Calcutta High Court
Binani Properties Private Ltd. vs M. Gulamali Abdul Hossain And Co. ... on 10 August, 1966
Equivalent citations: AIR 1967 Cal 390
Author: B Mukherji
Bench: B Mukherji
JUDGMENT Bijayesh Mukherji, J.

1. Stroud's Judicial Dictionary, 3rd edn., p. 2309, 2. Dictionary of English Law by Earl Jowitt, p. 48, 3. Nalinakhya Bysack v. Shyam Sunder Haldar, , 4. Commissioner for Special Purposes of Income-Tax v. Pemsel, (1891)AC 531. 5. Maxwell's Interpretation of Statutes. 10th edn. p. 321, 6. R. v. East Ardsley (Inhabitants), (1850) 14 QB 793, at p. 801, 7. Fisher v Val de Travers Asphalte Co., (1876) 1 CPD 259, (serials 6 and 7 cited by Craies on Statute Law, 6th edn., p. 106). 8. Babulal Dhandhania v. Gauttam and Co., , 9. Meghraj Sampatlall v. Raghunath and Sons, , 10. Suraya Properties (Pvt.) Ltd. v. Bimalendu Nath Sarkar. . Referred to.]

2. Say, "suit" is distinct from "proceeding". Still the notice here is too good a compliance with Section 13 (6), which does not say: "unless the landlord has given to the tenant one month's notice expiring with a month of the tenancy, and specifying whether he will file a suit or a proceeding." It says instead: "unless he has given to the tenant one month's notice expiring with a month of the tenancy," That is just what has been given, granting the landlord the freedom to file a suit or a proceeding, as is his pleasure. To that extent, it is no doubt a matter for the landlord's election in which however Sub-section (6) (of Section 13) does not give any stake to the tenant. His only stake is in one month's notice expiring with a month of the tenancy which the tenant here has got very much indeed.

3. A prosecution for criminal trespass (Section 441. of the Penal Code) may very well be regarded as a proceeding. But no such prosecution lies on facts as here. There is no mens rea, because there has been no intent whatever on the part of the tenant (the first defendant) to commit an offence, intimidate, insult or annoy any person in possession of "81". No such intent, no criminal trespass. "Binani" must have been annoyed a lot after the first defendant failed to quit "81" on the expiry of the last moment of the last day of April 1959 : just what the notice had asked it to do. Still criminal trespass remains as far as ever. For one thing, such annoyance was never intended, a consequence though it was. But the concept of criminal trespass is such that it can never, never be judged and determined in the glare of consequences. For another, "Binani" was never in physical possession of "81", entry into or upon which, or unlawfully remaining where, is sought to be made the foundation of criminal trespass. Again, a criminal court has, no doubt, the requisite power to restore Possession of immoveable property under Sec. 22 of the Code of Criminal Procedure. But when? Where a person gains wrongful possession of immoveable property by his unlawful acts; more, after such wrong-doer has been convicted of an offence attended by criminal force within the meaning of Section 350 of the Penal Code, or show of force within the meaning of Section 349 ibid., or by criminal intimidation; and it appears to the criminal court that by such criminal force etc., another has been dispossessed of immoveable property. And then there can be no manner of a trespass here--not even the tortious act of civil trespass--when the first defendant is a "person" still continuing in possession of "81" after the termination of its (contractual) tenancy on the last

moment of the last day of April 1959, against whom a decree for eviction has yet to be made by this Court, a court of competent jurisdiction, and who is, therefore, a statutory tenant within the definition of "tenant" in Section 2(h) of the Premises Tenancy Act. Tenancy and trespass, are concepts mutually exclusive of one another, just as, say, the concepts of black and white are. Tenancy excludes trespass, and vice versa. The extravagant contention about criminal trespass cannot, therefore, be accepted without converting black into white or vice versa.

4. The concept of a notice of suit firmly established itself in 1963 when the Special Bench rendered its decision in Suraya Properties' case and when or thereabouts the decision came into the reports too, . So, the drafter of the notice in 1959 drafted it in the old way, not caring so much to make it clear that a suit would follow the disobedience of the demand made therein. Not that it will serve as an excuse. It will not. If the law of the land calls for a notice of suit you did not give such notice at your peril, no matter that it required a Special Bench years later to proclaim the law (already there) clear and loud. All that is emphasized is that in March 1959 the concept of a notice of suit had not finally emerged, as it did in 1963, and has been holding the field ever since. Still, reading the notice fairly and as a whole, with the four telling grounds it mentions, coupling with the threat of costs, consequences and mesne profits,--a threat which goes hand-in-hand with the threat of a suit--it may be presumed that the tenant, the like of whom is seen Irere, so being in stature and organization, paying Rs. 2,000 a month as rent, as also doing business in the very hub of trade and commerce in Calcutta, so unlike a bhujawalla jogging on with a poorly establishment in a hovel, or a greengrocer eking a living on payment of a rupee a day, if that, as rent for the little space he sells his vegetables from, knows that it pays the forfeit of its tenancy on any one of these four grounds and that a notice as this is the precursor of a suit. No backwoodsman, therefore, is such a tenant. And not to credit so little to a tenant so big is to debit so much against common sense and natural human conduct.

5. Indeed, one way to find out if the notice is a notice of suit is to make sure what the tenant considered the notice to be, as in (11) Ajit Kr. Bhattacharjee v. Amarendra Nath Ghosh, F. A. No. 849 of 1961, decided by P. N. Mookerjee J-, sitting with A. C. Sen J., on 12-11-63 (Cal), and not yet come into the reports, where, to the landlord's notice, the tenant's lawyers reply saying--ff he (plaintiff) still insists to sue (on suing?) my client, he may do so at his own risk."--made the landlord's notice, mentioning no more than the ground of default in payment of rent, survive as a notice of suit as well. Another way for the Court--and a universally accepted way at that--is to consider the matters before it and to ask itself : is the fact of the tenant regarding the notice as a notice of suit so probable that a prudent man ought, in the circumstances of the particular case, act upon the supposition that this fact exists? Cf. definition of "proved" in Section 3. Evidence Act. The matters before the Court are (i) four prima facie valid grounds for eviction, (ii) a combined threat of costs (as also consequences) and mesne pro-fits of Rs. 150 a day, and (iii) a notice so couched, issuing from one (Solicitor Mitra) whose very profession is to tend law-suits, going not to one amongst the rabble, but to the first defendant-- an organization of standing, respectability and resources. So, It is within the competence of the Court to consider the existence of the fact of such a tenant, having taken such a notice to be a notice of suit, to be so probable indeed that it verges on certainty. Yet to think that the first defendant did not take the notice so as to put a premium on naivety. Still another way is to go by the test of "necessary intendment', laid down by the majority of the Special Bench in Suraya Properties' case ,--intendment which is here too clear to be missed : the intendment of the landlord

itching for a suit for which the first shot fired was the notice. In sum, the intention, upon the whole of the notice appears to be unmistakable : suit, suit and suit.

