, in which the then defendant had asserted a *mourasi mokurari* lease, were put in.

Mr. *Garth* and Mr. *Chaudhuri* for the plaintiff.

Mr. *Pugh* and Mr. *Evans Pugh* for the defendant.

Mr. *Garth*.—The defendant having denied the landlord's title, whatever the character of the lease, has forfeited it and ought to be ejected.

Mr. *Pugh* for the defendant.—The plaintiff has not proved satisfactorily that the defendant knew or understood the meaning of the plea put forward on her behalf in the Small Cause Court. It must be strictly proved that a Hindu lady knew and understood the nature and meaning of a document executed by her—*Sudisht Lal* v. *Sheobarat Koer* (1) and *Ramratan Sukal* v. *Nandu* (2).

The plaintiff has not done anything showing his intention to

(1) I. L. R., 7 Calc., 245 ; L. R., 8 I. A., 39.
(2) I. L. R., 19 Calc., 249 ; L. R., 19 I. A., 1.

1897

KALLY DASS AHIRI v. MONMOHINI DASSEE.

determine the lease. The lease being a permanent one is not liable to forfeiture. In suit No. 410 of 1869 the defendant's predecessor in title asserted a *mourasi mokurari* lease. The plaintiff cannot now say that there was not any such lease. The defendant has acquired the right of a *mourasi mokuraridar* adversely to the plaintiff. The defendant holds under a permanent lease, but, if she is unable to show that, she has, by declaring that it was permanent in 1869, converted it into a permanent lease by adverse possession under the operation of the Statute of Limitation. The doctrine of forfeiture is not applicable to a case of this kind. The lease having come into existence before the passing of the Transfer of Property Act the provisions of that Act do not apply—see section 2 of the Act. Even under that Act a permanent lease is not liable to forfeiture. Sections 105 and 111 of the Act do not apply to permanent leases.

The following cases were cited:—*Sonet Kooer* v. *Himmut Bahadoor* (1), *Nil Madhab Sikdar* v. *Narattam Sikdar* (2), *Kali Krishna Tagore* v. *Golam Ally* (3), *Drobomoyi Gupta* v. *Davis* (4), *Bejoy Chunder Banerjee* v. *Kally Prossonno Mookerjee* (5), *Tekaetnee Goura Coomaree* v. *Saroo Coomaree* (6), *Dinomoney Dabea* v. *Doorgaprasad Mozoomdar* (7), *Maidin Saiba* v. *Nagapa* (8), *Pitambar Baboo* v. *Nilmoni Singh* (9).

Mr. *Garth* in reply.—We have shown that the defendant instructed her *am-mukhtear* as to what her plea should be, and the *am-mukhtear* instructed her pleader; over and above that she gave her evidence, and she asserted on oath that she had no landlord and paid rent to no one. There was a clear denial of the plaintiff's title.

The provisions of the Transfer of Property Act as to forfeiture do apply to permanent leases. The case of *Kali Krishna Tagore* v. *Golam Ally* (3) supports my contention. In that case the tenant questioned the landlord's right to enhance, which was held to be not such a disclaimer as resulted in forfeiture. The

(1) I. L. R., 1 Calc., 391.
(2) I. L. R., 17 Calc., 826.
(3) I. L. R., 13 Calc., 248.
(4) I. L. R., 14 Calc., 323.
(5) I. L. R., 4 Calc., 327.
(6) 19 W. R., 252.
(7) 12 B. L. R., 274.
(8) I. L. R., 7 Bom., 96.
(9) I. L. R., 3 Calc., 793.

tenant did not in any sense repudiate the landlord's title. It has not been suggested that before the passing of the Transfer of Property Act a lease of this character was exempt from forfeiture for renunciation. The general rule that a tenant who impugns his landlord's title renders his lease liable to forfeiture has always obtained in this country.

JENKINS, J.—This is a suit for the recovery of certain premises in Calcutta known as 173, Aheereetolah Street, and to enforce payment of certain arrears of rent and mesne profits. The plaintiff was at the date of the Small Cause Court suit, to which I will later refer, the owner of these premises, subject to a subordinate tenure vested in the defendant at a monthly rent of Rs. 15-8. The rent having fallen into arrear the plaintiff, in conjunction with his mother, sued the defendant for these arrears in the Small Cause Court, and by way of defence the following pleas were raised :—

"Denies tenancy under the plaintiff or any one else, and admits occupation as owner of the land. Denies payment of any rent to the plaintiffs. Never indebted. Misjoinder of parties. Denies jurisdiction."

