to him on payment of the mortgage money in spite of the fact that in form the suit was not one for redemption, and I see no justification for holding that because of this slight defect in form proper relief should not have been granted.

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Nothing else is urged in support of the decision of the learned Single Judge. I would, therefore, allow this appeal, set aside the order dismissing the plaintiff's suit and restore the decree granted to him by the learned Senior Subordinate Judge. Considering the circumstances, however, I would leave the parties to bear their own costs.

R. P. KHOSLA, J.—I agree.

Khosla, J.

B.R.T.

LETTERS PATENT APPEAL

Before A. N. Grover and S. K. Kapur, JJ.

HANUMAN PARSHAD,—*Appellant*

versus

RUP NARAIN AND ANOTHER,—*Respondents.*

Letters Patent Appeal No. 6-D of 1962.

1965

May, 26th

Limitation Act (IX of 1908)—Arts. 142 and 144—Transfer of Property Act (IV of 1882)—S. 111(g)—Landlord and tenant—Tenant holding over parting possession to third party—Third party denying the title of the landlord—Tenant continuing making payment of rent to the landlord—Landlord—Whether precluded from determining the lease—Rent Restriction laws—Whether bar such determination—Possession of the third party—Whether ripens into title after 12 years.

Held, that if a tenant, during a current lease, is dispossessed by a third party, time does not commence to run against the landlord until the expiration of the lease, but when the lease has expired and the tenant is holding over with the landlord's consent and he loses the possession of the property to a third party who claims to be in adverse possession, the landlord is not precluded from determining the tenancy. If the landlord is in a position to determine the tenancy and sue the third party in ejectment, the landlord's right to sue the trespasser will be barred after twelve years of possession of the trespasser. The fact that the tenant continues to pay the rent of

the property to the landlord will make no difference. The Rent Restriction laws will be no bar to the suit of ejectment by the landlord because under these laws it has always been a ground on which ejectment can be sought, that a tenant has sub-let or parted with possession of the premises without the consent of the lordlord.

Letters Patent Appeal under clause 10 *of the Letters Patent from the judgment and decree dated* 16*th March,* 1961, *passed by the learned Single Judge (the Hon'ble Mr. Justice Falshaw) in R.S.A. No.* 19-*D of* 1957.

H. HARDY AND YOGESHWAR DYAL, ADVOCATES, for the Appellant.

BHAGWAT DAYAL AND ISHWAR DASS GARG, ADVOCATES, for the Respondents.

JUDGMENT

Grover, J.

GROVER, J.—This appeal under clause 10 of the Letters Patent arises out of a suit filed by the plaintiff, Roop Narain, for a declaration that he is the owner of the house in dispute by adverse possession. The contesting defendant, Hanuman Parshad, pleaded that he had let out the property in 1932 to the other defendant, Bishan Chand, who is a relative of the plaintiff and that the plaintiff had been occupying the house in question as a licensee from Bishan Chand. In 1941 Hanuman Parshad filed a suit in the Small Cause Court for recovery of Rs. 180 as arrears of rent at the rate of Rs. 10 per mensem. Both Bishan Chand and Roop Narain were impleaded as defendants in that suit which was contested by them. In that suit Bishan Chand denied that any relationship of landlord and tenant existed between him and Hanuman Parshad. Roop Narain claimed that he had been in adverse possession for a long time and neither Hanuman Parshad nor Bishan Chand had anything to do with it. This suit was dismissed in May, 1942. Hanuman Parshad went up in revision to the High Court at Lahore. On 15th May, 1943, Monroe, J., allowed the petition and granted a decree for Rs. 180 against Bishan Chand. No decree was passed against Roop Narain on the ground that he was not liable to pay any rent as he was in occupation by permission of Bishan Chand.

According to Hanuman Parshad, he went on realising the rent from Bishan Chand until 1953 when he filed a suit for ejectment on the ground of non-payment of rent

which was decreed on 15th December, 1953. In execution of this decree Hanuman Parshad sought to eject Roop Narain who set up his adverse title. Subsequently the latter filed the suit out of which the present appeal has arisen. The trial Court as well as the lower appellate Court dismissed the suit. On second appeal Falshaw, J. (as he then was) held that whatever the position might have been before 1942 the possession of the property in suit of the plaintiff had become adverse as against Hanuman Parshad at least since 1941 which period was for more than 12 years before the present suit had been filed. He, therefore, allowed the appeal and decreed the plaintiff's suit with costs throughout.

