Abdul Hakim Khan Chowdhury Vs Elahi Baksha Saha

Court: Calcutta High Court

Date of Decision: June 9, 1924

Citation: (1925) ILR (Cal) 43

Hon'ble Judges: Greaves, J; Chakravarti, J

Bench: Division Bench

Judgement

Chakravarti, J.
This is an appeal by the plaintiffs and the question raised in this appeal is whether upon the facts found by the lower

Appellate Court, the presumption, that the tenancy is a permanent one, is correct in law. The Munsif held that the presumption did not arise but the

Subordinate Judge has held that it did. The facts shortly stated are these:

Plaintiffs are the owners of a kaimi mokarari jote and the land in suit is a piece of bastu land situated within the municipality of the town of Rajshahi

and was let out to Golab Saha, the father of the defendant, about 44 or 45 years ago by the mother of the plaintiffs, apparently for dwelling

purposes-Plaintiffs served a notice to quit on the defendants-and after the expiry of the term brings this suit for khas possession of the lands, giving

the defendants the-option to remove the houses standing thereon, which the plaintiffs allege are of an unsubstantial character.

The defence of the defendants inter alia was to-quote the words of the learned Munsif ""that the defendants and their predecessors-in-interest

having-resided on the disputed land for a long time by erecting pucca and kutcha structures on payment of a uniform rate of rent and the tenancy

having been treated as heritable, the jote in suit is a kaimi mourashi mokarari one"".

2. The facts found by the Munsif were:

(i) That the tenancy was 44 or 45 years old and its-origin was not unknown.

(ii) That the rent paid was uniformly Rs. 5-10 per year.

(iii) That there was one case of succession from Golab to the defendant.

(iv) ""That Golab Shaba father of the defendant, built a house with mud walls and tiled roof, over which there were thatched chains. Golab also

constructed pucca staircase for the house and a pucca gateway. This house, which has been described as a marotaghar by defendants'' witnesses,

fell down in the great earthquake of 1304 B.S. The pucca gate was also destroyed by the earthquake. At present only the pucca steps of the

marotaghar exist. It is also established by the evidence of P. W. No. 4 that the defendants constructed a pucca privy on the land 7 or 8 years ago

and that the privy is still in existence. The question is whether the structures raised by the defendants and their father can be called substantial

structures. I am of opinion that the house built by Golab Shaba cannot be called a substantial structure as the roof was not a pucca one but was

covered with mud and required the protection of thatched chalas.

3. On these facts the Munsif held that the defendants have failed to establish that the lease was a permanent one. The Munsif further pointed out

that there was no allegation by the defendants that the lease was a permanent one at its inception.

4. On appeal by the defendant, the Subordinate Judge has reversed the Munsif''s judgment and held that the facts justified the presumption of

permanency of the tenure. As to the facts, the learned Subordinate Judge has agreed with the Munsif as to his findings under heads 1 to 3 and,

although there is no difference of opinion as to the nature of the structures on the land, the learned Subordinate Judge says that ""As the land was let

out for building, the presumption is that in its inception the holding was not a temporary holding. In the next place, it appears that defendants had a

marotaghar, i.e., house with mud walls and tiled root, over which there wore thatched chalas with pucca staircase and pucca gateway. There is

also a pucca privy. The learned Munsif says that the privy was constructed without the knowledge of the plaintiff, I do not agree to that view.

5. ""I am satisfied upon the evidence that plaintiffs had knowledge of the existence of the pucca privy. In my opinion all these structures are of a

substantial character"". The Munsif held that the defendants gave no evidence as regards the actual cost incurred in constructing the houses and

other structures. The learned Subordinate Judge has not said anything as regards this matter. The Munsif held that the structures were not of a

substantial character, but the Subordinate Judge on the same facts says ""In my opinion all these structures are of a substantial character."" There

were no pucca buildings on the land; pucca steps and a brick-built privy within a municipality are not, in my opinion, structures to which any

reasonable landlord could object, so long as the tenancy subsisted.