The oral evidence is to the effect that the denial of tenancy, and the claim of occupation as owner, were set up at the first hearing on the 28th April 1892, and there can be no doubt that at any rate they were in existence on the 10th of August 1892. On the 21st August 1892 the defendant was examined on commission, and in the course of her evidence she stated as follows : "I do not pay any rent for the premises No. 173, Aheereetolah Street, to anybody ; never paid any rent for it to Katyani Dassi or her ancestors or predecessors ; nor did I promise to pay rent to Katyani Dassi or her ancestors or predecessors. I never paid rent through Upendronath Dey or Sarodaproshad Dey to Katyani Dassi or her receiver. This land is rent free. I am the owner of this land and I have to pay rent to no one." After numerous adjournments the case came before Mr. MacEwen, one of the Judges of the Small Cause Court on the 8th of March 1893, when the suit was withdrawn with leave to sue again.

The judgment delivered on that occasion has been tendered by Mr. Pugh, and on Mr. Garth waiving all objections I have admitted it in evidence. From that judgment it appears that

1897

KALLY DASS AHIRI v. MONMOHINI DASSEE.

a *bonâ fide* question of title was still raised in that suit; that the defendant denied the tenancy under the plaintiffs and claimed the land as her own property. Nothing more was apparently done on either side until the 13th April 1894, when the present plaint was filed asking for possession on the ground that the defendant had by claiming a title in herself forfeited her lease. A written statement was filed on the 2nd of August 1894, and the case came on for hearing before the Christmas vacation, but Counsel who then appeared for the defendant applied for an adjournment, on the ground that the case would be settled subject to the defendant's approval, and I accordingly allowed the adjournment, as Counsel for the plaintiff did not oppose.

It seems, however, that the result of the adjournment was not a settlement, but an application for leave to file a supplemental written statement, which was subsequently put in.

On the trial before me the following issues were raised :—

1. Whether the defendant did by her pleading of the 28th of April 1892, or the 10th August 1892, deny the plaintiff's title?

2. If so, whether the forfeiture (if any) thereby caused has been waived by subsequent proceedings in the Small Cause Court action?

3. Whether the defendant did by her evidence given on the 21st August 1892 deny the title?

4. If so, whether the forfeiture (if any) thereby caused had been waived by subsequent proceedings in the Small Cause Court action?

5. Whether the plaintiff has done any act showing his intention to determine the lease.

6. Whether the lease is not forfeitable by reason of its being a permanent lease?

And there were three further issues which have since been dropped, and with which it is unnecessary for me to deal.

I will take these issues in order. Now, there can be no question that in the defence in the Small Cause Court suit there is a clear denial of the plaintiff's title, and the only question is whether it can be treated as a denial by the defendant, and

1897

KALLY DASS ADHIKARI v. MONMOHINI DASSEE.

for that proposition it becomes necessary to see what the facts are as to the introduction of these pleas. I am satisfied on the evidence that they were formulated by the defendant's pleaders on instructions received from Meghnad Srimani, the defendant'sb rother, and her *am-muktear*, and that these pleaders were appointed by the defendant under a document which was explained to her.

A defence *primâ facie* at any rate may be taken to express the contentions of the person on whose behalf it is framed; though it may be open to that person, especially if a *purdanashin* lady, to repudiate that defence. In the present case, however, I find that the plea raised by the defence was never repudiated, but on the contrary was sought to be established by the lady's own evidence, was persisted in to the last, and is corroborated by her failure to pay the rent due in respect of her tenure. The defendant is not called to say that she did not know of this plea, and not a word of cross examination on this point is put to her *am-mukhtear* or her pleader, though they have both been called by the plaintiff. Indeed when a question was put to the defendant's pleader involving the disclosure of communications protected under section 126 of the Evidence Act, Mr. Pugh in exercise of his undoubted right refused to give the requisite consent mentioned in that section.

Under the circumstances I hold that the denial in the defence was made by the defendant, and on the second issue, that the forfeiture (if any) thereby caused has not been waived by any subsequent proceedings in the Small Cause Court action. I will next deal with the third issue on the supposition that the first and second issues should have been otherwise decided.

