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the same parties for the same relief. It will be more convenient and proper to have these matters decided there. Accordingly, we dismiss the plaintiffs' suit with costs throughout, but make it plain that in doing so we do not adjudicate upon their right to seek partition of such properties as they contend are omitted to be partitioned under the compromise decree in the pending suit.

Appeal dismissed.

Agent for the appellants: *R. C. Prasad.*

Agent for respondent No. 1: *P. K. Chatterjee.*

KARNANI INDUSTRIAL BANK, LIMITED

v.

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[SAIYID FAZL ALI, MUKHERJEA and CHANDRASEKHARA AIYAR JJ.]

Transfer of Property Act (IV of 1882), ss. 106, 116—Lease for a term—Acceptance of rent for further period before expiry of term—New tenancy—Necessity of notice to quit—Lessee's property becoming property of lessor by failure to remove within time—Injunction against removal—Whether can be granted.

The context in which the provision for acceptance of rent finds a place in s. 116 of the Transfer of Property Act shows that what is contemplated is that the payment of rent should be made at such time and in such manner as to be equivalent to the landlord assenting to the lessee continuing in possession. Where payment is made at a time when there was no question of the lessor assenting to the lessee's continuing in possession and neither party treated the payment as importing such assent the case does not fall within s. 116.

A lease deed was executed on the 17th February, 1928, in respect of a land for a period of ten years from 24th February, 1928 the annual rent of Rs. 6,000 being payable in advance every year. In April, 1937, a cheque for Rs. 6,000, being the rent from 1st April, 1937, to 31st March, 1938, was sent by the lessee and accepted by the lessor: *Held,* that as the rent was paid before the expiry of the lease and neither party treated the payment of rent as importing assent on the part of the lessor to allow the lessee

to continue in possession as a lessee after the period of the lease, no new tenancy was created under s. 116 of the Transfer of Property Act. The utmost that could be said was that by implied consent the period of the lease was extended up to the 31st March, 1938, and even then no notice under s. 106 of the Transfer of Property Act was necessary for terminating the lease.

K. B. Capadia v. *Bai Jerbai Warden and Another* [1949] F.C.R. 262 distinguished.

Where in accordance with the terms of a lease bricks and other materials manufactured by the lessee on the leased premises had become the property of the lessor as they had not been removed by the lessee within the period fixed by the lease : *Held* that the lessor was entitled to ask for an injunction restraining the lessee from removing the materials even though he was not in possession of the leased premises.

Rathnasabhapathi Pillai and Others v. *Ramaswami Aiyar* (I.L.R. 33 Mad. 452). *Bhramar Lal Banduri & Others v. Nandalal Chowdhuri* (24 I. C. 199) and *Valia Thamburatti* v. *Parvati and Others* (I. L. R. 13 Mad. 455) distinguished.

CIVIL APPELLATE JURISDICTION. Civil Appeal No. 58 of 1950.

Appeal against the Judgment and Decree dated the 13th February, 1948, of the High Court of Judicature at Calcutta (Mitter and Sharpe JJ.) in Appeal No. 117 of 1942 arising out of Decree dated the 24th November, 1941, in Suit No. 85 of 1938.

N. C. Chatterjee and *Harish Chandra* (*K. C. Chopra and G. C. Mathur,* with them) for the appellant.

Chandra Sekhar Sen (*C. N. Laik,* with him) for respondent No. 1.

1951, May 4. The Judgment of the Court was delivered by

FAZL ALI J. The principal question for determination in this appeal is whether a certain lease had validly terminated by efflux of time or whether there was "holding over" by the lessee of the leasehold property as contemplated in section 116 of the Transfer of Property Act. The circumstances under which this question and several subsidiary questions to which reference will be made later have arisen may be briefly stated as follows :

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The Province of Bengal, (hereinafter referred to as the respondent No. 1 or plaintiff) is admittedly the owner of an area of 1125 bighas and odd of land in village Akra. On the 17th February, 1928, the respondent No. 1 executed a lease (exhibit 3) in respect of the said land for 10 years for manufacture of bricks in favour of the appellant, at a rental of Rs. 6,000 a year. The lease was to commence from the 24th February, 1928, and a year's rent was payable in advance. By the terms of the said lease, the lessee was prohibited from assigning or subletting the premises or any part thereof without the consent of the lessor except to a limited company and the lease also contained a general provision that the lessee would at the expiration of the lease restore to the lessor the demised premises in as good condition as it was at the date of the lease, reasonable wear and tear excepted. Two further clauses in the lease, which are material for the decision of this appeal, may be reproduced verbatim :—

