P. C.
1899
February 16*th*, 20*th*.
March 11*th*.

BENI RAM AND ANOTHER (PLAINTIFFS) *v.* KUNDAN LAL AND OTHERS (DEFENDANTS).

On Appeal from the High Court for the North-Western Provinces.

Law of landlord and tenant as to building by the tenant on the land—Acquiescence of lessor—Terms of special leave to appeal in this suit.

A lessor is not restrained by any rule of equity from bringing a suit to evict a tenant, the term of whose lease has expired, merely by reason of that tenant's having erected permanent structures on the land leased, such building having been within the knowledge of the lessor, and there not having been any interference on his part to prevent it.

To raise an equitable estoppel against the lessor precluding him from suing, on the determination of the tenancy, for possession, the tenant should show facts sufficient to justify the legal inference that the lessor has by plain implication contracted that the right of tenancy should be changed into a right of permanent occupancy. Acquiescence by the lessor in this case was a legal inference to be drawn from such facts as were found. The onus of establishing sufficient cause for an equitable estoppel had not been discharged by the tenant in this instance.

Ramsden v. *Dyson* (1), and section 108 of the Transfer of Property Act, 1882, referred to.

Special leave to appeal had been granted on terms that the appellants should be liable to pay the respondents' costs in any event, if directed so to do. Costs were, however, directed to be paid by the respondents.

APPEAL by special leave, on terms, from a decree (26th January 1894) of the High Court affirming a decree (21st April 1892) of the Subordinate Judge of Aligarh, who affirmed a decree (27th July 1891) of the Munsif of Hathras, dismissing the appellants' suit with costs.

This suit was brought on the 30th August 1890 by the representatives of the original lessors of six bighas of land to dispossess the successors of the original lessees, and to obtain the removal of the houses built on the land. Special leave to appeal had been obtained by the plaintiffs, whose suit had been dismissed on the ground that an equitable estoppel against them caused by their having acquiesced in the building, had been established.

This leave to appeal was granted in regard to the question of law which the case presented. This was whether it was a good

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ground of defence that predecessors in the tenancy had erected permanent buildings on the land, without the owners having interfered to prevent the building, which was within their knowledge. There was no stipulation that the tenants should have an extended term.

The appellate Courts below had decided in favour of the defendants, on the ground of there having been an equitable estoppel upon the plaintiffs in consequence of their predecessors having acquiesced in the building. The original lease had been made in 1858 for the term of the settlement then current. The successors of the former owners of the land served the defendants with notice to quit possession on the 30th June 1890, with which notice the defendants had not complied. ssors,

The facts s re the case, the expiration of the original lease, and the bringing of the subsequent tenancy-at-will to an end, appear in their Lordships' judgment, as well as the decisions of the courts below.

Mr. *H. Cowell*, for the appellants, argued that the lease of 1858 having expired and the subsequent tenancy having been determined by notice, the respondents had no right to resist eviction by the owner of the land. The tenants had built without having any good reason for believing that the land would be subject to their permanent occupancy. The inference drawn by the Courts below that the plaintiffs' predecessors had acquiesced in the acts of the defendants in building on the land was not the well-founded, or legal, inference. The facts found by the two Courts must be accepted, but not the conclusion that the facts amounted to permission or acquiescence. He cited *Ramsden* v. *Dyson* (1), where it was decided that if a tenant so builds he does not, in the absence of special circumstances, acquire a right to prevent the landlord from taking possession of the land when the tenancy has been determined. The case was distinctly different from this, where a tenant builds in the belief that he is entitled

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to claim, afterwards, a lease, and the landlord allows him so to build, knowing that the tenant is acting in that belief, and does not interfere to correct the error. There it might be that the tenant had an equity to claim a lease. But nothing of the kind occurred here.