[12 Subodh Chandra Singha v. Santosh Kumar Srimani, (1964) 68 Cal WN 184, 13, Dulin Chand Dutta v. Sm. Renuka Banerjee, (1964) 68 Cal WN 296--Referred to.]

6. In presuming that the first defendant took the notice as a notice of suit the maxim, Ignorantia juris neminem excusat, is not called in aid, though the provisions of the law touching the grounds in the notice have become the bywords even amongst the lowly tenants of today or yesterday, nothing to say of the first defendant, so big in stature and organization. Because the true meaning of the maxim is, not that everyone is presumed to know the law, but that no man can excuse himself from doing his duty by saying that he did not know the law on the matter.

[14 Baseshar Nath v. Commissioner of Income-Tax, Delhi and Rajasthun . 15 Kiriri Cotton Co. Ltd. v. Dewani, (1960) 1 All ER 177, 16. M. Ct. Muthiah v. Commissioner of Income-Tax, Madras, --Referred to.] What is called in aid instead is a common-sense proposition that even a lowly tenant of today and yesterday, nothing to speak of one like the first defendant, knows that he forfeits his tenancy on any one of the four grounds the notice traverses, and that a suit is intended because of such grounds, coupled with the threat of costs, consequences and mesne profits, set out in the notice.

7. Upon the 'liquid expression' in the notice: "my client will take such steps it may be advised": is rested the contention about an assortment of all manners of likely advise, barring the institution of a suit, and not necessarily from a lawyer, there being no presumption, it is said, that the right advice will be given. But presumptions are of three kinds: (i) of fact, (ii) of law. and (iii) of mixed law and fact. The last two varieties of presumptions do not bulk large here. The first variety does. And it is of three kinds too: (i) violent presumption, (ii) probable presumption and (iii) rash presumption. The presumption of fact is violent when the fads and circumstances necessarily attend the fact presumed. It is probable when they usually attend the fact presumed. And it is rash when it has neither weight nor validity. [17. 3 Bluckstone pp. 371 and 372, cited by Sir Hari Singh Gour in his commentary on the Penal Code, 8th edn., p. 1407--Referred to.] Section 114 of the Evidence Act (1872) does no more than deal with the presumptions of Fact--violent, probable and rash-- it's mandate to the Court being: 'Take into your consideration (i) the common course of natural events, (ii) human conduct, and (iii) public and private business, in their relation to the facts of the particular case; and presume you may the existence of any fact which you think likely to have happened.' Applying this to the facts here, and in the very general nature of things, the following conclusions emerge--

(a) "Binani" has already approached Solicitor Mitra in whose hands its problem of recovering possession of "81" has been left. A Solicitor is but a lawyer, a pleader--a term which means and includes an attorney of the High Court: Section 2(15), Code of Civil Procedure. A Solicitor is much more: "a man of affairs". "Binani", by approaching such a one: a lawyer, has become a lawyer-fodder (in the best sense of the term without the slightest tinge of slight anywhere) the first morsel of which is the notice. In the circumstances, who will "Binani" be advised by for the next step or sicps for

eviction, except by the mentor of its choice: Solicitor Mitra. So. no room for guess is here--whom "Binani" will go to--a lawyer or a non-lawyer. "Binani" has already made its choice by choosing a lawyer.

(b) Again, regard being had to the manner in which a solicitor, a man of affairs, conducts his business when faced with a recalcitrant tenant of his client refusing to quit in spite of being called upon to do so. who docs he go to for the next sfep for eviction of such a refractory one, but to a counsel whom he has made a percipient appraisal of? Sure enough, law is not so wooden as to prevent the Court from making this little of a presumption. Law is still less wooden as to enable the Court to presume that Solicitor Mitra, not only a man of affairs but also a respectable officer of the Court, steeped in law and having veneration for law, will not go to a counsel (where he normally and invariably goes) for advice to take steps for eviction, but to the "roughs" for driving away the first defendant by force, as if "81" is in no-man's-land where the rule of law does not prevail.

(c) Then "81" is "81" occupied not only by the first defendant and its retinue of officers and men, but also by its sub-tenants--21 strong--rendered stronger still by their usual complement of men as well. Imagine then the minimum of force to evict so many: A slight push will not do, A body of stout men, drawn up in battle-array, may succeed, if at all. And a lawyer, of all persons, will act as an aider and abettor of such hooliganism: To think so is to think the unthinkable. Again. "81" is not in the remotest corner of a remote jungle, far, far away from the forces of law and order. It is in the heart of the town of Calcutta where the mobility of the police-men is so well known. In the face of this, a lawyer, of all persons, will say to "Binani" and Solicitor Mitra: "Go, gather your men--street 'rough' all and drive away so many people by force: "To say so is to say the unsayable.

(d) Furthermore, the given of the advice is not a pedestrian sort of a man. but a lawyer, a barrister, who is a brain and a tongue and a character. Given the four telling grounds for eviction, and having regard (i) to the common course of natural events, (ii) to the conduct expected of such a one, a character, and (iii) to the manner in which he does his business, there can be one and only one presumption of fact in this particular case, deriving its force from in-exorable logic, that he shall advise the filing of a suit for eviction, and not use of force, however reasonable. It thus becomes a case ot violent presumption--a presumption you cannot do without. At all events, it cannot be anything short of a probable presumption by any computation.

[18. Hamlyn Lectures (1962) on Lawyer and Litigant in England by Meggary, 19. Phip-son on Evidence. 10th edn., Para 2016, p. 837 Referred to.]

