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the grant itself the plaintiff as *patnidar* can be held entitled to the underground, a position that has been contended for on behalf of the appellant on the supposed authority of the decision in *Rajeswar Prosad Bhakat* v. *Anil Kumar Roy* (1).

The result is that, in my judgment, the appeal must succeed. I therefore allow the appeal, reverse the decision of the District Judge and restore that of the Subordinate Judge with cost in this and the lower Appellate Court.

CUMING, J. I agree.

G. S. *Appeal allowed.*

(1) (1927) I. L. R. 55 Calc. 35 ; 32 C. W. N. 16 ; 46 C. L. J. 307.

APPELLATE CIVIL.

Before Page and Mallik JJ.

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Jan. 18.

NIBARAN CHANDRA DHARA MODAK

v.

KRISTO MOHAN KUNDU.*

Onus of Proof—Permanent occupancy, who should prove—Presumption of law—If origin of tenancy is unknown, what tenant should prove—Bengal Tenancy Act (VIII of 1885)

The onus of proving that a defendant is in occupation under a tenancy which is not subject to a notice to quit is upon the tenant who sets up that his tenancy is of a permanent nature.

The Court must decide whether the tenancy is a permanent one or not as an inference of law to be drawn from a consideration of all the relevant matters of fact that are proved in evidence before it.

*Appeal from Appellate Decree, No. 2027 of 1925, against the decree of K. B. Ballav, Officiating Subordinate Judge of Hooghly, dated May 1, 1925, affirming the decree of Jadu Nath Majumdar, Munsif of Serampur, dated June 29, 1923.

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Nainapillai Marakayar v. *Ramanathan Chettiar* (1) followed.

If the origin of the tenancy is taken to be unknown, the tenant must needs prove such facts that the reasonable inference therefrom is that the tenant had been granted a permanent right of occupancy.

Abdul Hakim Khan Chaudhuri v. *Elahi Baksha Sha* (2) discussed.

SECOND APPEAL by Nibaran Chandra Dhara Modak and another, the plaintiffs.

This second appeal arose out of a suit to recover possession of certain premises. The defence was that the tenancy was governed by the Bengal Tenancy Act, that it was of an agricultural nature, and that the tenant had acquired a permanent right of occupancy. The lower Courts dismissed the suit.

Dr. Bijan Kumar Mukherjee, for the appellants.

Babu Rupendra Kumar Mitter, for the respondent.

PAGE J. This is a suit to recover possession of premises let for residential purposes. Notice to quit was served upon the tenant, and if the tenant was liable to be ejected after notice to quit it is not contended that the notice was not duly served according to law. The defence set up was that the tenancy was governed by the Bengal Tenancy Act; that it was of an agricultural nature, and that the tenant had acquired a permanent right of occupancy. That defence was negatived by the lower Appellate Court, and it was held that the tenancy was not of an agricultural nature but one for residential purposes, and that it was, therefore, outside the ambit of the Bengal Tenancy Act, and governed by the general law. Certain facts have been found, and must be taken to have been correctly found, by the lower Appellate

(1) (1923) L. R. 51 I. A. 83. (2) (1924) 29 C. W. N. 138

Court. The learned Subordinate Judge in the course of his judgment stated that

"We come to the conclusion that the defendant's tenancy is governed "by the general law that prevailed before 1882. The defendant can claim "a permanent tenancy only by a contract with his landlord. The relation-"ship (*i.e.*, of landlord and tenant) is established by the decree filed before "me. I find that the origin of the defendant's tenancy is not known. I "find that it has been inherited by defendant No. 2 from his father. I find "that it has been held for over 50 years, and that an uniform rent of Rs. 7 "has been all along paid. I find further that this tenancy was taken for "residential purposes. I find there is no brick-built structure of the "defendant on the land, and that the structure that is there was built "after objection by the plaintiff, and after the failure of the plaintiff in "the previous suit."

It was also found or admitted that the defendant held a permanent tenure, but that such tenure was not for agricultural purposes or governed by the Bengal Tenancy Act; that before 1920 there was no structure upon the land; that there has been no transfer *inter vivos* during the currency of the tenancy; and that in 1920 when the defendant was proceeding to erect a building on the land the plaintiff brought a suit for an injunction to prevent him from putting up a *pucca* structure on the land without the consent of the landlord. That suit was dismissed upon the ground that the structure which the defendant was erecting was *katcha*, and not a *pucca* building. In that case the Court further expressed the opinion that the defendant did not possess any permanent right of occupation. I mention this last fact as part of the narrative, but for the purpose of my judgment I have not relied upon it. The question that falls for determination is whether the proper inference of law to be drawn from these facts is that the tenancy is a permanent one. Now, the onus of proving that a defendant is in occupation under a tenancy which is not subject to a notice to

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quit is upon the tenant who sets up that his tenancy is of a permanent nature. The duty of the Court, as I apprehend the law, is to take into consideration all the facts proved that are relevant for the determination of the issue, and to decide as a matter of law whether from the facts proved the legitimate inference is that the tenancy was a permanent one. The law upon this subject has been laid down by the Judicial Committee of the Privy Council in the case of *Nainapillai Marakayar* v. *Ramanathan Chettiar* (1). In the course of delivering the judgment of the Board Sir John Edge observed:

"It cannot now be doubted that when a tenant of lands in India in a "suit by his landlord to eject him from them, sets up a defence that he "has a right of permanent tenancy in the lands, the onus of proving that "he has such right is upon the tenant. In *Secretary of State for India* v. "*Luchmeswar Singh* (2), it was held that the onus of proving that they had "a permanent right of occupancy in lands was upon the defendants who "alleged it as a defence to a suit by their landlord to eject them, and that "proof of long occupation at a fixed rent did not satisfy that onus; and in "*Seturatnam Aiyar* v. *Venkatachala Gounden* (3), in a suit by landlords "for the ejectment of the defendants from lands in a ryotwari district in "Madras, the giving of notice to quit not being disputed, it was held that "the onus of proving that the defendants had rights of permanent "occupancy was upon them. . . . . That permanent right of occu-"pancy 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."