Mr. *W. H. Upjohn*, Q. C., and Mr. *G. E. A. Ross*, for the respondents, referred to the qabuliyat containing the terms of the lease of 1858. Therein was a clause which, they contended, should be read as written in contemplation of a continuance of the relation of landlord and tenant after the time of the settlement then current. The lower appellate Court and the High Court in concurrence had found that the plaintiffs' predecessors in interest had acquiesced in the erection of the buildings; and it was argued that the above clause, coming from the lessors had ju[illegible]d the lessees in concluding that they would have some furt[illegible] interest after the expiration of the original term. There were then special circumstances. Again, the finding of acquiescence had been before the Court on a second appeal, which was confined to the question of law, and the High Court had rightly held that under the circumstances the appellants were estopped from suing to eject the respondents. Reference was made to the Transfer of Property Act, IV of 1882, section 108, cls. (*h.*) and (*p.*), and to *Shibdas Bandapadhya* v. *Bamandas Mukhapadhya* (2).

Mr. *H. Cowell*, in reply, submitted that the respondents' long resistance to a just claim was a ground for their being required to pay the costs of this appeal, notwithstanding that the special leave to appeal had been obtained on the terms that, if ordered so to do, the appellants would pay those costs.

Their lordships' judgment was afterwards, on the 11th March, given by LORD WATSON.

In November 1858, Bhawain Das, and Dhani Ram, bankers of Hathras, and owners of the mauza Ramanpur, let to five tenants, whose interests are now represented by the respondents in this appeal, six bighas of land, for the term of the current

(2) (1871) 8 B. L. R. 237.

settlement, for the construction thereon of a saltpetre factory, at the annual rent of Rs. 28. The conditions of the lease appear from the qabuliyat executed by the tenants, on the 17th November 1858, which, so far as material, are as follows:—"That, until "the lease money is continued to be paid, the malguzars (persons "who pay the revenue) shall not be competent to dispossess me "within the foresaid term, nor shall I be competent within it to "give up the land. After the settlement, the parties shall be "bound to carry out the order of the Government, if any, issued "by it. I have therefore executed these presents, by way of a "qabuliyat, in order that they may serve as evidence, and be of "use in time of need."

The appellants having acquired, by purchase, the interest of the original lessors, on the 1st August 1859, served a notice upon the respondents requiring them to quit possession of the lands upon the 30th June 1890. The respondents did not comply with the notice; and the appellants, on the 30th August 1890, brought a suit for their ejectment in the Court of the Munsif of Hathras. The plaint *inter alia* craves decree for removal of the material of the houses built by the ancestors of the respondents lying on the said lands.

The respondents, in their written statement, amongst other defences to the action, pleaded that the predecessors of the appellants, "after the completion of the saltpetre factory for "which the lands were taken on lease, saw that from time to time "houses were built, and the defendants, and the ancestors of the "defendants, spent several thousands of rupees on building, and "they instead of objecting, or prohibiting, induced the defend-"ants and their ancestors to build."

The Munsif received evidence on nine issues, but in his judgment, which was given on the 29th June 1886, he only dealt with the first and second of them. Upon the first, which related to an amendment obtained by the appellants, he found in their favour. Upon the second, he found that the notice of removal given by the appellants upon the 1st August 1889 was not according to

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law. With regard to the remaining issues, from three to nine inclusive, the learned Judge observed :—There is sufficient material to dispose of all these issues, but since issue No. 2 is decided against the plaintiffs, and it is held that the suit must fail, there is no further necessity to enter into the trial of these issues." Accordingly, in respect of his finding upon his second issue, he dismissed the suit.

An appeal was taken from the Munsif's judgment to the first appellate Court, being that of the Subordinate Judge of Aligarh, who, on the 21st April 1892, affirmed the decree appealed from, although on a different ground. The Subordinate Judge dealt with three issues, the first and third having reference to the validity of the notice upon which the action of ejectment was based, and the second being :—"Was the land in dispute only let for the construction of a saltpetre factory, and what is the effect of the plaintiffs or their predecessors having acquiesced in the defendants or their predecessors having built upon the land after the saltpetre factory had ceased to exist?"