8. What the Court of Appeal observes in (20) State of West Bengal v. Birendra Nath Basunia. , on the lessor (Government) throwing out the lessees (Basunias) by force no more than is necessary, on the assumption that no law other than the Transfer of Property Act is excluded, cannot but rank as obiter, wholly unnecessary for the decision come to--a decision which remains intact, even if these observations are excised. Should, however, the aforesaid observations be treated as an additional reason, and not as obiter, even then they cannot reach the litigation in hand. Because, here the first defendant's is--there the Basunias' were not--a statutory tenancy commencing from the termination of the contractual tenancy: vide Section 2(h) of the Premises Tenancy Act, 1956. Indeed. when even

the Court cannot pass a decree for eviction against the first defendant, thereby ending its statutory tenancy, so long as it is not satisfied about any one of the four grounds on winch the instant suit is based, it is ridiculous to think that the landlord is more powerful than the Court and can evict the first defendant by force.

9. Furthermore, the very first foundation on which the English law (which the Court of Appeal goes by) and the English decisions, such as Hanman J.'s in (20) Aglionby v. Cohen, (1955) 1 All ER 785, rest; namely, the common law rights ot the landlord to " self-help, is missing here in India, where the statute law for more than a century, from Section 15 of the Limitation Act, 1859, to Section 9 of the Specific Relief Act, 1877, and again from Section 9 aforesaid to Section 6 of the Specific Relief Act, 1963, excludes self-help. And what is missing there in England; absence of a civil remedy, the second foundation of the English law, of Harman J.'s decision and of other cases of that class, is very much present here in India, namely, the competence of the tenant dispossessed by the landlord, "otherwise than in due course of law", to sue him (the landlord") for recovery of possession, and that too by a summary suit, eliminating any reference to the question of title, making previous possession as sufficient evidence of right against the dispos-sessor and thereby ensuring a speedy decision. In England as well, Harman J., quotes "the weighty opinion" of Patteson J., in (21) Doe d. Stevens v. Lord, (1839) 6 Dowl 256, refusing to assent to the doctrine that a party having recovered in ejectment may, by his own act only, and without the authority of the process of the Court, enter upon and retain possession of the land so recovered. First and last, in Basunias" case, , governed by the Government Grants Act (15 of 1895), the operation of all laws (including Section 9 of the then Specific Relief Act) was excluded. So, what the Deputy Commissioner, Jalpaiguri, representing the lessor (Government) could do there, by virtue of Clause 15 of the lease, enabling him to take possession "at once" of the "jote" resumed, and prevailing over all other laws, the lessor here ("Binani") could not.

[22. Halsbury's Laws of England, Hailsham edn., Vol. 20, pp. 280-281, 3rd. edn., by Lord Simonds, Vol. 38, Art, 1219 at P 747 and Article 1260 at P 763, 23. Hemmings v. Stoke Pogcs Golf Club Ltd., (1920) 1. KB 720, 2). Jacobs v. London County Council, (1950) 1 All ER 737: 1950 AC 361. 25. Pollock and Mulla's Specific Relief Act, 8th edn., pp 751 and 752, 26. Rudrappa v. Narsingrao Ramchandra (1905) ILR 29 Bom 213, 27. Jogendra Chandra v. Birendra Lal , 28. Khajah Enaetollah v. Kishen Soondur, (18671 8 WR 386, 29. Sofaoll Khan v. Woopean Khan, (1868) 9 WR 123, 30. Jonardun Acharjee v. Haradhun Acharjee, (1868) 9 WR 513, 31. Setalvadi Hamlyn Lectures (1960) on. The Common Law in India, 32. Brigadier K.K. Verma v. Union of India, --Referred to.]

10. Section 13(6) of the Premises Tenancy Act, opening with the non obstante clause: 'Notwithstanding anything in any other law', and closing with: 'unless he has given the tenant one month's notice", 'fosters the contention that it keeps away the law of agency, inconsistent as such law is with the law prescribed here, and that the landlord must, therefore, himself give the requisite notice with a view to making it a valid notice of suit. Such contention cannot be accepted for a number of reasons :--

One, the plain meaning of non obstante is "notwithstanding". The history of the English law furnishes the background of the use of this expression. The issue of licences by the crown to do such

and such a thing non obstante any law to the contrary started in or about 1250. Later, such licences were frequently given to the Corporations to hold lands in contravention of the mortmain statutes. Protests were made, but in vain. Worse, James II resolved to dispense with the provisions of the Test Act, 1672, and so on. Result: Revolution, and the Bill of Rights 1688 enacting that any dispensation non obstante should be wholly void and without effect.

[33. The Dictionary of the English Law, 1959, by Jowitt. Vol. 2, P 1233--Referred to.] Two, here are the rules of construction of an enactment with a non obstante clause and the result such rules lead to. First, make a fair construction of the words in the enacting part of Section 13(6), according to their natural and ordinary meaning. Once you do so, the conclusion you reach is that the landlord has to give the tenant a month's notice expiring with the month of the tenancy. That done, he can file a suit against the tenant in ejectment; otherwise not. Secondly, turn to the non obstante clause, only to find that one of the laws for the time being in force is the first paragraph of Section 106 of the Transfer of Property Act which provides that a tenancy of this type is terminable by 15 days' notice expiring with the end of the month of the tenancy. But it is a notice to quit, whereas the notice under Section 13(6) is a notice of suit. Since the two notices are on different planes, the earlier existing law, viz., Section 106, first paragraph, is not abrogated, but declared to be insufficient by itself, though it was sufficient in itself before the advent of Section 13(8). Both the notices stand and must be given, one being in addition to the other, in order to confer on the landlord the right to raise an action in ejectment. True, the question may be a question of abrogation of the earlier law, as in (34) Aswini Kumar Ghose v. Arabinda Bose, , reversing the special Bench decision of this Court in (35) . The question may well be (as here) the question of addition to the earlier law. The word "notwithstanding" does duty as much in one as in the other. Thirdly, ascertain if the enacting part of Section 18(6) controls its non obstante part. Here, that it does. But for the enacting part, a notice to quit simpliciter, 15 day's notice expiring with the end of the month of the tenancy, would have sufficed with a view to enabling the landlord to raise his action in ejectment, Now that the enacting part is there, a mere notice to quit will not do. The command of the enacting part, therefore, is 'Never mind what the existing law is; never mind the 15 days' notice, as the first paragraph of Section 106 prescribes; there shall have to be another notice: a month's notice expiring with the month of the tenancy, before the landlord can file a suit for recovery of possession of his premises."