The only question which was agitated before the learned Single Judge was whether the admitted possession of Roop Narain from 1932 onward was adverse to Hanuman Parshad. It may be mentioned that the plea of *res judicata* on the basis of the judgment of the Lahore High Court dated 15th May, 1943, was not pressed and is no longer open for consideration. The approach of the lower appellate Court on issue No. 1 which raised the question whether the plaintiff was the owner of the property in dispute by adverse possession was to examine the nature of the possession of Roop Narain on the admitted and proved fact that he had been in possession since 1932. The Court considered the rival contentions of the parties, the allegations of Hanuman Parshad being that the property was on lease with Bishan Chand and the plaintiff was in permissive possession having obtained the same from the lessee and Roop Narain's case being that his possession was adverse. After discussing the evidence and in particular, the previous litigation which went up to the Lahore High Court as also the books of account produced by Hanuman Parshad, it was held that the latter was in possession of the premises through his tenant Bishan Chand and the occupation of Roop Narain was by permission of Bishan Chand. It was argued before the lower appellate Court on behalf of Roop Narain that he had set up an adverse title both against Hanuman Parshad and Bishan Chand in the year 1941 and since his possession continued undisturbed for more than 12 years it had ripened completely into ownership. Relying on certain authorities, which will be presently noticed, as also the provisions of the Rent Restriction Acts, the lower

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appellate Court came to the conclusion that Hanuman Parshad could not have evicted Bishan Chand so long as he continued to pay rent and, therefore, the possession of Roop Narain could not have become adverse to Hanuman Parshad. The learned Single Judge accepted the view laid down in certain cases that where there is a current lease and the tenant is dispossessed by a third party, time does not commence to run against the landlord until the expiration of the lease, but when the lease has expired and the tenant is holding over with the landlord's consent and the possession of the third party is adequate and adverse, the landlord is not precluded from determining the tenancy and suing the trespasser in ejectment, and his right to sue is barred after 12 years of such possession.

The learned counsel for the appellant has contended that the finding given by the lower appellate Court that Hanuman Parshad had been in possession of the premises through his tenant Bishan Chand and that the occupation of Roop Narain was merely by his permission was one of fact and must be accepted as final for the purposes of a second appeal. On that finding the possession of Roop Narain could ripen into ownership by lapse of a period of 12 years. Reliance has been placed on *Chandi* v. *Srimati Katyani Debi* (1), and *Smt. Katyayani Debi* v. *Udey Kumar Das* (2), and it is necessary to examine both these cases with care. In the Calcutta case, which was decided by a Full Bench and in which the judgment was delivered by Mookerjee, J., a suit had been instituted by the appellant for recovery of arrears of rent from the defendant in respect of a tenure for two consecutive periods. The grounds put forward by way of defence included a claim for abatement of rent on the plea that the defendant was not in possession of the lands in Mouzah Daskati comprised in the tenancy. What had happened there was that in 1878 a certain Tagore had granted a reclamation lease of certain lands which were then lying waste and in a state of jungle. Shrimati Katyani Debi had acquired the tenancy rights in the lands as a purchaser at a sale in execution of a decree for arrears of rent due by the prior tenant. By 1894 Shrimati Katyani Debi had obtained possession of the whole lands within the boundaries mentioned

(1) A.I.R. 1922 Cal. 87.
(2) A.I.R. 1925 P.C. 97.

in the lease with two exceptions (1) a small area of 61 *acres* to which her husband had established a paramount title dating from 1875 against the original lessor, and (2) a much larger area of which her husband had taken possession without any title some six years previously and of which he had continued to hold possession in spite of the efforts of the previous tenant to eject him. In the suit which was filed by the landlord for recovery of rent in 1917, it was conceded that she was entitled to an abatement of rent relating to 61 *acres* mentioned above. The controversy centred round the question of corresponding abatement in respect of the much larger area which her husband continued to possess without title. The following observations of Mookerjee J. are noteworthy :—

> "It is now well-settled that the possession of a trespasser, during the continuance of a lease does not become adverse against the lessor, the lessor is in possession by receipt of rent from his lessee; so long as such rent is not intercepted by a trespasser he cannot be said to have been dispossessed."