6. As I have already observed the question raised in this appeal is: Is a presumption of permanency of the tenancy justified upon the facts found by

the learned Subordinate Judge? The question thus raised is a question of law and is open to correction a Second Appeal.

7. The learned Subordinate Judge has mainly based his judgment on the decisions in Bent Madhab v. Jai Krishna (1869) 7 B. L. R. 152, 159. and

Durgaprasad v. Brindal an (1871) 7 B. L. R. 159, 164. and the case of Nabu Mondul v. Cholim Mullik I. L. R.(1898) Cal 896. and he concludes

by a bare reference to the Privy Council cases of Ismail Khan I. L. R. (1904) Cal 41, 51; L. R. 31 I. A. 144, 149.

8. Upon the question now at issue, there are numerous cases of this Court and a number of decisions of the Judicial Committee of the Privy

Council. It is somewhat strange that the learned Subordinate Judge has not noticed them. It is indeed true that the cases are so many that it is

neither possible nor profitable to refer to so many cases, but it seems to me that the case of Bent Madhab v. Jai Krishna (1869) 7 B. L. R. 152,

159. is hardly of any assistance in this matter. Sir Barnes Peacock when dealing with the question as to the permanency of the tenancy observed

that ""the evidence showed that pucca buildings had been erected, and that the land had been held for upwards of 35 years and had descended

from father to son, and the Kabuliyat showed that the tenures were not merely of a temporary nature"" and further on he said, ""that in equity the

plaintiff was not entitled to turn the defendant, out of the Lands, because he stood by and saw the tenants erecting pucca buildings on the land

without any objection whatever. If he allowed the defendants to erect pucca buildings upon the land without objecting, it appears to me that he was

bound in the same way in equity as if he granted them a pattah with the privilege of building a pucca house on the land."" The decision in this case

was based upon the terms of the lease and upon the principle of equitable estoppel. The question is different here.

9. As to the case of Durgaprasad v. Brindaban (1971) 7 B. L. R. 159, 164., the passage quoted by the Subordinate Judge shows that the main

fact which was relied upon was that the land ""was not given for any temporary purposes."" What these words were actually intended to mean it is

impossible to find out. At any rate there is no finding as to the purpose precisely for which the lease was created at its inception and the main

question raised and decided was that of the transferability of the tenancy.

10. The case of Nabhu Mondul v. Cholim Mullik (1898) . 25 Cal 896. is helpful in so far as it gives us a list of most of the cases then available.

The view of the learned Judge referring the case to the Full Bench was against the raising of a presumption of permanency merely upon long

occupation and ultimately the reference fell through without any decision by the Full Bench on the points referred to it. The Privy Council cases of

Ismail Khan I. L. R. (1904) Cal 41, 54; L. R. 31 I. A. 144, 149. which, as I said before, was only mentioned by the Subordinate Judge, has no

application here as I shall show later on.

11. The learned vakil who appeared for the appellant submitted that the facts found do not justify the presumption and referred us to the cases of

Lala Beni Ram v. Kundan Lal (1899) L. R. 26 I. A. 58., M. Narasayya v. Raja of Venkatagiri I. L. R. (1910) Mad. 1., Secretary of State v.

Maharajah Luchmeswar (1888) L. R. 16 I. A. 6, 11. J. Winterscale v. Sarat Chandra (1903) 8 C. W. N. 155. Seturatnam v. Venkatachala

(1919) L. R. 47 I. A. 76., Nainapillai v. Ramanatham (1923) L. R. 51 I. A., 83. The learned vakil for the appellant argued that in the present case

the origin of the tenancy was not unknown, there were no substantial buildings on the land, therefore there was no justification for raising the

presumption of permanency of the tenure. The learned Vakil for the respondents, in addition to the cases quoted by the Subordinate Judge cited

the following cases:---William, M. Grant v. Mrs. Robinson (1906) 11 C. W. N. 242., Moharom Chaprasi v. Telamuddin Khan (1911) 16 C. W.