Three, there is not in Section 13 (6) the word "himself" a reflexive form of a personal pronoun which, according to the grammarians' rule, is used for two purposes : (i) to show that the person does something to himself, or (ii) to make the pronoun more emphatic.

Four, the second paragraph of Section 106 no doubt prescribes that the notice--but it is only a notice to quit--must be in writing signed by or on behalf of the person giving it, and lays down too four modes of service. All this, however, has little to do with the notice of suit under Section 13 (6). What such notice should be like, in writing or oral, who it should be signed by, and how it would be served, Section 13 (6) is silent about. Still no inconsistency can be spelt out. Indeed, the very term inconsistency connotes that there are two facts or propositions which do not agree. Where (as here) there is but one proposition (Section 106's 2nd paragraph) in one Act, and that too in a distinct field: a notice to quit, with nothing whatever in the other: Section 13 (6) covering another field, a notice of suit, what inconsistency can there be between an existing proposition in one plane and a

non-existing one in another planer So, the non obstante clause of a statute effacing the old law (it specifies) inconsistent with the new law (the enacting part makes), has no part to play here. But subordination there is in the sen.se that whereas under the old law a mere notice to quit would have sufficed, under the new law, that--a notice to quit--plus a new notice, a notice of suit, must pre-exist before a landlord can sue in ejectment, Five, the Legislature may provide for signature by an agent. The Legislature may not too. If it does not, the inference by no means follows straight off that the personal signature is imperative. All that then happens is that it becomes a matter for construction. And the general rule; Qui facit per alium facit per se (he who does an act through another is deemed in law to do it himself), still remains an active rule to go by. It is displaced only when there is something special either in the language or in the object of the Act showing that a personal act is intended. Something special is neither in Section 13 (6) nor in the Act. Indeed, there is nothing in the Premises Tenancy Act 1956 which requires, expressly or impliedly, a personal signature of the landlord.

Six, if the signing by the principal, which the statute requires, can be done by his agent, which the statute may be silent about, on what principle or logic cannot the giving of the notice by the landlord, just what Section 13 (6) requires, be done by his agent duly authorized to do so, even though such notice may need neither writing nor necessarily signing and may, therefore, be by word of mouth only? And when it comes to giving an oral notice, quite valid under the law, a paralytic landlord confined to his bed, a nonagenarian of a landlord who cannot move, a pardanashin houseowner who will not appear before the tenant, far less talk to him, a child landlord who cannot even speak, a house-owning deity who, though omnipotent and omniscient, can neither meet the tenant nor ask him to quit, a Juristic person like a company (as "Binani" is) which suffers from the same disability etc. etc. have personally to five to their tenants the requisite notice under ection 13 (6). So put to test, on the basis of an oral notice, there appears to be no warrant for the extravagant contention that the landlord himself must give the notice. Could it, however, have been held that the mandate of Section 13 (6) was the giving of the notice personally by the landlord, such difficulties would have mattered little. All that would have then been a very good cause for a suitable amendment. But it cannot be held so.

[36. R. v. Wimbledon Justices; Ex Parte, Derwent, (1953) 1 QB 380 (DC) cited by Craies on Statute Law, 6th edn., p. 70, 37. In re, Prince Blucher; Ex parte, Debtor. (1931) 2 Ch. 70, 38. Nilkanta Sidramappa Ningashetti v. Kashinath Somanna, , 39. Hyde v. Johnson, (1836) 2 Bing NC 776, 778, 40. In re, Whitley Partners, Ltd. (1886) 32 Ch 337, 41. Radharani Dasi v. Angur Bala Dasi, (1961) 65 Cal WN 1119, 42. Halsbury's Laws of England, vol.], 3rd edn., pp. 147-148, 157, 42. Maxwell: Interpretation of Statutes, 10th edn., p. 74, 43. Japan Cotton Trading Co., Ltd. v. Jajodia Cotton Mills, Ltd. , 44. Suraya Properties' case, Referred to.]

11. Therefore, the notice is a valid notice of suit under Section 13 (6) of the Premises Tenancy Act. 1956.

III. On the contention whether the notice in hand is a condition precedent or a cause of action and whether the suit will fail or not, because the notice as notice of suit has not been pleaded, it is held--

1. The notice being a notice of suit is certainly a condition precedent. No such notice, no suit. It shall, therefore, be implied in "Binani's" pleading, under Order 6, Rule 6, of the Procedure Code, so unlike Section 80 ibid, which concludes: "and the plaint shall contain a statement that such notice has been so delivered or left."

2. It is part of the cause of action too, Still the suit shall not fall. It shall not because not a word is there in the written statement that part of the cause of action, as a notice of suit is, has not been pleaded in the plaint. Though under Order 8, Rule 2, it was incumbent upon the first defendant to raise this matter by its pleading. The fact of the matter is that filed as the written statement was on 6 Jan. 60, the concept of a notice of suit (not "born" then) had not crossed the drafter's mind, and much less the mind of the drafter of the plaint filed earlier still (June 18, 1959). Thus, here was a typical case of a blind man meeting a blind man with that new fangled concept (not fan-gled then) pleaded neither in the plaint nor in the written statement. And then the suit shall not fail too, because in the very notice pleaded in the plaint, albeit as a notice to quit, is seen a notice of suit as well.

[45 P.N. Mookerjee J.'s judgment in Suraya Properties' case, (SB), 46. Engineering Supplies Ltd. v. Dhandhania & Co. 47. Samarendra Nath Mitra v. Pyaree Charan Laha , 48. Musstt. Chand Koer v. Partab Singh, (1887-88) 15 Ind App 156 (PC), Referred to.] IV. Subletting by the lessee after 31 March 1956, the date of commencement of the Premises Tenancy Act 1956--Lessee holding over then, on expiry of the lease of 3 Feb. 1938, a clause whereof conferred on him the power to sublet--If such post-Act subletting required the lessor's fresh consent in writing.