As the decision of the Calcutta Court went against Shrimati Katyani Debi, she appealed to the Privy Council and their Lordships' judgment is reported in *Smt. Katyani Debi* v. *Udey Kumar Das* (2). Their Lordships noticed the incidents of the lease which had been granted in that case. It was permanent and transferable, the rent being fixed. Under such a lease the tenant virtually became the proprietor of the surface of the lands subject only to the payment of the stipulated rent and the lessor and succeeding landlords had no interest in the lands except in so far as they formed a security for payment of the rent. When the rent fell into arrears the landlord's only remedy was to bring the tenure to sale by public auction in execution of the decree for payment of rent. The purchaser of the tenure acquired title to the lands on the terms of the original lease. In their Lordships' view when Shrimati Katyani Debi had acquired the lease by purchase, only six years of adverse possession by her husband had run against the former tenant and she could immediately put an end to this tortious possession by her husband on her purchasing the tenure. She did not do so but allowed

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him to continue in possession, so that it could be assumed that he and his heirs had acquired by limitation an absolute right as against the tenant to continue in possession. The contention raised on behalf of Shrimati Katyani Debi was that the right which her husband had acquired against her was also good against the landlord's representatives. It was argued that the lessor had a title to eject the trespasser and that, if he did not do so, the trespasser obtained a title against him as well as against the tenant and that, as the landlord was deprived of the possession of the lands, she was entitled to an abatement of rent. Their Lordships affirmed the soundness of the decision of the High Court on the point and observed that the duty of a tenant under a perpetual tenure was to protect himself against illegal encroachments by others on the lands of which he had the exclusive possession. If he failed to do so, he could not prejudice the landlord's claim for rent.

The submission of the learned counsel for the appellant is that the law as laid down in the above case is fully applicable and so long as Hanuman Parshad was in possession by receipt of rent from Bishan Chand he could not be said to have been dispossessed by the hostile occupation of Roop Narain which had been found to be permissive. It is urged that even if it be assumed that Roop Narain was a trespasser and had started prescribing his title by adverse title, he could not be regarded to have dispossessed Hanuman Parshad, the lessor, so long as the payment of rent by Bishan Chand was not intercepted by him. It has also been pointed out that in *Hajra Sardara* v. *Kunja Behari Nag Choudhury* (3), *and Ramlakhan Pandey* v. *Digbijay Narain Singh* (4), the decision in *Shrimati Kalyani Debi's* case has been followed.

Before the learned Single Judge as also before us, the learned counsel for the respondent has sought to distinguish the aforesaid cases on the ground that in them the landlord or the lessor was not aware of the adverse claim to ownership being set up by the person who had taken possession from the tenant whereas in the present case there was a clear assertion of adverse title by Roop Narain in the suit in 1941, more than 12 years before the

(3) 40 I.C. 271.
(4) A.I.R. 1948 Pat. 274.

decree was obtained by Hanuman Parshad against Bishan Chand in December, 1953, under which Roop Narain was sought to be dispossessed. The learned Single Judge agreed with that contention mainly on the basis of another decision of the Calcutta Court in *Kishwar Nath Sahi Dev* v. *Kali Shanker Sahai* (5). In that case the plaintiff's ancestor had granted a lease to the Ranchi Municipality of certain property which expired in 1881. The Municipality was allowed by the landlord to hold over which it did until the year 1890 when it gave up possession. In the year 1882 the principal defendant in that case sued the Municipality to recover possession and obtained a decree which was followed by delivery of possession in 1884. Since then that defendant had been in possession. In 1902 a suit was filed by the landlord for obtaining possession and the question was whether it was barred since 12 years had elapsed from the date of the defendant obtaining possession. The view which Maclean C.J., who delivered the judgment of the Court, expressed was that the suit of the plaintiff was barred inasmuch as he could at any time determine the tenancy which became annual after 1881 when it had expired and could have sued the principal defendant in ejectment. His hands were not tied by the lease so as to prevent him from suing. The case was, however, remitted for decision to the Court below as it was felt that the facts had not been determined on that basis. The ratio of this decision, therefore, is that where a trespasser has taken possession of property demised to a tenant and the landlord is in a position to determine the tenancy and sue the trespasser in ejectment, the landlord's right to sue will be barred after 12 years of such possession by the trespasser. In *Hansa* v. *Ramlok* (6) and *Digamber Shridhar Dhekne* v. *Ramratan Raghunath* (7), it was held that adverse possession against the mortgage was generally ineffectual against a mortgagor but when a trespasser took possession of the mortgaged property and asserted a title which was hostile not only to the mortgagee but also to the mortgagor and the latter allowed 12 years to elapse, the title of the trespasser would become indefeasible not only against the mortgagee but also against the mortgagor. As regards these cases, it may be said at once that the view

