Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Beverley.

1884 *June* 10.

NUDDYARCHAND SHAHA AND OTHERS (PLAINTIFFS) *v.* MEAJAN AND ANOTHER (DEFENDANTS).*

Encroachment by tenant—Landlords' right—Encroachment acquiesced in by landlord.

If a tenant during his tenancy encroaches upon the land of a third person, and holds it with his own tenure until the expiration of the tenancy, he is considered to have made the encroachment not for his own benefit, but for that of his landlord; and if he has acquired a title against the third person by adverse possession, he has acquired it for his landlord and not for himself.

THIS was a suit brought to recover possession of 3½ cottahs of land.

The plaintiffs were taluqdars and claimed the land as belonging to their ancestral taluq which they held under defendant No. 2.

Defendant No. 1 stated that the plaintiffs had never been in possession of the land, and that he (defendant No. 1) had been put into possession by the defendant No. 2, who was his zemindar.

The Munsiff found that the land did not belong to the plaintiffs' taluq; but considered that it belonged to defendant No. 2, and that as it adjoined other lands of the plaintiffs, they had at some time or other appropriated it by encroachment. But he further held that the plaintiffs had occupied the land for more than twenty years, and that they had therefore acquired a valid title both against defendant No. 1, and defendant No. 2 their landlord.

Defendant No. 1 appealed to the Subordinate Judge, who held that the plaintiffs' case had been that they occupied the land as included within their own taluq held under defendant No. 2, but that having failed to prove that the land was so included in their taluq, they could not be permitted to turn round and plead

* Appeal from Appellate Decree No. 2559 of 1882, against the decree of Baboo Dwarka Nath Mitter, Officiating Additional Subordinate Judge of Mymensing, dated the 6th of September 1882; reversing the decree of Baboo Jagat Chandra Das, Munsiff of Issurgunge, dated the 13th June 1881.

adverse possession against their own admitted landlord; and he further held that the defendant No. 1 was in possession apparently with the consent of the landlord, and that unless they could show a better title, they could not eject them; he therefore reversed the decision of the Munsiff.

The plaintiffs appealed to the High Court.

Baboo *Dwarkanath Chakravati* for the appellants.

Baboo *Joygopal Ghose* for the respondents.

Judgment of the High Court was delivered by

GARTH, C.J., who, after stating the facts, continued.—It has been contended on appeal that the Subordinate Judge was wrong; and that as it has been found that the plaintiff had been in possession of the land for upwards of 12 years, paying no rent for it, and as the land did not form part of his taluq, he must be considered as having held it adversely to his landlord; and as he has held it in this way for more than 12 years, he has acquired a title to it by limitation.

This case, therefore, directly raises the question, what the law of this country is with regard to encroachments made by a tenant upon his landlord's property.

There is no doubt whatever that by the English law, an encroachment made by a tenant upon land adjoining to, or even in the neighbourhood of, his holding, is presumed, in the absence of strong evidence to the contrary, to be made for the benefit of the landlord. See the recent cases of the *Earl of Lisburne* v. *Davies* (1) and *Whitmore* v. *Humphries* (2).

And this rule applies to all land so encroached upon, whether the landlord has any interest in it or not. If a tenant during his tenancy encroaches upon the land of a third person, and holds it with his own tenure until the expiration of the tenancy, he is considered to have made the encroachment, not for his own benefit, but for that of his landlord; and if he has acquired a title against the third person by an adverse possession, he has acquired it for his landlord, and not for himself. (See *Kingsmill*

(1) L. R., 1 C. P., 259. (2) L. R., 7 C. P., 1.

1884

NUDDYAR-CHAND SHAHA v. MEAJAN.

v. *Millard* (1); *Andrews* v. *Hailes* (2), and this doctrine appears to have been adopted here in the case of *Goroo Doss Roy* v. *Issur Chunder Bose* (3), as well as in other cases.

It is true, that by the English Law, if it could be distinctly proved that the tenant made the encroachment adversely to his landlord, an adverse possession for 12 years might then give the tenant a title by limitation; and probably that would be so in this country.

But that was clearly not the case in this instance, because the plaintiff himself in his plaint claims the land in question *as part of his taluq*.

The only possible ground, as it seems to us, upon which a person in the plaintiff's position could claim to retain possession of the land so encroached upon, would be, that the landlord had either expressly or impliedly acquiesced in the encroachment; or, in other words, that he had allowed the tenant to add the area encroached upon to his holding.

It might be supposed from the language of the judgment in the case to which we have last referred that the learned Judges there intended to lay down the rule more broadly, and to say that in all cases, whether the encroachment were made with or without the landlord's consent, the tenant making it had a right to retain the land so encroached upon till the end of his tenancy. But we have consulted our brother Mitter as to this, and we find that it was by no means the intention of the Court in that case to lay down the rule thus broadly.

It would indeed seem strange if, as a matter of law, a tenant were allowed, *without his landlord's permission*, to appropriate any land which adjoins his own tenure, and then when his landlord complained of the trespass, and required him to give the land up, he were allowed to take advantage of his own wrong, and insist upon retaining possession of it, until the expiration of his tenure.

In this particular case, however, it was no part of the plaintiffs' case that the zemindar, either expressly or impliedly, had consented to the encroachment. His case in the first instance was,

(1) 11 Ex., 313. (2) 2 E. & B., 349.
(3) 22 W. R., 247.

that the land in question formed part of his original taluq. That has been negatived by both the Courts.

He then contended that he had held it adversely to his landlord; but that, for the reasons already given, we have found to be untenable.

The result therefore is that the appeal must be dismissed with costs.

Appeal dismissed.

FULL BENCH REFERENCE.

Before Sir Richard Garth, Knight, Chief Justice, Mr. Justice Mitter, Mr. Justice McDonell, Mr. Justice Prinsep, and Mr. Justice Wilson.

HURRY MOHUN RAI (PLAINTIFF) *v.* GONESH CHUNDER DOSS AND OTHERS (DEFENDANTS.)*

1884 *June* 16.

Hindu law—Repairs to houses held by a Hindu lady having a life interest—Credit—Death of life tenant before payment—Liability of estate for the debt.

A daughter succeeding to the estate of her father ordered a quantity of lime for the purpose of making repairs to certain houses on the estate; the repairs were completed, but the lady died before the debt contracted by her for the lime had been paid off.

At the time of her death there remained outstanding a large sum due as rent, which the lady had neglected to collect during her lifetime.

In the suit brought by the creditor against the heir of the lady, and the reversionary heirs of her father's estate (into whose hands the estate had passed), in which he asked for a decree—(1) against the estate in the hands of the reversioners; and (2) sought for payment out of the rents uncollected in the lady's lifetime, or in the alternative, that the lady's personal estate might be held liable: On a reference being made to a Full Bench, as to whether the plaintiff could enforce his claim against the estate in the hands of the heirs of Raj Chunder generally, or as against the amount of rents, which accrued due to the lady and which remained uncollected;

Held by Mitter, McDonell and *Prinsep*, JJ., (*Garth*, C.J., and *Wilson*, J., *dissenting*) that the plaintiff was certainly entitled to be paid out of the arrears of rent since collected, but that he also was entitled to enforce his claim against the heirs of the last full owner of the estate generally.

* Full Bench Reference on a judgment of Norris, J., dated 19th July 1883.