1. Pre-Act sublettings cannot be made the foundation of a decree in ejectment under Section 13(1)(a), where the use of the verb 'sublets' in the present tense shows the time of the action of subletting, which must be after the Act, that is to say, on and after 31 March 56. No past tense of the verb "sublet" is here, so as to signify an action which was done, a subletting which was completed, before 31 March 56, Hence, the very language used goes to show that Section 13(1)(a) applies only to post-Act sublettings.

2. Clause 2(1) of the lease dated 3 Feb. 38 does embody the previous consent in writing of the then landlord (whose mantle has now fallen on "Binani") to the subletting by the first defendant of "81". On the expiry of the lease, the first defendant has been holding over. The effect of such holding over under Section 116, Transfer of Property Act, is that the lease is renewed, with all its conditions and terms intact, in absence of an agreement to the contrary. There is no agreement to the contrary. Therefore, Clause 2 (1) of the lease, making it lawful for the tenant to sublet, keeps itself going, so long as the holding over continues.

3. That being so, a clause as this does 'not 'die' with the coming into force of the Premises Tenancy Act 1956 on 31st March of that year. It does not, because the requirement of Section 14 (1) (a) is no more and no less than this: that there shall be the previous consent in writing of the landlord. And that is just here in Clause 2(1) of the lease. It is consent. It is consent in writing. And it is previous consent too to the post-Act subletting. How this consent, so glaring and writ large upon the lease, 'evaporates' on the coming into force of the Premises Tenancy Act is not understood.

4. Necessity of post-Act consent in writing, even when pre-Act consent exists in writing too, is not to be found in the plain language of Sec-lion 14 (i) (a) which does not say: "without the previous consent in writing" obtained after the commencement of the Act All it says is: "After the commencement of this Act, no tenant shall, without the previous consent in writing of the landlord, sublet .... " Previous consent means what it says : such consent must be previous to subletting, Whereas subletting must have to be after the commencement of the Act, consent need not be invariably so. It may be after that as well as before that. But it must be previous to subletting. If consent is after the commencement of the Act followed by subletting, it is previous consent. It becomes no less previous consent, but more, if it is before the commencement of the Act followed by subletting after the commencement thereof.

5. Indeed, that cannot but be so. "Previous" is a common word conveying the simple meaning: going before in time, So previous consent signifies--and can only signify--consent before subletting, no matter whether such consent is before or after the commencement of the Act. Fresh consent, in the sense of post-Act consent, is not the burden of Section 14(1)(a). But fresh subletting, in the sense of post-Act subletting, is its very theme.

6. The formula, if there has to be one, is : 'No previous consent, no fresh sub-letting; not "Fresh subletting, fresh consent'. In vain an inconsistency is sought to be spelt out between Clause 2(1) of the lease and Section 14(1)(a). This Section says to the tenant. 'Do not sublet after 31 March 56 without the previous consent in writing of the landlord.' The tenant answers: 'I have sublet after 31 March 56, but with the previous consent in writing of the landlord obtained on 3 Feb. 38. Surely 3 Feb. 38 goes before 31 March 56 in time.' Thus, no inconsistency is seen : what is seen instead is a term of the contract (1938 lease), creating the tenancy, so consistent with a provision of the Act, to wit, Section 13(1)(a). In terms of Section 19(1), therefore, the tenant (the first defendant) shall be entitled to the benefit thereof. Which means that it shall be entitled to sublet "81" after 31 March 56. Thus, far from superseding Clause 2(1) of the lease, Section 14(1)(a), read with Section 19(1), recognizes and protects the first defendant's right to sublet in terms thereof.

[49. Radharanii v. Angur Bala, 65 Cal WN 1119 at p. 1122, 50. Nandalal Das v. Monmatha Nath Ghose, --Referred to.] V. Subtenancies--Whether pre-Act or post-Act--Pleadings--Evidence--Failure to notify subtenancies after the 1956 Act--Punishable by law--Effect.

1. The plaint does not state a word about the subtenancies being pre-Act ones or post-Act ones. All it pleads is the existence of subtenancies. Traversing this, the written statement by the first defendant, the creator of the subtenancies, docs not disclose either, when they were created. The first defendant is ordinarily under no obligation to traverse in its written statement that which is not pleaded in the plaint. Necessarily, the doctrine of non-traverse embodied in Order 8, Rule 5, of the Code of Civil Procedure is not attracted. And it is impossible to say that the fact of the sub-tenancies being post-Act ones shall be taken to be admitted.

2. Without more, the position appears to be so. But there is a little more. The first defendant is out to establish at the trial that all the sub-tenancies, "Binani" refers to in the plaint and the first defendant admits in the written statement, are pre-Act ones, and, therefore, outside the scope of

Section 13(1)(a). In other words, it is a new fact not pleaded in the plaint. It is a new fact which shows the suit to be not maintainable to that extent. That being so, the first defendant must raise by its pleading this particular matter: just as Order 8, Rule 2, prescribes. But this is exactly what it has not done. More, the subtenancies having been pre-Act ones is a material fact on which the first defendant relies. Its pleading (written statement) shall therefore contain, and contain only, a statement in a concise form of this material fact, not the evidence by which it is to be proved: Order 6, Rule 2. But this is just what is written statement does not contain. Again, when you claim that so many sub-tenancies are pre-Act ones, which Section 13(1)(a) cannot touch, surely these are particulars so necessary beyond such as are exemplified in the forms of pleadings prescribed by Order 6, Rule 3, read with Appendix A to the Code of Civil Procedure, and shall therefore be stated in your pleading (written statement). But this is exactly what you have not stated.

3. Once attention is called from such pleadings to the oral evidence, it is found that counterfoils and other books of undoubted authenticity, which are with the first defendant and would have shown when the sub-tenancies were created, are withheld. It may therefore be presumed that were they produced, they would not have supported the case of the first defendant; the more so, when such sub-tenancies are especially, that is to say, pre-eminently or exceptionally, within its knowledge, it being the creator thereof : Section 106, Evidence Act.

4. A presumption as this cannot be escaped on the ground that the pleadings are silent about the creation of sub-tenancies with the result that there has been no issue either, touching the subject. Ordinarily the Rule, no doubt, is that no amount of evidence can be looked into upon a plea which was not put forward in the pleadings. But where (as here) parties deliberately depart from the pleadings, enter into evidence about the sub-tenancies being pre-Act ones or post-Act ones, with the knowledge that this is very much at issue, upon which the applicability of Section 13 (1) (a) depends, though no specific issue is there, and have elaborate arguments addressed on that footing, that rule has no application.