If words are to have their natural meaning, then it seems to me impossible to say that the defendant did not in her evidence deny the plaintiff's title. It seems that immediately before she gave her evidence, she had an interview through the medium of her *am-mukhtear* with her pleader, who says that he was taken to the defendant to receive her instructions and that he did get instructions from her. The pleader was then asked by Mr. Garth what those instructions were, but as Mr. Pugh would not waive his privilege the question could not be answered. After her

1897

KALLY DASS AHIRI v. MONMOHINI DASSEE.

evidence was taken down it was explained to her both by the Commissioner and her pleader, and she then affixed her seal to the document. I, therefore, hold that the defendant did by her evidence given on the 21st of August 1892 deny the plaintiff's title, and my opinion on the 4th issue is that there has been no such waiver as is thereby suggested. The 5th issue is intended to raise the question whether the terms of section 111 (*g*) of the Transfer of Property Act have been complied with. I have not the slightest doubt that by bringing this action and proceeding with it against the defendant the plaintiff has shewn his intention to determine the lease.

The last issue with which I need deal is whether the lease is not forfeitable by reason of its being a permanent lease. This issue inferentially raises the issue whether the defendant holds under a permanent lease, and the burden of establishing the affirmative of this would lie on the defendant.

The lease itself is not produced, and the ordinary inference as to a lease of buildings in Calcutta at a monthly rent would appear to be that the tenancy is from month to month (see Transfer of Property Act, section 106, and *Nocoordass Mullick* v. *Jewraj* (1). Mr. Pugh, however, relies on an allegation in a written statement filed by his predecessor in title, that the plaintiff's predecessor had granted a *maurasi mokurari pottah* as amounting to a claim by him, which afterwards by the lapse of time ripened into a right, and in confirmation of this he points to the fact that the present plaintiff did in the Small Cause Court describe the defendant as holding under a permanent lease. But the plaintiff, while disputing the defendant's conclusion as to the character of her tenure, contends that even if she be correct, still the lease would be none the less forfeitable, and I will accordingly deal with that point.

In the first place, I must point out that to draw any analogy from the English law of real property is wholly misleading. It has been said that the effect of a grant by a *maurasi mokurari* lease is similar to a conveyance in fee simple, but though there may be some correspondence in the practical results, it appears to me that any argument as to the legal effect based on this resemblance is wholly fallacious.

(1) 12 B. L. R., 263.

1897

KALLY DASS AHIRI v. MONMOHINI DASSEE.

Because at the present day a conveyance in fee simple leaves nothing in the grantor, it does not follow that a lease in perpetuity here has any such result. As a matter of fact this effect of an English grant dates from the Statute of Westminster III known as *Quia Emptores* (1), which for reasons stated in its preamble forbade the system of sub-infeudation that up to that time had prevailed; for at common law a feoffment made by A to B of a portion of his lands would create the relation of lord and tenant with all the incidents attaching to that relation including the right of forfeiture.

Now, the law of this country does undoubtedly allow of a lease in perpetuity, and we learn from section 105 of the Transfer of Property Act that it is the transfer of a right to enjoy property in perpetuity, and at the same time it is provided by section 111 of the same Act that a lease determines by forfeiture.

It is urged, however, by the defendant, that though the words of the provision are wide enough to authorize the forfeiture of a lease in perpetuity, still in fact that result is impossible, and next that in any case it would not apply to a lease such as this which came into existence before the passing of the Act. I will deal with these points in order.

The impossibility on which the defendant relies is based upon the assumption that a lessor has no reversion. There seems to me to lurk in this assumption a fallacy based on the theories of English real property law.

A man who being owner of land grants a lease in perpetuity carves a subordinate interest out of his own and does not annihilate his own interest. This result is to be inferred by the use of the word "lease," which implies an interest still remaining in the lessor. Before the lease the owner had the right to enjoy the possession of the land, and by the lease he excludes himself during its currency from that right, but the determination of the lease is a removal of that barrier, and there is nothing to prevent the enjoyment from which he had been excluded by the lease. Logically the case of *Kali Krishna Tagore* v. *Golam Ally* (2) to which I was referred by Mr. Pugh, appears to demand the same conclusion, for it proceeds on

(1) Statute 18 Edw. I. Cap. 1. (2) I. L. R., 13 Calc., 248.