Clause 11 *of Part I of the Schedule*

"The Secretary of State reserves the right to terminate the lease at any time subject to six months' notice in the event of the lessee's failing to observe and duly perform the conditions hereinbefore and after mentioned and it is hereby agreed that the lessee shall before the expiration or prior termination of the lease hereby granted remove his boilers engines trucks kilns railway and tram lines bricks tools and plant and all other materials whatsoever and yield up the said demised premises unto the Secretary of State and that those bricks tools and plant and other materials that shall not be removed before such expiration or prior termination shall become the property of the Secretary of State."

Clause 1 *of Part III of the Schedule*

"The lessee shall be at liberty to keep on the said premises hereby demised for three months after the expiration or prior termination of the term of this

lease any bricks boilers engines trucks kilns railway and tram lines and all other materials whatsoever as may have been manufactured by him in the premises in accordance with the conditions of these presents but any bricks and other materials left in contravention to this condition shall become the absolute property of the Secretary of State without payment.

It may be stated here that at the time of the execution of the lease, the lessee had purchased from the lessor for Rs. 50,000 "all the boilers, engines, trucks kilns, railway and tramway lines and all other movable property, plant and machinery on the demised premises."

The case of the respondent No. 1, who is the plaintiff in the present litigation, is that the appellant (defendant No. 1) had, in contravention of the terms of the lease, sublet the brickfield to defendants-respondents 2 to 18 without the consent of respondent No. 1, and they had caused serious damage to the brickfield in general and failed to maintain the embankments, sluices, etc. in proper repair resulting in a total loss of Rs. 16,840. It was further alleged that the defendants had refused to deliver possession though the lease had terminated, and they had not removed the bricks, pugmills and other materials within 3 months from the termination of the lease. On these allegations, the respondent No. 1 prayed for the following reliefs :—

(a) a decree for ejectment and khas possession over the brickfield ;

(b) damages amounting to Rs. 4,000 for the period between the termination of the lease and institution of the suit and mesne profits for the subsequent period;

(c) a decree for Rs. 16,840 for damages caused to the field ; and

(d) a decree for permanent injunction restraining the defendants from removing or otherwise disposing of the bricks, pugmills, etc. which were claimed to have become the property of the plaintiff.

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The suit was contested by the appellants, and the other defendants, and their defence was that the appellants had held over with the implied consent of respondent No. 1, and hence the lease had not validly terminated, that no damage or injury had been caused to the land, that the respondent No. 1 was not entitled to forfeit the properties of the appellants lying in the brickfield inasmuch as the term in the lease to that effect was by way of penalty and as such unenforceable, and that the respondent No. 1 was not entitled to the relief of injunction.

The trial Judge by his judgment dated the 24th November, 1941, held that there was no holding over with the assent of the plaintiff and both parties were under a mistaken belief that the lease had expired on the 23rd February, 1938. He however held that the evidence did not show that there was any damage or injury caused to the property. On these findings, the suit was decreed in part, and the respendent No. 1 was directed to be put in possession of the brickfield and was also granted a decree for Rs. 4,000 as mesne profits up to the date on which the respondent No. 1 was put in possession. The prayer for damages for injury alleged to have been caused to the field and the prayer for injunction were however disallowed. The trial Judge allowed the appellants 3 months' time "to remove their belongings from the Akra brickfield including kilns, pugmills, bricks, coals and any other brick-making material that may be lying there" after this period these properties, if any, left in the field, were to become the absolute properties of the plaintiff. The appellants thereafter preferred an appeal to the High Court at Calcutta, and the respondent No. 1 also preferred a cross-objection claiming that the prayer for injunction should have been allowed and the claim for damages should have been decreed in full. The learned Judges of the High Court who heard the appeal, by their judgment dated the 13th February, 1948, dismissed the appellants' appeal and allowed the cross-objection of the respondent No. 1 in part. They held that on the facts established in the case there was no holding over, and that the clause in the lease stating that if the

appellants did not remove the bricks etc. from the field within 3 months after termination of the lease they would become the property of respondent No. 1, was not a clause by way of penalty and should be given effect to. They further held that the claim of respondent No. 1 for damages for injury caused to the demised premises was not established. The present appeal is directed against the judgement of the High Court.