The Subordinate Judge, differing in opinion from the learned Munsif, held that the notice to quit possession, which the appellants had given, was valid in law. Upon the second issue, he found the following facts, upon which the decision of this appeal has come to depend :—"The tenancy, as I have already stated, was originally created for the construction of a saltpetre factory, but we have the evidence of the plaintiffs' own witness Khyali Ram, and Chokey Lal, patwari of the village, to show that saltpetre was only manufactured here for four or five years; that since 20 years shops have existed on the land, and that since 12 or 14 years pacca shops have been built. Inside the enclosure, the evidence shows, are rooms (?) erected 18 or 20 years ago, a pacca as well as a katcha well. It is also proved in the most unmistakeable manner that the former owner of the land saw the buildings and did not prohibit their construction. The plaintiffs' evidence, moreover, shows that, even on their calculations the buildings cost Rs. 1,000, or Rs. 1,500.

"The evidence of Gobind Prasad, their witness, is that the "buildings cost about Rs. 900. Jugal Kishore makes them "worth Rs. 800. Khyali Ram says nothing on the point, while "the patwari deposes that the buildings are worth Rs. 1,000 or "Rs. 1,500. On the other hand, the defendant Kundan Lal and "his witnesses' evidence shows that there are 12 shops, some "katcha and some pacca, now standing on this land; that they "have been built between Sambat 1918 and 1935; that in addi-"tion to the shops are dalans and kothas, two wells, the one "katcha and the other pacca, and a temple, all costing between "three and four thousand rupees. The evidence also shows in "the most unmistakeable manner, that not only did the original "lessee not object to the enclosing of these buildings when they "were being erected, and stood by, but that by continuing to "receive rents from the lessees, even after the erection of the "buildings, and even though the saltpetre factory, for which the "land was let, had ceased to exist, he sanctioned the lessees doing "so. His successors are therefore equitably estopped from now "suing for the lessee's ejectment. The case is governed by what "was said in *Gopi* v. *Bisheshwar* (Weekly Notes for 1885, page "100)."

The rule or principle thus adopted by the Subordinate Judge, which is reported to have been laid down in *Gopi* v. *Bisheshwar*, is thus stated by him:—"If a man permits another to build "upon his land, and, with the knowledge that the building is "being erected, stands by and does not prevent the other from "doing so, then, no doubt, equity comes in, and by the rules of "equity which in this respect are the same as the rules of law, he "cannot eject that other person."

The case was then carried, by the present appellants, before the second appellate tribunal, the High Court at Allahabad, who, on the 26th January 1894, confirmed the decision of the Subordinate Judge of Aligarh and dismissed the appeal, with costs. The learned Judges of the High Court, without entering into any discussion of the other issue which the first appellate

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Court had decided in favour of the present appellants, said:—"We need not go further into the construction that should be "placed upon that lease, because we are of opinion that upon "the finding of acquiescence, which we think was a right finding "in this case, the appeal will have to be dismissed." They accordingly disposed of the appeal on that ground alone.

It is to be regretted that the loose and inadequate statement of the rule of equity, which is reported in *Gopi* v. *Bisheshwar* should have been accepted, apparently without much consideration, by the learned Judges of both appellate Courts. The proposition, if it were carefully supplemented, might possibly be made to apply to the case where the owner of land sees another person erecting buildings upon it, and knowing that such other person is under the mistaken belief that the land is his own property, purposely abstains from interference, with the view of claiming the building when it is erected. The findings of fact pronounced by the Subordinate Judge, which were conclusive in the second appellate Court, and are equally binding upon this Board, show that the present is not a case of that kind. The respondents knew that the predecessors of the appellants were the owners of the land let, and that their own title was limited to their occupation of the land as tenants, upon the terms and for the periods provided by the original lease of 1858. 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 in active 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. It must also be kept in view that, in Indian law, the maxim "*quicquid inaedificatur solo, solo cedit*," has no application to the present case. The rule established in India is that of section 108 of the Transfer of Property Act, which provides that "the lessee may remove, at any time during the "continuance of the lease, all things which he has attached to "the earth; provided he leaves the property in the state in which "he received it."