N. 567. and contended that the facts found in the present case brought it within the principle laid down in these cases.

12. As I have already observed the cases on the point, as one expects, are not only many but are not easily reconcilable. In these circumstances it

may be said, if that can be said of a question of law, that the circumstances of each case must determine whether the presumption should be made

or not as it is impossible to give any exhaustive enumeration of the facts which shall or shall not justify the presumption to be drawn.

13. I shall endeavour to find out from some of the leading cases, and the general law, as to what are the principles upon which the Court has

proceeded in deciding the question now raised. I must not however be understood to attempt an exhaustive analysis of all the cases.

14. I shall now briefly refer to some of the principles which underlie a question of this nature as between landlord and tenant and I am here

speaking only of the non-agricultural holdings created before the Transfer of Property Act of 1882.

15. When a tenant claims to hold land as a tenant under-the landlord, the tenant must prove the nature and the extent of the interest which the

landlord, the owner of the full rights, granted to him and thereby put a limitation to his own rights. In this connection I shall quote a few passages

from the decision of Lord Hobhouse in the case of Secretary of State v. Maharajah Luchmeswar Singh (1888) L. R. 16 I. A. 6, 11. His Lordship

says: ""The Government undoubtedly are tenants of the Darbhanga Raj. It is for them to show why the landlord may not recover his property, and

they can only do that by proving that there is some agreement between them and their landlord that ""they shall have something more than the

ordinary tenancy-at-will or from year to year. All they offer is some conjecture of such an agreement founded simply on their long possession at a

uniform rate of payment. If we could not find out the origin of these things there would be strength in that argument, but as the origin of them is

known the argument loses its force. In fact the possession is not difficult to explain in other ways. It is not the business of the plaintiff to explain the

possession, it is the business of the defendant to show that it leads to the inference of a perpetual tenancy."" The Judicial Committee recently

referred to this case and restated the law in these words: ""That permanent right of occupancy can only be obtained by a tenant by custom or by a

grant from an owner of the land who happens to have power to grant such a right or under an Act of the Legislature."" Nainapillai v. Ramanatham

(1923) L. R. 51 I. A. 83, 90. No person can, after the Transfer of Property Act came into operation, claim to hold a permanent tenancy in what is

called bastu land unless it was created by a written and registered lease.

16. It is common knowledge that numerous leases of the class, we are dealing with now, were and are daily created in Bengal more especially in

the towns, and one may safely say that 50 years back and thereafter written leases had come into general, use and except under special

circumstances, no tenant would consider it safe to take a permanent lease without a registered deed evidencing the demise, particularly when the

tenant paid a substantial premium, or intended to spend large sums on the land for building and our purposes. The granting of a permanent right in

land is a matter of considerable importance and usually is evidenced by appropriate deeds. The Transfer of Property Act must have had regard to

the habits and practice of the people of Bengal when it was made applicable to them. Before the Transfer of Property Act, there was no statute

dealing with homestead land as distinguished from agricultural land as to which numerous statutes, beginning with the Regulations passed at the time

of the Permanent Settlement down to the passing of the Tenancy Act in Bengal in 1885, regulate the relationship between the landlords and the

tenants. There are numerous judicial decisions with reference to agricultural land and they have no direct bearing on the question now at issue.

17. The cases, some of which I shall presently discuss, proceed upon two broad principles and some of them rely upon a combination of both,

whenever the inference of permanency of the tenancy has been made in favour of the tenant when the terms of the original tenancy could not be

directly proved. The first principle is, that in. cases where the origin of the tenancy is unknown, and its inception is lost in antiquity the principle of a

lost grant has been invoked by the tenant and from the conduct of the parties and the surrounding circumstances, the Court has been asked to

presume that the tenancy was a permanent one. The conduct of the landlord in recognising succession, transfer and in standing by when pucca

buildings have been raised upon the land, have been mainly relied on in finding out the terms of the lease at its inception.

18. The second principle relied upon is that of equitable estoppel, against the landlord, from showing that the lease was a terminable one.