The admitted facts of the case are briefly these. The appellants duly paid Rs. 6,000 as rent to respondent No. 1 in February, 1928. In February, 1929, a sum of Rs. 6,714 and odd was paid by the appellants as rent for the period 17th February, 1929, to the 31st March, 1930, and thereafter they continued to pay Rs. 6,000 as rent for the yearly period, 1st April to 31st March of the succeeding year, and the last payment was made in April, 1937 by means of a cheque sent with a covering letter, the material portion of which runs as follows :—

"We beg to enclose herewith a cheque for Rs. 6,000 in payment of rent of Akra brickfield for the year 1937-38 ending 31st March, 1938, and shall thank you to please favour us with your formal receipt for the above."

The cheque was duly cashed and the amount was entered in the cash book of the plaintiff in the following terms :—

"5—4—37 (date of receipt). Received without prejudice from Karnani Industrial Bank Ltd. on account of yearly rent for Akra brickfield for the year ending 31st March, 1938."

On the 27th August, 1937, the appellants applied to the Secretary to the Government of Bengal, Public Works Department, for renewing the lease for a further period of 10 years, but no reply was received to that letter. After addressing several other letters, the appellants received a letter dated the 23rd February, 1938, with which was enclosed a copy of an extract from a letter addressed by the Executive Engineer.

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Suburban Division to the Assistant Engineer, No. III Sub-division, which was a under:—

"He is requested to make arrangements with Messrs. Karnani Industrial Bank Limited for vacant possession of the Akra brickfield on the 24th instant as the lease with the Bank will expire on the 23rd instant according to the terms of the agreement."

Ultimately, on the 17th March, 1938, the appellants received the following communication from the Executive Engineer, Suburban Division :—

"I would inform you that it is not the intention of Government in this Department to lease out the brickfields and arrangement is being accordingly made to make over the lands to the Government in the Revenue Department for disposal."

In a subsequent letter dated the 14th September, 1938, the Executive Engineer wrote to the appellants as follows :—

"I am instructed to state that Government have decided that you cannot be allowed to continue in occupation of the premises any further.....However, as a matter of grace Government will allow you time till the 30th day of September next, to dismantle the kilns and to remove all your bricks, boiler etc. from the site, on which date Government will take over possession of the property from you."

The correspondence to which reference has been made does not show that at any point of time the plaintiff had assented to the appellant's continuance of possession. On the other hand, some of the letters written by the appellants show that, notwithstanding their having paid rent up to the 31st March, 1938, they had proceeded all along on the footing that the lease was to expire in February, 1938. For instance, in the appellants' letter of the 23rd August, 1937, it is stated : "we are desirous of renewing the lease of the brickfield for a further period of 10 years from the date of the expiration of the period of the lease dated 17-2-1928." Again, in the letter dated the 23rd October, 1937, reference is made to the appellants'

application for renewal of the lease for a further period of 10 years on its expiry. Even in the letter which was written on behalf of the appellants on the 3rd March, 1938, after the expiry of the date on which the lease was to terminate, the statement made in the earlier letters was repeated, and it was further stated : "we applied for renewal of the lease on the 23rd August, 1937, six months prior to the date of expiration of the lease." In this letter, it is nowhere suggested that the appellants were holding over by reason of the acceptance of rent up to the 31st March, 1938. On the other hand, at the end of this letter, we find the following statement :—

"We therefore pray that if the Government is not at all inclined to renew the lease, time may be granted to us for dismantling and removing till the end of December, 1938, and we shall pay the proportional rent to the Government for seven months time in pursuance of the terms of the lease."

The reference to the period of 7 months shows that it was assumed that the lease had expired in February, 1938.

The letters written on behalf of the Government point to the same conclusion, namely, that both the parties were acting on the assumption that the lease was to expire on the 23rd February, 1938. For instance in a letter written on behalf of the Government on the 25th February, 1938, the following statement is made :—

"I have the honour to inform you that none of your agents was present at the Akra brickfield today as previously arranged to make over the possession of the brickfields. You are therefore requested to please inform me about as to what arrangements are being made by you to make over the possession of the said brickfield to this department. The term of lease expires on the afternoon of the 23rd February, 1938."