5. In short, the onus, which lies on the first defendant to prove that the sub-tenancies are pre-Act ones, remains undischarged.

6. An attempt is made to reach the same conclusion; that the sub-tenancies are not pre-Act ones, in another way : 'Not to notify to the landlord pre-Act subtenancies under Section 16(2) of the Premises Tenancy Act (1956), both by the tenant and the subtenants is to commit an offence punishable by Section 30(5) The tenant and its so many subtenants (defendants all) must be presumed innocent of this sort of offence, till the contrary is proved. The evidence, as it is, does not prove the contrary. Conclusions : I, The first defendant and its subtenants are not proved guilty of an offence under Section 30(5), resting on infraction of Section 16(2). 2. Pre-Act tenancies are not proved either.' Circuity apart--and such circuity cannot be preferred to the pleadings and evidence upon which the finding of the subtenancies being post-Act ones rests--the same method is equally applicable to post-Act subtenancies which have got to be notified too, but under Section 16(1), and non-notification of which does also make an offence under Section 30(5). So, applying this method, the first defendant and its subtenants are to be presumed innocent of the offence under Section 30(5) resting on infraction of Section 16(1), and the post-Act subtenancies are not proved either. The

subtenancies are then neither pre-Act ones nor post-Act ones--a clear rednctio ad absurdmn.

[51. Siddik Mahomed Shah v. Mt. Saran , 52. Nagubai Animal v. B. Shama Rao, , J. K. & Sons v. Metal Press Works Ltd., (1965) 70 Cal. WN 324, 54. Sambhu Nath Mehra v. State of Ajmer, . Law relating to Fire Insurance by Welford and Otter-Barry-- Referred to.] VI. Permanent mezzanine floor-- Pleaded in plaint--Non-traverse in written statement Effect--Such construction in 1950--If Section 13(1)(b) of the Premises Tenancy Act, tabooing such construction, is retrospective--Lease of 3 Feb 38--Requirement of previous consent in writing-- If Section 13(1)(b) enforces only the statutory obligation laid down in Section 108(p), Transfer of Property Act.

1. The material averment in the plaint about a permanent mezzanine floor is passed over in the written statement. The permanency of the construction shall therefore be taken for granted, as Order 8, Rule 5, prescribes. True, under the proviso thereto, the Court, in its discretion, could have required the fact so admitted to be proved otherwise than by such admission. But the Court was not minded to exercise its discretion so, for the obvious reason that, in a place like Calcutta, and in a building like "81", the more so because of its situation, the Court had taken for granted the permanent character of the mezzanine floor, as the first defendant had taken it for granted in its written statement.

2. What Section 13(1)(b) lays down is that the prohibition upon a Court to record a decree for eviction in favour of the landlord against ft tenant is lifted where the tenant bas done any act contrary to Section 108(p) of the Transfer of Property Act. The use of the present perfect tense has done goes to show a completed event connected with the present time. Perfect denotes that the event is in a completed or perfect state. Present perfect denotes a little more: that the event in the present time is in a completed or perfect state. Translating this elementary rule of grammar to Section 13(1)(b)'s language, all it comes to is that the act contrary to the provisions of Section 108(p) is in a completed or perfect state in the present time which necessarily means the time from which Section 13(1)(b) speaks. And it started speaking from 31 March 56. It continues to speak to this day. More, provisions of a permanent Act, it will continue doing so till it is amended or repealed. Therefore, it is prospective and retrospective both.

3. Clause 2(h) of the 1938 lease prohibits construction of a permanent character in absence of the landlord's previous consent in writing. The contention that Section 13(1)(b) enforces only the statutory obligation of the lessee laid down in Section 108(p) of the Transfer of Properly Act, and has little to do with the lessee's contractual obligation, as evidenced by Clause 2(h) of the lease, looks more ingenious than ingenuous. "In the absence of a contract", the lessee must not, without the lessor's consent, erect on the property (here "81") any permanent structure. That is Clause (p) of Section 108. Contractual obligations, therefore, come in as a matter of course Clause 2(h) of the lease thus embodied a contractual obligation doubly reinforced by statute--first by Section 108(p) and then by Section 13(1)(b). Again, by Clause 2(h), the parties are agreeing to the mode or manner of the lessor's consent. It does not, therefore, militate against Clause (p) as such, Clause (p) simply specifying the lessor's consent and not the manner of such consent.

VII. Whether "Binani" a properly company or not--Evidence Act (1872), Section 91--'Best evidence' rule--Memorandum of association--Non-production thereof--Presumption--Reception of oral evidence--No objection - - If waived.

1. A contract, by a company, upon a matter not within the words of but foreign to, its charter is extra vires the directors, and not intra vires the Company too, so much so that even the subsequent assent, if any, of the whole body of shareholders cannot ratify it.

156. The Directors and Company of the Ashbury Railway Carriage and Iron Co. Ltd. v. Hector Riche, (1875) 7 H. L. 653Referred to.]

2. But where (as here) the first defendant docs not raise by its pleading that "Binani" is not a property company or that its object is not to buy and make houses in Calcutta, for which alone the suit fails, though it was bound to do so under the provisions of Order 8 Rule 2, of the Code of Civil Procedure, and where the parties have never been at issue on this, such a point taken for the first time at the closing stage of the trial, when evidence has been closed and arguments are being heard, and taking "Binani" completely by surprise, appears to be barred in limine. A litigation is like playing cards on double-dummy where the risk of surprise is reduced to minimum. Because of the timing of the objection at the stage of arguments there is much more than likelihood (as Order 8, Rule 2, prescribes) : there is certainty, of "Binain"' being completely taken by surprise.