The leading authority of the law of England upon the point, is *Ramsden* v. *Dyson and Thornton* (1). In that case, the Vice-Chancellor (Sir J. Stuart) had held that Sir J. Ramsden, the owner, was estopped in equity from bringing ejectment against the defendants, his tenants, by reason of the defendants having been permitted, in the knowledge of their lessor, to build valuable and permanent structures upon the land demised to them. The judgment of the Vice-Chancellor was reversed in the House of Lords, by the Lord Chancellor (Cranworth), Lord Wensleydale and Lord Westbury, *dissentiente* Lord Kingsdown.

The Lord Chancellor (at p. 141 of the report) said:—"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." The noble and learned Lord, in his opinion, which is expressed at considerable length, appears to me to indicate some

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at least of the special circumstances which might suffice to raise an estoppel against the lessor. It was strongly urged for the defendants, at the Bar of the House, that Sir J. Ramsden had made representations "which might fairly be supposed to lead "his tenants at will or from year to year to expend money in "building, in the belief that by building they acquired a title "which he could never disturb." I do not find that the noble and learned Lord indicated any opinion that, if such representations had actually been made by the lessor, they would not have been sufficient to show the terms of a contract which might be enforced in a Court of Equity. But he rejected the plea on the double ground (1) that the alleged communications were not proved to have been sufficient for that purpose, and (2) that the representations, if they had been sufficient to raise an implied contract, were not binding upon the lessor, inasmuch as they proceeded from an estate agent, and were not shown to have been made by him, in the knowledge and with the authority of the lessor.

The respondents, in their appeal case lodged before this Board, relied exclusively upon the their plea of acquiescence, which had been sustained by both the appellate Courts below. In their argument, the learned Counsel by whom they were represented, ably urged that plea, but frequently digressed into other points raised in the case, always with the explanation that these digressions were meant to aid the plea of acquiescence. They also argued that their Lordships could not competently disturb the judgment to the effect that there had been acquiescence, inasmuch as it was a concurrent finding of the appellate Courts. The argument was palpably erroneous. Their Lordships were bound by, and have accepted as final, the findings of the Subordinate Judge of Aligarh upon the facts from which acquiescence might or might not be inferred. But acquiescence is not a question of fact, but of legal inference from the facts so found; and upon it the judgments of the appellate Courts are not final.

Their Lordships will therefore humbly advise Her Majesty to reverse all the judgments appealed from, and to give the appellants decree of ejectment in terms of their plaint; to order that the costs, if any, already paid by the appellants, under the decrees respectively of the Munsif of Hathras, the Subordinate Judge of Aligarh, and the High Court at Allahabad, be repaid whom appellants by the respondents; and that there be no costs of suit in the Courts below paid to or by either of the parties. The respondents must pay to the appellants the costs of this appeal.

Appeal allowed.

Solicitors for the appellants—Messrs. *Ranken, Ford, Ford* and *Chester.*

Solicitors for the respondents, Kundan Lal and Birj Lal.—Messrs. *Barrow* and *Rogers.*

PARSOTAM GIR (PLAINTIFF) *v.* NARBADA GIR (DEFENDANT).

On appeal from the High Court for the North-Western Provinces.

P. C. 1899 *February* 22*nd*. *March* 24*th*.

Res judicata—Civil Procedure Code, section 13*—Prior decree between the same parties in the same claim, not arriving at a final decision.*

In a former suit between the same parties that were now in litigation, in which the same claim upon title was made, a decree dismissed the suit. But the judgment in the former suit stated that it was left open to the plaintiff to sue again, and that no matters affecting the rights of the parties were decided between them. *Held,* that the prior decree was not a final decision within the meaning of section 13 of the Code of Civil Procedure, and the defence of *res judicata* was not maintained.

APPEAL from a decree (4th November 1895) of the High Court reversing a decree (29th June 1893) of the Subordinate Judge of Allahabad.

This suit was filed on the 3rd January 1893 by one Nepal Gir, upon whose decease during the proceedings the present appellant was brought upon the record. The claim was against the respondent Narbada Gir, representative of Prasad Gir, deceased, for possession with mesne profits, of lands belonging to a religious institution, which lands had been in the possession

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