19. The first of those principles was relied upon by the tenant in the case of Secretary of State v. Maharajah Luchmeswar (1888) L. R. 16 I. A. 6,

11. already cited. Their Lordships refused to draw the inference although in that case the lease was created in 1764 and one uniform rent was paid

for 80 years before the dispute arose. This principle was also relied upon by the tenant, but this Court refused to draw the inference in the

following cases:

In the well-known case of Prosunno Coomaree I. L. R. (1878) Cal 696. Sir Richard Garth on a careful consideration of the earlier cases, laid

down the law in the following words:---""The truth is that the terms of a holding as between landlord and tenant must always be matter of contract

either expressed or implied,"" then again there is no law, of which we are aware in this """"country which converts a holding-at-will or from year to

year or for a term of years into a permanent tenure merely because the tenant without any arrangement with his landlord chooses to build a

dwelling house upon land demised.

20. In this case the defendants, their father and grandfather had occupied the land for fifty or sixty years and used it as a homestead consisting of a

house and fruit trees. Sir Richard Garth refused to draw the inferences of permanency in this case although the-origin of the tenancy was unknown.

21. This case was followed in a number of subsequent cases and I shall refer to some of them only:---Tarukpada Ghosal v. Shyama Charan Napit

(1881) 8 C. L. R. 50., Prosunno Coomar Chatterjee v. Jagan Nath By sack (1881) 10 C. L. R. 25, 30. Rakhal v. Dinamoyi I. L. R (1889) Cal

652., in these cases; the Court refused to presume the permanency of the holding.

22. In the cases, which I shall next discuss, the principle was relied upon and the Court drew the inference in favour of the permanency of the

tenancy. I have already discussed the case of Bent Madhab v. Jai Krishna (1869) 7 B. L. R. 152, 159. In the case of Prosunno Coomar

Chatterjee v. Jagan Nath Bysack (1881) 10 C. L. R. 25, 30., Sir Richard Garth discussed some of the cases and, distinguishing the case of

Prosunno Coomaree Debea I. L. R. (1878) Cal 696; 1 C. L. R. 577., and held at page 30: ""No doubt if land is let for building pucca houses upon

it, or if the tenant with the knowledge of the landlord, does in fact lay out large sums upon it in buildings or other substantial improvements, that

fact, coupled with a long continued enjoyment of the property by the tenant or his predecessors-in-title, might justify any Court in presuming a

permanent grant, especially if the origin of the tenancy could not be ascertained. But the mere circumstance of a tenant occupying buildings upon

property would not justify such presumption unless it could be shown that they were erected, by him or his predecessors, because a landlord might

let property of that kind in the same way as agricultural land, at will, or from year to year. In the case of Gungadhar Sikdar v. Ayimuddin I. L. R

(1882) Cal 960, 962. Sir Richard Garth again distinguished the case of Prosunno Coomaree I. L. R.(1878) Cal 696; 1 C. L. R. 577. and held that

It was apparently let upwards of sixty years ago for building purposes; because it is found that, after the grant (whatever it was), these buildings,

which are of a substantial, character, were erected some sixty years ago by the defendant''s ancestors, and that they and their ancestors have lived

there ever since. Under these circumstances we think that the Courts below were at liberty to presume, if they thought fit, that the land was granted

for building purposes and that the grant itself was of a permanent character."" These two cases might be considered as laying down the principle

clearly and definitely. These cases were followed by Sir F. Maclean 0. J. in the case of Grant v. Robinson (1906) 11 C. W. N. 242. and the

circumstances from which the inference was drawn were that the original nature of the grant was unknown, the defendants were tenants on the land

and were in occupation for nearly sixty years and that they raised substantial structures on the land and the grant was for the purpose of residence.