3. That apart, the oral evidence on the object of "Biuani", a property company, gets into the record unchallenged and un-cross-exa-mined. Section 91 of the Evidence Act is no doubt there. But it refers only to the method or mode of proof. Now, the mode of proof is a question of procedure only and may therefore be waived. And when it is in fact waived (as here), there can be no subsequent objection. More, where the objection to be taken is not that the oral evidence on the object of "Binani", the plaintiff company, is in itself inadmissible, but that the mode of proof put forward is irregular or insufficient (lack of best evidence : the charter of "Binani"), it is essential that the objection should be taken at the trial before such oral evidence is admitted to the record. The first defendant cannot lie by until the case comes to the stage of arguments and then complain for the first time of the mode of proof, [57. Walsh J. in his Foreword to the 2nd Edn. of Sarkar's Evidence Act. 58. Gopal Das v. Sri Thakurji , 59. Sri Rajah Prakasarayanim Garu v. Y.P. Venkata Rao, ILR 38 Mad 160: (AIR 1915 Mad 793), 60. Janab Bibi Saheba v. Hy deralli Saheb, ILR 43 Mad 609: (AIR 1920 Mad. 547) (FB), 81. Mt. Bibi Kaniz Zai-nab v. Syed Mobarak Hossain, AIR 1924 Pat. 284, 62. Rani Shashimukhi v. Sarat Chandra , 63. Dogar Mal v. Sunam Ram, AIR 1944 Lah 58 Referred to.]

4. More, here the issue is not : has "Binani" its memorandum of association? Were this the issue, no evidence could have been given, in proof or disproof of such matter, except the memorandum itself or the secondary evidence of its contents, secondary evidence being otherwise admissible. What the object of "Binani" is becomes a statement of an independent fact that is to say, a fact other than facts Section 91 specifies : the terms of (i) a contract, (ii) a grant or (iii) any other disposition of property reduced to writing, by the parties voluntarily or by the requirement of law. That being so, Explanation 3 to Section 91 does not preclude oral evidence as to such independent fact. It does not because it contains no prohibition against such matter mentioned in the main part of Section 91, the

prohibition being only against three classes of facts: (i), (ii) and (iii) just referred to.

5. The memorandum of association is no doubt a private document of "Binani", But it does form part of public records kept in the State of West Bengal in the custody of the Registrar of Joint-Stock Companies. It belongs to that class of public records of private documents and is, therefore, a public document within the meaning of Section 74(2) of the Evidence Act. Indeed, it is so unlike a registered receipt of money which has to be returned to the person who presented it for registration, just as Section 61(2) of the Registration Act (16 of 1908} prescribes. And this is the reason why the Privy Council held in Gopal Das's case supra , that the registered receipt there could not be "a public record of a private document", and necessarily not a public document either, within paragraph 2 of Section 74. But the memorandum of association of a company is a document which the Registrar retains and registers: Section 33(3) of the Companies Act (1 of 1956). Just so in (64). In the matter of Tarit Kanti Biswas, 21 Cal WN 1161: (AIR 1918 Cal 988) where, it has been held, the returns under Section 32 of the Indian Companies Act 1913 transmitted to, and filed by, the Registrar of joint-Stock Companies, do constitute public records of private documents within the meaning of Section 74(2) of the Evidence Act. More they are undoubtedly intended for reference and use by the public. When the position at law is so, making secondary evidence of "Binani's" memorandum of association receivable, under Section 65(e) of the Evidence Act, under which no foundation even is required to be laid for the admission of such secondary evidence, as in cases coming within Clauses (a), (b) and (c) of Sec. 65, just what Sir George Rankin observed in Gopal Das's case again , the point about non-production of the memorandum of association appears to be a pointless one.

VIII. Premises Tenancy Act (12 of 1956)--Section 13(1)(f)--Reasonably required for rebuilding--Tests to determine--"Binani"--A family concern--Absence of a formal resolution for rebuilding--If fatal--Absence of cross-examination--Effect--Interested evidence--Meaning--Section 13 (4). If clog to decree for eviction.

1. The condition of the building, some 100 years old, its situation, the possibility of its being put to a more profitable use after reconstruction, the obvious means of the landlord "Binani" the yardstick of means these days being not the cash you have, but the credit you can command in the market, and all surrounding circumstances, including the ethics of the whole thing, satisfy the test of reasonable requirement by "Binani" for rebuilding. Once the finding is that, the question of the tenant's or the tenant's tenant's hardship--which is real and which one is apt to bemoan--ceases to be germane even. In the circumstances, to deny the landlord this little is to deny him the right the statute expressly gives him--which no court can do, rising above the law.

[65. Rekhab Chand v. D'Cruz, 26 Cal WN 499 : (AIR 1923 Cal. 223), 66. Basanta Lal v. P. C. Chakravarty, . Sharma Electric Engineering Works v. Radha Devi, . Deb Kumar Mukherjee v. Abhoy Pada, . Netaram v. Jiwanlal, . Lakshmipati Hazra v. Rajen-dra Nath, 69 Cal WN 1063--Referred to.]

2. A company is a juristic entity, which cannot tell the Court what it is after, as a human being will by his word of mouth. But it acts, as it must, in the very nature of things, through a human agency. Here Binani's human agency consists of four directors father, son, son's wife and another. This body of four is "Binani". And "Binani" is this body of four. No doubt a formal resolution is a mode of

speech available to such a one : a company. But it is not the only mode. A letter written by the company ("Binani") conveying what it proposes to do, and the evidence of a director speaking of a decision after discussion with the remaining three directors, two of whom are his father and wife, constitute each a mode of expressing "Binani's' intention Therefore, while dealing with, a family concern as this, to which attaches, in the very nature of things again, a certain informality, absence of a formal resolution cannot be fatal to its case of reasonable requirement for rebuilding.

3. In absence of cross-examination on the evidence of "Binani's ownership of a house property in Calcutta valued at Rs. 15 to Rs. 20 lakhs etc., evidence pro tanto may well be taken as accepted by the first defendant, this being the general rule. Sun; enough, evidence as this is not of so incredible and romancing a character that the most effective cross-examination would be to ask witness giving such evidence to leave the box--an exception to the general rule. Nor does such evidence fall under the other exceptions to the rule: (i) the witness having had notice to the contrary beforehand, (ii) the abstention (from cross-examination) arising from mere motives of delicacy, e. g., where children are called as witnesses for their parents in divorce cases, (ii) counsel indicating that he is merely abstaining to save time, (iv) several witnesses on the same point being there.

[71. Browne v. Dunn, (1893) 6 R. 67 at p. 70. 72, A. E. G. Carpiet v. A. Y. Derderian, . Phipson on Evidence, 10th Edn., para. 1542, p. 595--Referred to.]