Apart from the fact that the appellants did not set up in any of their letters a case of holding over, we have to see whether the plea can be said to have been

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successfully made out by them. There is no doubt that the appellants have established that the rent was paid on their behalf up to the 31st March, 1938, and it was accepted by the respondent No. 1. It has also been established that this payement was made by a cheque and that cheque has been cashed by the Government. Section 116 of the Transfer of Property Act, on which reliance was placed on behalf of the appellants, runs as follows :—

"If a lessee or underlessee of property remains in possession thereof after the determination of the lease granted to the lessee, and the lessor or his legal representative accepts rent from the lessee or underlessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year, or from month to month, according to the purpose for which the property is leased....."

This section was construed by the Federal Court in *K. B. Capadia* v. *Bai Jerbai Warden and Another* (1), and it was held that where rent was accepted by the landlord after the expiration of the tenancy by efflux of time, section 116 applied even though the landlord accepted the amount remitted to him as "part deposit towards his claim for compensation for illegal use and occupation, and without prejudice to his rights". It is to be noted that in that case rent had been accepted after the expiry of the tenancy. In our judgment, the present case cannot be governed by that decision because of the fact, which in our opinion is important; that here the payment of rent up to the 31st March, 1938, was made not after the date of expiry of the lease, but on the 5th April, 1937, nearly a year before the expiry of the lease. A reference to section 116 of the Transfer of Property Act will show that for the application of that section, two things are necessary :— (1) the lessee should be in possession after the termination of the lease; and (2) the lessor or his representative should accept rent or otherwise assent to his continuing in possession. The use of the word 'otherwise'

(1) [1959] F.C.R. 262

suggests that acceptance of rent by the landlords has been treated as a form of his giving assent to the tenant's continuance of possession. There can be no question of the lessee "continuing in possession" until the lease has expired, and the context in which the provision for acceptance of rent finds a place clearly shows that what is contemplated is that the payment of rent and its acceptance should be made at such a time and in such a manner as to be equivalent to the landlord assenting to the lessee continuing in possession. Both the courts below, after dealing with the matter elaborately, have concurrently held that in the circumstances of the case of the consent of respondent No. 1 to the appellants' continuing in possession cannot be inferred, and we agree with this finding.

It was pointed out to us on behalf of the respondent that the entry relating to this payment in the books of the plaintiff contains the words: "received without prejudice from Karnani Industrial Bank...." The same words however occur in several earlier entries, and we are not inclined to attach any special signifinance to them. But it seems to us that the very fact, that the payment was made at a time when there was no question of the lessor assenting to the lessee's continuing in possession and neither party treated the payment as importing such assent, is sufficient to take the case out of the mischief of section 116 of the Transfer of Property Act.

There is also another view which we think is possible to take upon the facts of the case. As we have seen the rent for the first year was paid in advance near about the time of the execution of the lease, and nothing turns upon it. When however the second payment was made, the sum paid was Rs. 6,714 and odd, and the payment was made in respect of rent up to the 31st March, 1930. After this, all the subsequent payments were made up to the 31st March of the succeeding year, evidently because the financial year, which the parties considered themselves to be governed by, ran from the 1st April to the 31st March of the succeeding year. It was presumably in view of this fact that the

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plaintiff filed an application on the 6th November, 1941, for amending the plaint so as to include the following statement :—

"The plaintiff submits that even assuming that the registered lease terminated on the 23rd February, 1938, by an agreement between the plaintiff and the defendant No. 1, the latter was allowed to hold over up to the 31st March, 1938."

This application however was rejected, because it was made at a very late stage, that is to say, after the defendants' evidence had been closed and an adjournment had been granted to the plaintiff to adduce rebutting evidence. However that may be, the utmost that can be said upon the evidence as it stands is that by the implied consent of the parties the period of the lease was extended up to the 31st March, 1938. In this view, the respondent No. 1 became entitled to re-enter after the 31st March, and no notice under section 106 of the Transfer of Property Act was necessary. In the circumstances, the decree for ejectment passed by the courts below must be upheld.