These cases really settled the grounds upon which such a presumption in favour of the tenant may be drawn and the subsequent cases which

followed these cases stressed the facts that the-origin of the tenancy must be unknown and that substantial pucca structures must be built without

objection long before the controversy arose. The present case does not come within the principle so laid down. In the case of Moharam Chaprasi

v. Telamuddin Khan (1911) 16 C. W. N. 567. their Lordships found that the origin of the tenancy was unknown, the rent never varied, the

landlord treated the tenancy as heritable and that the and was let oat for residential purposes, and relied upon the authority of a number of cases

both of this Court and of the Judicial Committee. Their Lordships summed up as follows:---""There can be no doubt that in view of the decision of

this Court in the cases of Dinendra v. Tituram I. L. R. (1903) Cal 801., J. Winterscale v. Sarat Chandra (1903) 8 C. W. N. 155. and of the

Judicial Committee in the cases of Gopal Lal v. Teluck Chunder (1855) 10 I. A. 183, 191., Dhunput v. Gooman (1867) 11 I. A. 433., Ram

Chunder v. Jugesh Chunder (1873) 12 B. L. R. 220., Rajah Suttosarun v. Mohesh Chunder (1868) 12 I. A. 263., Upendra Krishna v. Ismail

Khan I. L. R. (1904) Cal 41; L. R. 31 I. A. 144. Nilratan v. Ismail Khan I. L. R.(1901) Cal 51; L. R. 31 I. A. 149., and Naba Kumari v. Behari

Lal I. L. R. (1907) Cal 902; 6 C. L. J. 122., the inference is irresistible that the tenancy in its inception was of a permanent character. The

Subordinate Judge himself indeed would have arrived at the same conclusion but for the error into which he fell when he assumed that to bring a

case within this rule, it was essential to establish that there were permanent structures on the land. But the decision of the Judicial Committee in

Naba Kumari v. Behari Lal I. L. R. (1907) Cal 902; 6 C. L. J. 122., shows conclusively that although the presence of permanent structures on the

land maybe factor, it is by a very important no means essential to establish that the tenancy in its inception was of a permanent character.

23. This case for the first time definitely held that a tenancy in homestead land, without any substantial structures built on it by the tenant, may be

presumed to be a permanent tenancy even in the absence of any admission by the landlord, or any circumstance importing permanency of tenure.

24. The cases cited in support oil that view, it is respectfully submitted, lend no support to that proposition. The first case cited, the case of Dinesh

v. Tripura I. L. R (1943) Cal 801. relates to a question of apportionment of compensation money and has little Mo do with the question now in

issue.

25. The next case oil Winterscale v. Bar at Chandra (1903) 8 C. W. N. 155. was decided on the ground that the landlord was aware of a kobala

and of a pattah from the terms of which the Court presumed that the landlord was bound to recognise the permanency of the tenure. The next 4

cases are decisions of the Judicial Committee in which, the question of the permanency of agricultural tenures was discussed and decided, and as I

have shown before, this class of tenancy stands upon a different footing altogether. The case of Nilratan v. Ismail Khan I. L. R(1904) Cal 51; L. R.

31 I. A. 149. which is next referred to, deals no doubt with tenancy in homestead land, but in that case the head note itself shews this ""that the

execution and exchange of the pattah and kabuliyat shows knowledge and recognition on the landlord"s part of the transmission of permanent

rights. Obviously this case has nothing to do with the proposition, under consideration in this case. The last case, of Naba Kumari v. Behari Lal I.

L. R. (1907) Cal 902: 6 C. L. J. 122. drills with a non-agricultural tenure but the decision is mainly based on an admission by the landlord. It sterns

to me therefore the case of Moharam Chaprasi (1911) 16 C. W. N. 567. went beyond the rule which had been adopted by the leading cases

which I have already discussed, and they show that in these cases permanency was presumed on the-theory of a lost grant.

26. The fact that the tenant is allowed to continue in possession of lands for generations, without alteration of the rent, is of common occurrence in

this country and is usually attributable to the reluctance of a landlord to eject a tenant from his home so long as he does not make himself

objectionable and regularly pays his rent. Mere forbearance to enhance the rent or eject the tenant, where the right exists, means nothing. If

transfers are made, describing the tenancy as permanent and the landlord recognises the transfer, then the landlord allows creation of evidence by

conduct, otherwise transfer of tenancy of homestead land would also be ordinarily no evidence of the permanency of the tenancy.