4. The meaning of the expression interested evidence needs clearing up. For, in the vast majority of cases, there can be none more interested in the success of their cause than the parties to the suit and the husband or wife of such party. Yet in all civil proceedings they shall be competent witnesses, as Section 120 of the Evidence Act specifically prescribes. No more, therefore, are those days when surprisingly enough the rule at common law was: 'No one can be a witness in his own cause. If parties to a suit are to be disbelieved as interested witnesses, only because they are parties, that will nullify Section 120. So the testimony of the parties or their spouses must be scrutinized in the same way as that of any other witness. The competency of an engineer, whom "Binani" pressed into service for the drawing up a plan of the proposed reconstruction at "81", appears to be beyond question : Section 118 of the Evidence Act. The true test to determine, whether or not the evidence of the engineer is interested, is to find out if he is an independent witness. But "independent" merely means independent of source which is likely to be tainted. The meaning of interested evidence is then this: it is that sort of evidence the source of which is likely to be tainted.

[74. Jogendra Krishna Roy v. Kurpal Harshi and Co., AIR 1923 Cal 63: ILR 49 Cal 345: 35 Cal LJ 175. 75. Rameshwar v. State of Rajasthan, --Referred to.] (5) Section 13(4) of the Premises Tenancy Act may have opened a new chapter in the rent law by providing for partial eviction, given certain circumstances. But when the finding, upon evidence, is that the building which now stands tottering has to be pulled down lock, stock and barrel, the question of partial eviction can hardly arise. Such a paramount consideration apart, Section 13, Sub-section 4, along with other sub-sections near about, has to be looked into a little closely, in the light of facts here. Sub-section 2, Section 13, which is as exception to the general law that the subtenants have not to be impleaded in are action in ejectment against the tenant, provides for two things. One, the subtenants who have given notice of their subtenancies to the landlord under Section 16, shall be made parties. Only two of the subtenants

here have given such notice. The remaining 19 have not. Two, even such subtenants have no immunity from eviction in a case covered by Clause (f). Sub-section 1, Section 13: reasonable requirement, as the suit (sic) hand is covered by. Thus, the position comes to this. It is not for the 19 sub-tenants, who have not notified the landlord under Section 16, to claim the protection under Section 13(4). Nor is it for the remaining two, though they have notified so, because the suit is grounded on reasonable requirement: the proviso to Sub-section 2. Sub-section 3 can also do them little good. Because nothing in Sub-sections 2 & 4 saves them from eviction. Again, the Court being of opinion that "Binani's requirement cannot be substantially satisfied by partial eviction, Sub-section 4 eludes them too. [Bisakha Dassi v. Radharani Biswas, (1968) 70 CWN 336, Referred to.] IX, Sale of "81" by previous owner Rakhal Das to the plaintiff "Binani" on 25 Aug. 58. No payment of rent to either. If default, prior to knowledge of such sale knowledge stated to have been got on 3 Feb. 59. Transfer of Property Act (4 of 1882), Sections 50,55 and 109, Mean" of such non-payment--Who.

1. The default in payment of rent from the broken period of August 1958, making it a default for the whole of that month, up to December 1958 is patent. Is patent to the first defendant's knowledge on or about 25th August 58 of the sale of "81" that day, there being no cross-examination of "Binani's" witness imputing such knowledge. The credibility of a witness cannot be impeached upon a matter on which he has not had any opportunity of giving any explanation by reason or there having been no suggestion whatever in course of the case that his story is not accepted. Indeed, a cross-examination which errs on the side of excess may be far more fair to a witness than to leave him without cross-examination, and then to suggest that he is not a witness of truth. Even on the assumption that the first defendant had not known of the sale of "81" on 25 Aug. 58 earlier than 3 Feb. 39 there appears to be no escaps from Section 50. Transfer of Property Act, by virtue of which payment to Rakhal Das, the vendor, in good faith, of rent, would have stood the tenant (the first defendant) in excellent stead and could not have the slur of a defaultor out upon it, no matter that it appeared on 8 Feb. 59 that Rakhal Das was an impostor with no right to have received such rent then. The proviso to the first paragraph of Section 109 ibid would have done duty to the first defendant in the same way.

2. It is said on behalf of the first defendant: "True it is that if I had paid to the transferor Rakhal Das, though I was under no obligation to pay him, I would have had no further liability to the transferee 'Binani'. But that is only a protection afforded me--not a payment to the landlords. And for non-payment to Rakhal Das, a non-landlord, I cannot be a defaulter vis-a-vis 'Binani', the landlord." To say so, however, is to make far too nice a refinement of what is really so simple. The question is: is the first defendant a defaulter or not? Payment to the transferor landlord, taking him in good faith to be still the landlord, will not make the first defendant liable to pay the rent over again to the transferee landlord, be it under Section 50, the proviso to Section 109, or both. By operation of law the first defendant is discharged--which means that it is not a defaulter. By operation of law again, it is payment to the transferee landlord too, to whom the payment would have been made, had he given the notice of assignment. Similarly, nonpayment to the transferor landlord, when the first defendant knows not the transfer, will make it a defaulter, because payment to him, in the circumstances, is payment to the transferee landlord, as it were, by operation of law again.

(3) The Legislature, in enacting Sections 50 and 109, Transfer of Property Act, had exactly in contemplation the situation that is seen here: the innocent lessee may not suffer, and the unscrupulous one, not paying to either, under the cwer of an assignment, may not escape, Section 55, Sub-section 4, Clause (a), as also Sub-section 6, Clause (a), of the Transfer of Property Act notwithstanding.

(4) Here the first defendant is itself "the mean" that the rent was not paid to either: Rakhal Das or "Binani". So, it is not for such one to take advantage of its own wrong or of a situation it itself has brought about.

[77. Charubala Das v. Madhusudan Kundu , Bal Gangadhar Tilak v. Sriniwas Pandit, 42 Ind App 135: (AIR 1915 PC 7). 79. Browne v.

Dunn, (1893) 8 R 67 at p. 77. 80. New Zealand Shipping Co., Ltd. v. Societe des Ateliers et Chantiers de France, 1919 AC 1. 81. Subramania Aiyar v. United India Life Insurance Co., Ltd. AIR 1928 Mad 1215. 82. In re, Mayrick's Settlement; Meyrick v. Meyrick. (1921) 1 Ch 811 Referred to.]