(5) 10 Cal. W.N. 343.
(6) A.I.R. 1928 Lahore 147.
(7) A.I.R. 1947 Bom. 471.

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expressed therein may not be appositely applicable to the present case as different considerations may obtain where property is in possession of the mortgagee.

The learned counsel for the respondent has further relied on *Somai Ammal* v. *Vellaya Sethurangam* (8), in which it was decided that the landlord, though he had given a lease to a third person, was entitled for the purpose of putting his lessee in possession, to maintain a suit to eject a trespasser. The decision in *Basoo Mahton* v. *Bhagwan Das* (9), proceeded on the same lines and accorded recognition to the rule that a landlord was bound to maintain his tenant in peaceful possession and if that possession of the tenant was disturbed, the landlord was entitled to maintain an action against the trespasser. In *Raj Cumar Mandal* v. *Ali Mia* (10), in which the judgment of the Division Bench was also delivered by Mookerjee, J., it was said that it was open to a landlord if his title was in jeopardy and where it might be damaged by denial of his rights over the property, to bring a suit for the purpose of having his rights declared as against the wrong-doer and for the purpose of being put into possession of the land as against him. It was further laid down that a landlord's cause of action to recover possession from a tenant only accrued from the time when he determined the tenancy and there could be no limitation or adverse possession as against a landlord so long as the tenancy continued.

The sum and substance of the argument of the learned counsel for the respondent is that as far back as 1941, Bishan Chand had disclaimed the title of Hanuman Parshad (*vide* written statement dated 30th November, 1941, Exhibit P. 6) which entitled the latter to determine the tenancy under section 111(g) of the Transfer of Property Act, 1882. Since Roop Narain was also asserting hostile title which was evident from his pleas in his written statement filed in that very litigation, Hanuman Parshad was bound in law to file a suit for possession if he wanted to protect his own right against prescription of adverse title by Roop Narain and because he failed to do so and filed the present suit long after the lapse of 12 years the bar of limitation was clearly applicable. On the other hand, the learned

(8) 26 I.C. 347.
(9) 112 I.C. 314.
(10) A.I.R. 1923 Cal. 192.

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counsel for the appellant maintains that in the previous litigation of 1941 the matter had been fought out and adjudicated and a decision had been given in favour of Hanuman Parshad. It had been found that there was relationship of landlord and tenant between him and Bishan Chand and that eliminated all questions of denial as to title by Bishan Chand. The fact still remains that in spite of Roop Narain asserting hostile title against Hanuman Parshad in 1941 the latter took no steps to obtain possession from him by determining the lease in favour of Bishan Chand which he was certainly entitled to do under section 111(g) of the Transfer of Property Act. Even the Rent Restriction laws in force in Delhi at least up to 1947 did not restrict the right of a landlord to maintain an action for ejectment where there was denial of title by the tenant. The learned Single Judge also seems to be right in saying that it has always been a ground on which ejectment could be sought even under the Rent Restriction laws that a tenant has sublet or parted with possession of the premises without the consent of the landlord and thus there was no bar to the filing of a suit by Hanuman Parshad at any time after 1942.

In the result, the appeal fails and it is dismissed but in view of the nature of the points involved the parties are left to bear their own costs throughout.

S. K. KAPUR, J.—I agree.

Kapur, J.

K.S.K.

APPELLATE CIVIL

Before Inder Dev Dua and R. S. Narula, JJ.

NAGAHIA SINGH,—*Appellant.*

versus

AJAIB SINGH AND ANOTHER,—*Respondents.*

First Appeal from Order No. 126 of 1963

1965

May, 27th

Lunacy Act (IV of 1912)—S. 3(5)—Lunatic—Meaning of—Whether includes person with weak intellect—Declaration of a person as a lunatic—Principles to be borne by Court when doing so stated.