27. The building of pacca houses and that to the-knowledge of the landlord is evidence of the assertion by the tenant of his belief that the tenancy

at its. inception, which is unknown, was permanent. In this connection, no question of estoppel or acquiescence arises, the case depends upon the

principle of inference of the terms of a lost grant.

28. The second principle, namely of estoppel against landlord, the Privy Council deal with in the case of Lala Beni Ram v. Kundan Lal (1899) L.

R. 26 I. A. 58, 63. the decision runs thus:

In order to raise the equitable estoppel which was enforced against the appellants by both the Appellate Courts below, it was incumbent upon the

respondents to show that the conduct of the owner, whether consisting in abstinence from interfering or inactive intervention, was sufficient to

justify the legal inference that they had by plain implication contracted that the right of tenancy under which the lessees originally obtained

possession of the land should be changed into a perpetual right of occupation.

Their Lordships have had no difficulty in coming to the conclusion that the respondents have failed to discharge themselves of that onus. If there be

one point settled in the equity law of England, it is that, in circumstances similar to those of the present case, the mere erection by the tenant of

permanent structures upon the land let to him, in the knowledge of and without interference by his lessor, will not suffice to raise the equitable right

against the latter which has been affirmed by the Courts below"". Lord Watson in discussing the case of Ramsden v. Dyson and Thurston (1866) L.

R. 1 H. L. 141., the leading authority in the Law of England quoted the following passage from the judgment of the Lord Chancellor (Lord

Cranworth) in Lala Beni Ram''s case (1899) L. R. 26 I. A. 58, 64.: ""It follows as a corollary """ from these rules, or perhaps, it would be more

accurate to say it forms part of them, that if my tenant builds on land which he holds under me he does not thereby, in the absence of special

circumstances, acquire any right to prevent me from taking possession of the land and buildings when the tenancy has determined. He knew the

extent of his interest, and it was his folly to expend money upon a title which he knew would or might soon come to an end.

29. In order to avail himself of the equitable estoppel against his landlord, the tenant is bound to prove special circumstances, the mere building of a

costly structure is not enough. In the present case the principle of Equitable Estoppel was not relied upon and could not be.

30. An analysis of the cases cited before, in which presumption of permanency was made, shows that the following elements existed in those

cases, viz., first, the origin of a tenancy for residential purpose must be unknown; secondly, existence of permanent pucca buildings on the lands

built long before any controversy arises and that to the knowledge of the landlord; thirdly, uniform payment of rent, fourthly, recognition of

successions and transfer by the landlord. Many cases were decided upon the admission by landlords as to permanency of the tenure in various

ways but those cases are based on a different consideration as also the cases in which an equitable estoppel is raised against the landlord. It seems

to us that the absence of either of the elements Nos. 1 and 2 as stated above would be ordinarily fatal to any claim of permanency on the theory of

lost grant.

31. Absence of the 3rd and the 4th elements usually would raise difficulties in the way of raising the presumption, but may not be decisive if there

are other-circumstances in aid of the presumption.

32. In the case now before us, both the Courts have agreed in holding that the origin of the tenancy was not unknown and no evidence was

adduced to prove its terms. Absence of written lease, cannot improve the position of the tenant because, a tenant must know under what terms he

holds the land of his lessor. At the time, when the building was first constructed, the tenancy was one, in which no presumption in favour of the

tenant existed and the tenancy in the absence of proof of any definite term of permanency, would be at best one from year to year. On this ground

alone, we think that the presumption of permanency raised by the lower Appellate Court is erroneous and the case of Moharam Chaprasi (1911)

16 C. W. N. 567. is distinguishable. Upon the findings of the lower Appellate Court it appears to us that there were no substantial pucca buildings

on the land as understood in the cases in which the presumption has been sustained and some of which I have already discussed. In the

circumstances of this case, we do not think the inference of permanency is justifiable. The result is that the judgment and decree of the lower

Appellate Court is set aside and those of the Munsif are restored, with costs in all Courts.

Greaves, J.

33. I agree.