In this case it is not contended that the tenant obtained a permanent right of occupancy by custom, or by an Act of the Legislature. It was, therefore, incumbent upon him to prove that he had obtained it by an express grant from the owner of the land. Now, how can a tenant prove the existence of such a grant? If the origin of the tenure is known *cadit quaestio*, for then it is possible to ascertain from the

(1) (1923) L. R. 51 I. A. 83, 89. (2) (1888) L. R. 16 I. A. 6.
(3) (1919) L. R. 47 I. A. 76.

terms of the agreement whether the tenancy was a permanent one or not. But where, as in this case, the origin of the tenancy is taken to be unknown, the tenant must needs prove such facts that the reasonable inference therefrom is that the tenant had been granted a permanent right of occupancy.

A large number of cases have been canvassed before us, but I confess (though I speak with all due deference) that it appears to me that in some of the cases the real issue has been clouded by confounding two different things, an inference to be drawn from facts and a presumption of law. In this country those who are employed in administering the law for the most part are occupied with cases in which presumptions created by statute play a large part in the argument, and it seems to me that from time to time certain facts, if proved, have been treated as raising a presumption of law that a particular tenancy is of a permanent nature rather than as evidence from which an inference that a permanent tenancy has been created may reasonably be drawn. Indeed, in some cases the decisions have gone so far as to state that there can be no legal presumption of permanency unless certain specific facts are proved; for instance, in the case of *Abdul Hakim Khan Chaudhuri* v. *Elahi Baksha Sha* (1), Chakravarti J., in the course of delivering a judgment in which Greaves J. concurred, stated that:—

"An analysis of the cases cited before, in which presumption of permanency was made, shows that the following elements existed in these cases, *viz.*, first, the origin of a tenancy for residential purposes 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 transfers by the landlord. . . . . It seems to us that the absence of either of the elements Nos. 1 and 2 as stated above

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"would be ordinarily fatal to any claim of permanency on the theory of "lost grant."

No doubt, if the origin of the tenancy was known, there would be no room for a discussion of the mode in which the tenancy was created, but the absence of permanent *pucca* buildings on the land built long before any controversy arose to the knowledge of the landlord, with all due deference, appears to me, although an important element for the Court to take into consideration, in itself not necessarily conclusive against the tenant. In my opinion the true rule is that the Court must decide whether the tenancy is a permanent one or not as an inference of law to be drawn from a consideration of all the relevant matters of fact that are proved in evidence before it. It would not be difficult to imagine cases in which, notwithstanding that no *pucca* structure had been erected on the land, the evidence might be such that from it the existence of a permanent tenure might reasonably be inferred. In my opinion in each case the Court must take into consideration all the relevant evidence that has been adduced. In this case, no doubt, there are elements which point to the tenancy being a permanent one; for instance, its origin is unknown, the land has been held in occupation for over fifty years by the present occupant or his father, and the rent has always been paid at a uniform rate. But those are not the only facts that have been found. The mere fact that there has been a transmission on death from father to son without objection from the landlord is not conclusive of the matter; for, as was pointed out by Chakravarti J. in *Abdul Hakim Khan's case* (1).

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

(1) (1924) 29 C. W. N. 138, 147.

"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."

But it is an element which must be taken into consideration. Another important fact is that the defendant himself did not claim in his defence that he was the holder of a permanent tenancy under the general law by reason of a lost grant of a permanent tenancy. That fact is not conclusive against the tenant, but it is an element in the case which cannot be ignored. Again, there is the fact that no structure was upon the land until 1920. If this was a permanent tenancy that had been created at least fifty years ago for residential purposes it is strange that no building was erected upon the land until eight years ago. That fact, in my opinion, militates, but is not necessarily conclusive, against the permanent nature of the tenancy. Further, it is sometimes found that a tenant has put up a substantial structure upon the land without objection from the landlord. In my opinion that is evidence of considerable weight that the parties intended and agreed that the tenancy should be a permanent one, for in this country landlords are not wont to allow *ticca* tenants to put up substantial structures on the land. But, in my opinion, such a fact is not conclusive against the landlord, nor in itself does it necessarily give rise to a *praesumptio juris* that the tenancy is of a permanent nature. On the other hand, the landlord sometimes is found to have objected to a structure being erected on the land by the tenant. If he has failed to raise any objection until the structure has been in existence for a considerable period, the landlord may be met in a proper case by the equitable doctrine of acquiescence. But if the landlord has objected forthwith or while the work upon the structure was proceeding, that circumstance,

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no doubt, is evidence that the tenancy was not a permanent one; a *fortiori*, if, as in this case, while the building was in process of construction he brought a suit for an injunction to prevent the tenant from building a *pucca* structure upon the land. In short, each case must turn upon its own facts (*Bireswar Mookherji* v. *Srimati Troilokhya Dasi* (1) and, in my opinion, taking into consideration all the facts that have been found in the present case, the proper inference of law to be drawn therefrom is that the defendant has failed to establish that his tenancy of the land is a permanent tenure under the general law.

The result is that the decrees of the lower Courts must be set aside, and a decree for possession passed in favour of the plaintiffs. The plaintiffs are entitled to their costs in all the Courts.

MALLIK J. I agree.

B. M. S. *Appeal allowed.*

(1) (1926) 30 C. W. N. 709.