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was held that the lease being one of the right to receive the collections of a village was not a lease for agricultural purposes within the meaning of section 117 of the Transfer of Property Act. Similarly in *Ballabh Das* v. *Murat Narain Singh* (1) where it was found that the primary object of the lease was not cultivation it was held that it was not a lease for agricultural purposes so as to be brought within the exception made in section 117 of the Transfer of Property Act. In *Raja Satya Niranjan Chakravarty* v. *Surajbala Debi* (2) their Lordships of the Privy Council held that a tenancy for the purpose of realisation of rent from the cultivating tenants is governed by the provisions of the Transfer of Property Act.

The authorities cited above fully support the view that the lease (exhibit 1) cannot be regarded as an agricultural lease and is therefore subject to the provisions of section 107 of the Transfer of Property Act. The result therefore is that the decision of the lower appellate court is correct and must be upheld.

I accordingly dismiss the appeal with costs.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge and Mr. Justice H. G. Smith

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September 2

GUR DIN SAH (PLAINTIFF-APPELLANT) *v.* BADRI AND OTHERS (DEFENDANTS-RESPONDENTS)*

Transfer of Property Act (IV of 1882), section 106—Lease—Lessee not admitted to tenancy of existing shops but allowed to build new shops on the ruins of old ones—Nazrana *and monthly rent charged—Shops constructed and occupied for over thirty years without any attempt by lessor to enhance*

*Second Civil Appeal No. 390 of 1934, against the decree of Pandit Dwarka Prasad Shukla, Additional Subordinate Judge of Unao, dated the 31st of October, 1934, reversing the decree of Pandit Hari Shankar Chaturvedi, Munsif of Unao, dated the 28th of April, 1934.

(1) (1926) I.L.R., 48 All., 385. (2) (1930) P.C., 18.

rent or eject lessee—Nature of tenure—Lease, whether of permanent nature—Res judicata—*Parties not litigating under same title—Suit, if barred by* res judicata—*Second appeal—Finding of fact not vitiated by error of law or procedure, whether conclusive.*

Where a lessee is admitted to the tenancy of no existing shop or house but is allowed to build new shops and houses on the ruins of old ones, and the lease shows that the lessor realised a cash *nazrana* when he granted the lessee permission to build shops on the plot in question and that the lessee agreed to pay a monthly rent of 11 annas, the lease is one for building purposes and the rent reserved is only in the nature of ground rent. In such a case if the lessee makes constructions which continue in existence for over thirty years without any attempt by the lessor to enhance the rent or eject the lessee and there is nothing in the terms of the lease to suggest that the lessor has a right to eject the lessee at will, the tenure on which the land is held should be presumed to be of a permanent nature and section 106 of the Transfer of Property Act has no application to such a case. *Sitara Shahjahan Begam* v. *Munna* (1), *Rungo Lal Lohea* v. *Wilson* (2), and *Promada Nath Roy* v. *Srigobind Chowdhry* (3), referred to.

Where the parties to the subsequent suit are not litigating under the same title under which they litigated in the former suit, the plea of *res judicata* must be overruled.

Where a finding of fact is not vitiated by any error of law or procedure, which could justify interference therewith in second appeal, and is based on legal evidence, the finding must be accepted as conclusive.

Mr. *Radha Krishna Srivastava*, for the appellant.

Messrs. *Hyder Husain, S. C. Das, Ram Prasad Shukla, Manohar Lal, H. H. Zaidi* and *Behari Lal Nigam*, for the respondents.

SRIVASTAVA, C.J. and SMITH, J.:—This is a second appeal arising out of a suit for ejectment and arrears of rent. The plaintiffs' case was that they were the owners of Bazar Nawabganj in the Unao District, that the defendants were in possession of two shops Nos. 357 and 358, each having a house attached to it in the said bazar as their tenants on payment of 11 annas per month as rent, and were as

(1) (1927) A.I.R., All., 342. (2) (1898) I.L.R., 26 Cal., 204.
(3) (1905) I.L.R., 32 Cal., 648.

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such liable to be ejected at the pleasure of the plaintiffs by notice. It was further alleged that a notice had been given to the defendants but in spite of it they did not quit the shops and the houses. It was also pleaded that the rent had not been paid from October, 1930 and that a sum of Rs.24-12 was due on account of the arrears. Accordingly, the plaintiffs claimed a decree for possession of the two shops and houses and a decree for Rs.24-12 in respect of the arrears of rent.

The defendants denied the plaintiffs' title. They pleaded that they had built a *pucca* house and shop, and raised the pleas of acquiescence and adverse possession.