The next question which arises in the case turns up the proper construction of clause 11 of Part I and clause I of Part III of the lease, which have already been quoted. It seems to us that clause 11 should be read as a whole, and, when it is so read, it becomes clear that it was intended to be applicable only where the Secretary of State decided to exercise his right to terminate the lease 'at any time subject to 6 months' notice," in the event of the lessee failing to observe and duly perform the conditions mentioned in the lease. In such a case, if the lessee did not remove the boilers, engines and all other materials and yield up the premises to the Secretary of State, those articles were to become the property of the Secretary of State. This clause is evidently not applicable to the present case. The clause which applies to this case is clause 1 of Part III, which is intended to be applicable to the normal case of the lease expiring by efflux of time. This clause, as we have seen, provides that the lessee

shall be at liberty to keep on the demised premises for 3 months after the expiration of the lease any bricks, boilers, etc., but it also provides that "any bricks and other materials left in contravention of this condition shall become the absolute property of the Secretary of State without payment." There can be no doubt that under this clause, the bricks and other materials have become the absolute property of the plaintiff. The only question is as to the meaning of "other materials." It seems to us on an examination of the lease as a whole that there must be a distinction between materials, and machinery and tools and similar articles, and the words "other materials" have no reference to engines, trucks, railway and tramway lines and plant. They mean building materials such as bricks, tiles and similar articles that might have been manufactured by the appellants on the demised premises. That being so, the decree under appeal should be modified accordingly.

The only other point which arises for consideration relates to the plaintiff's prayer for a decree for permanent injunction against the defendants, to restrain them from removing or otherwise disposing of the articles in regard to which the decree is to be passed. It was contended on behalf of the appellants that the respondent No. 1 not being in possession of these properties could not ask for the relief of injunction without asking for the declaration of its title in respect of them and possession over them, and in support of this proposition, the following cases were cited :—*Ratnasabhapati Pillai and Others* v. *Ramaswami Aiyar* (1), *Bhramar Lal Banduri and Others* v. *Nanda Lal Chowdhuri* (2) and *Valia Tamburatti* v. *Paravati and Others* (3). After reading and fully considering those cases, we find them to be wholly inapplicable to the present case. In the present case, it has been found that the bricks and other materials have become the property of the plaintiff, and there can be no legal objection to the granting of an injunction as prayed.

(1) I.L.R. 33 Mad. 482.

(2) 24 I.C. 199.

(3) I.L.R. 13 Mad. 455.

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The appeal therefore substantially fails and it is dismissed with costs. But it should be made clear in the decree that only the building materials such as bricks, tiles and similar articles that might have been manufactured by the appellants on the demised premises shall become the property of the respondent No. 1. As for the boilers, engines, trucks, kilns, railway and tram lines, etc., three months' time is given from the date of this decree to enable the appellants to remove them from the demised premises.

Appeal dismissed.

Agent for the appellant: *Rajinder Narain.*

Agent for respondent No. 1: *P. K. Bose.*

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KUMAR PASHUPATINATH MALIA & ANOTHER

V.

DEBA PROSANNA MUKHERJEE.

[SHRI HARILAL KANIA C. J., PATANJALI SASTRI and S. R. DAS JJ.]

Bengal Money Lenders Act (*X of* 1940), *ss.* 2(22), 36(5)—*Relief under s.* 36—*"Suit to which this Act applies"—Suit in which execution proceeding was pending on Jan.* 1, 1939—*Execution Case struck off but attachment continuing in force on Jan.* 1, 1939—*Applicability of Act—Civil Procedure Code* (*V of* 1908), *O.* 21, *r.* 57—*Striking off execution case keeping attachment in force—Whether terminates execution proceeding—Sub-mortgagee—Whether assignee of mortgage—Right to claim protection under s.* 36(5).

A decree on a mortgage was passed in a suit brought by the representatives in interest of a sub-mortgagee in 1929 and a personal decree for recovery of the amount remaining due after the sale of the mortgaged properties was passed in 1935. In 1936 the decree-holder started execution of the personal decree and attached certain properties of the judgment-debtor. The decree-holder filed a petition on January 30, 1937, praying that the execution case "may be struck off for non-prosecution, keeping the attachment in force" in view of certain negotiations for amicable settlement, and the court passed an order that the execution case "is dismissed for non-prosecution, the attachment