1897

KALLY DASS AHIRI v. MONMOHINI DASSEE.

the ground that one who sets up a permanent tenancy does not repudiate any title or interest which would have been in his landlord had the tenancy not been permanent.

I may further point out that section 105 of the Transfer of Property Act provides that a lease should either be for a certain time or in perpetuity, while section 108 (*i*) contemplates the determination of a lease of uncertain duration by the fault of the lessee, and though too great stress should not be laid on this, still it is at least consistent with the view that a lease in perpetuity is forfeitable.

Mr. Pugh himself admitted that a perpetual lease would be forfeitable, if there were a right of re-entry, and then if that view is correct, it implies that the lessor has still a superior estate in the land, for I imagine that an unlimited right of entry not incident to an estate but simply creative of a fresh estate would be an infringement of the rule against perpetuity.

I, therefore, come to the conclusion that if the lease set up by the defendant be one to which the Transfer of Property Act is applicable, it is forfeitable, notwithstanding that it is permanent.

But there still remains the question whether having regard to section 2 (*b*) and (*c*) of the Act this alleged lease is forfeitable. Now, it has not been suggested that there is any authority which exempts a lease of this character from forfeiture for renunciation, or which establishes that the lessee is entitled to be relieved from forfeiture, nor has any alleged principle been urged which I have not already disposed of. If the relationship be one of landlord and tenant, then there is the general rule which obtained in this country before the Transfer of Property Act that a tenant who impugns his landlord's title renders his lease liable to forfeiture, and this rule is only a particular application of the general principle of law that a man cannot approbate and reprobate, or, as it is more familiarly expressed, he cannot blow hot and cold.

I therefore hold that the lease has been determined, and that its determination dates as from the date of the pleas in the Small Cause Court. There is the possibility of a doubt whether those pleas were framed on the 28th of April, or the 10th of August, and giving the defendant the benefit of that doubt, I hold that the lease was determined as from the later date.

1897

KALLY DASS ABIRI v. MONMOHINI DASSEE.

It is admitted that rent is in arrear, and the only question is how far back, having regard to the statute of limitation, the plaintiff can claim. The point has not been argued before me, but article 110 of the Indian Limitation Act of 1877 imposes a limit of three years. The only question is whether section 14 applies. The plaintiff has made no attempt to satisfy me on this point, nor do I know why his suit in the Small Cause Court was withdrawn. I therefore see no reason for allowing him to carry back his claim more than three years from the institution of this suit.

There will also be judgment for mesne profits, the amount of which must be determined by a reference to the Registrar, and the defendant must pay the costs of the action.

Attorneys for the plaintiff: Messrs. *Kally Nath Mitter & Sarbadhicary.*

Attorney for the defendant: Babu *S. K. Deb.*

S. C. B.

APPELLATE CIVIL.

Before Sir Francis William Maclean, Knight, Chief Justice, and Mr. Justice Banerjee.

SHIBU HALDAR AND ANOTHER (DEFENDANTS) *v.* GUPI SUNDARI DASYA (PLAINTIFF).*

1897 *February* 17.

Jurisdiction—Suit for rent of a fishery—Uncertainty as to jurisdiction—Code of Civil Procedure (Act XIV of 1882), section 16A—Immoveable property—Right of fishery.

A suit for rent of a fishery is a suit for immoveable property within the meaning of section 16*A* of the Code of Civil Procedure. *Fadu Jhala* v. *Gour Mohun Jhala* (1) referred to.

A suit for rent of a fishery was brought in a certain Court, and there was reasonable ground of uncertainty as to the jurisdiction of that Court to entertain the suit. On an objection that the suit ought to fail for want of jurisdiction:—

Held, that the conditions required by section 16*A* of the Civil Procedure Code had been satisfied in the case, and that the objection as to jurisdiction ought not to be entertained.

* Appeal from Appellate Decree No. 70 of 1895 against the decree of J. Posford, Esq., District Judge of Faridpur, dated the 28th of August 1894, affirming the decree of Babu Beni Madhub Roy, Munsif of Goalundo, dated the 11th of December 1893.

(1) I. L. R., 19 Calc., 544.