The learned Munsif disallowed the pleas raised in defence and decreed the claim for possession as well as for arrears of rent, but on appeal the learned Additional Subordinate Judge held that the shop and houses in suit had been built by the defendants on the site of the ruined houses and shops of one Hira Lal with the permission of the then landlord as contained in the document exhibit B-1, and that in any case, even if exhibit B-1 was invalid on any account, the defendants having been in possession for more than twelve years their title to remain in possession as before had become unassailable.

The facts which have been established and which are no longer in dispute, are that bazar Nawabganj formerly belonged to one Nawab Amin-ud-daula, the predecessor-in-title of the plaintiffs. There were shops owned by Nawab Amin-ud-daula on Nos. 357 and 358, which were in the occupation of one Hira Lal as a tenant on a monthly rent of 11 annas. These shops fell into ruin, and on the 3rd March, 1904, Raza Quli Khan, one of the heirs and legal representatives of Nawab Amin-ud-daula, gave permission to Ram Lal and Badri to construct shops on the said plots. Badri is defendant No. 1 in the suit, and Gaya Din, the original defendant No. 2, was the son of Ram Lal. It has been

found by the lower appellate court that in pursuance of this permission the defendants built the present constructions on the site of the ruined houses and shops of Hira Lal. The learned Additional Subordinate Judge was of opinion that in the circumstances the plaintiffs had failed to prove that the defendants were such tenants as could be ejected at their will. He accordingly dismissed the suit.

The learned counsel for the plaintiffs-appellants has challenged the finding of the lower appellate court in regard to the constructions made by the defendants, and has based their claim for ejectment on the ground of custom as entered in the *wajib-ul-arz* and on the provisions of the Transfer of Property Act. He has also relied on a previous judgment *inter partes* of this Court in a suit relating to a shop No. 3 in the said bazar of Nawabganj. As regards the finding about the constructions, it is contended that it is bad because it is based on a wrong view of the onus of proof. We are of opinion that the finding is one of fact and is amply supported by evidence. The plaintiffs-appellants cannot, therefore, be permitted to go behind that finding in second appeal. The remarks of the learned Additional Subordinate Judge on the question of onus do not in any way affect the validity of the finding. Those remarks merely amount to this, that according to the opinion of the learned Additional Subordinate Judge the trial court would also have arrived at the same finding had it not been for the erroneous opinion formed by it about the shifting of the burden on the defendants. The defendants have examined several witnesses to prove that the present structures were new constructions made by the defendants after the old structures of the time of Hira Lal had fallen down. The learned Additional Subordinate Judge has referred to the statements of four of these witnesses, D. Ws. 1 to 4, and based his finding on the testimony of these witnesses. He has disagreed with the opinion of the trial court

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which had disbelieved the evidence of these witnesses. Thus we are satisfied that the finding is not vitiated by any error of law or procedure, which could justify interference therewith in second appeal, and being based on legal evidence the finding must be accepted as conclusive.

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Next as regards custom. The plaintiffs' argument is that the clause in the *wajib-ul-arz,* exhibit 6, which refers to new tenants applies to the case. This clause provides that the landlord has a right to eject new tenants whenever he likes. We are of opinion that the clause in question has no application to the defendants' case. Our reading of the clause is that it refers to tenants who are admitted to the occupation of existing shops or houses. The finding of the lower appellate court, which we have just accepted, shows that the defendants were not admitted to the tenancy of any existing shop or house, but were allowed to build new shops and houses on the ruins of old shops and houses. The *wajib-ul-arz* makes no provision as regards the terms on which such persons are to hold the shops and houses constructed by them. The plea based on custom must therefore fail.

Next, as regards the provisions of the Transfer of Property Act, it has been argued that as a monthly rent was provided in exhibit B-1, therefore the tenancy must be deemed to be a monthly one under section 106 of the Transfer of Property Act. It was also argued that the lessees may at best remove the constructions made by them under clause (*h*) of section 108 of the Transfer of Property Act. The opening words of section 106 are: "in the absence of a contract or local law or usage to the contrary". Exhibit B-1 shows that the lessor realised a cash *nazrana* of Rs.20 when he granted the defendants permission to build shops on the plots in suit, and it was further agreed that the lessees would pay rent at the rate of 11 annas per month. The terms of this document coupled with the defendants' oral

evidence leave no doubt in our mind that the lease was one for building purposes, and that the rent reserved was only in the nature of ground rent. In such circumstances we are of opinion that the tenancy should be presumed to be of a permanent nature. In *Sitara Shahjahan Begam* v. *Munna* (1) it was held that if the origin and the nature of a tenancy is not known and if it is proved that land was let for building purposes and a building was actually constructed on it, and remained in occupation of the lessees for a long number of years, these facts, in the absence of anything pointing to the contrary conclusion, should be enough to lead to the presumption that the tenancy was a permanent one. In *Rungo Lal Lohea* v. *Wilson* (2) certain lands were held under a *patta*, which, though not expressly stated to grant a permanent lease, was granted for the purpose of constructing "a brick-built dock, buildings, etc. and workshops". The works were constructed; and during a period of 42 years the interest of the lessees was from time to time transferred without any conduct on the part of the lessors or their successors indicating that they regarded the interest of the lessees as not permanent. It was held that the tenure created by the *patta* was of a permanent nature. Similarly in *Promada Nath Roy* v. *Srigobind Chowdhry* (3), it was held that in the case of a lease for building purposes the Court could presume that the lease was intended to be permanent. In the present case we know the origin of the lease, but there is nothing in the terms of exhibit B-1 to suggest that the lessor had a right to eject the lessees at will. The defendants made constructions estimated by the lower appellate court to be worth about Rs.2,000. They have been in existence for over thirty years without any attempt by the lessor to enhance the rent or eject the lessees during this period. We think, taking all the circumstances into consideration, that the

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(1) (1927) A.I.R., All., 342. (2) (1898) I.L.R., 26 Cal., 204.
(3) (1905) I.L.R., 32 Cal., 648.

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tenure on which the land is held by the defendants should be presumed to be of a permanent nature.

It was also argued that Raza Quli Khan as one of the co-sharers could not have granted the lease without the consent of the other co-sharers, and that in any case the lease was invalid for want of registration. We are inclined to agree with the lower appellate court that the defendants having been allowed to remain in possession for more than twelve years they must be deemed to have acquired a good title to hold the land as lessees by adverse possession for more than twelve years.

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Lastly, reliance was placed on the judgment of this Court in a litigation between the same parties relating to the shop No. 3 in this bazar. It was held in that case that the plaintiffs were entitled to eject the defendants from the said shop. It has been argued that the decision in that case operates as *res judicata* in the present suit. We are clearly of opinion that the argument has no substance. The title under which shop No. 3 was held by the defendants was not the same as the title under which the defendants claimed to hold the shops in dispute in this case. It is, therefore, clear that the parties are not litigating in the present suit under the same title under which they litigated in the former suit. The plea of *res judicata* must, therefore, be overruled.

We are accordingly of opinion that the lower appellate court was right in disallowing the plaintiffs' claim for the ejectment of the defendants. It has, however, dismissed the plaintiffs' claim for arrears of rent also. No reason has been given for this. The learned counsel for the defendants also is unable to support the lower appellate court's order dismissing the claim for arrears of rent. It is not disputed that rent has not been paid from October, 1930. We are, therefore, of opinion that the plaintiffs are entitled to a decree for Rs.24-12 claimed for arrears of rent.

The result therefore is that we allow the appeal in part, and decree the plaintiffs' claim for Rs.24-12 together

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with interest thereon at 6 per cent. per annum from the date of suit till realisation. Parties will receive and pay costs in proportion to their success and failure in all the courts.

Appeal partly allowed.

REVISIONAL CRIMINAL

Before Mr. Justice H. G. Smith

1936 September 9

SHEO BALAK SINGH (COMPLAINANT-APPLICANT) *v.* SANT BAKHSH SINGH (OPPOSITE-PARTY)*

Criminal Procedure Code (Act V of 1898), sections 202, 203 and 436—Complaint before Sub-Divisional Magistrate—Enquiry under section 202—Complaint transferred to Special Magistrate—Special Magistrate, if can examine witnesses under section 202 again and dismiss complaint—Power of Sessions Judge to direct further enquiry.

If the complaint is transferred at the very outset by one Magistrate to another, the latter has power to take action under sections 202 and 203 of the Code of Criminal Procedure; but it is impossible to suppose that the Code contemplates that when one Magistrate has examined witnesses under section 202 and has believed them, and thereupon transfers the case for trial to a subordinate Magistrate, that Magistrate should have power to examine those same witnesses over again under section 202, and then proceed to dismiss the complaint under section 203 of the Code of Criminal Procedure.

Even assuming that the subrodinate Magistrate has power under the Code to take evidence under section 202 and to dismiss the complaint under section 203, Cr. P. C., further enquiry ought to be made into the complaint after summoning witnesses. Sessions Judge himself can, in such a case, order further enquiry under the provisions of section 436 of the Code of Criminal Procedure and it is not necessary for him to make reference to the High Court.

Dr. *Qutub Uddin*, for the applicant.

Mr. *Akhtar Husain*, for the opposite party.

SMITH, J.:—This is a reference by the learned Sessions Judge of Rae Bareli.

*Criminal Reference No. 33 of 1936, made by Mr. K. N. Wanchoo, I.C.S., Sessions Judge of Rae Bareli.