LETTERS PATENT.

Before Harries, C.J. and Khaja Mohamad Noor, J.

1939.

April, 17, 18, 25.

HAFIZ MUHAMMAD ZEYAUDDIN

v.

SHAIKH DARGAHAN.*

Landlord and Tenant—lease—tenancy of unknown origin —permanency, onus of proving, on whom lies—inference from proved facts, whether question of law—land in possession for over a hundred years—substantial kuchha structure—occupation without payment of rent—tenancy, whether permanent.

Where a tenant alleges that his interest is a permanent one, the onus of establishing such an interest lies on him.

Kamal Kumar Datta v. *Nanda Lal Dule*(1), followed.

An inference as to the nature of a tenancy from proved facts is a question of law.

Dhanna Mal v. *Moti Sagar*(2), followed.

The inference of permanency of a tenancy can only be drawn where the facts point irresistibly to such a conclusion. Where the facts are equally consistent with permanency or a tenancy at will, then permanency cannot be inferred; but where the facts are inconsistent with a tenancy at will and consistent only with a permanent tenancy, the permanency of the tenancy must legally be inferred.

Where, therefore, it was found that the origin of the tenancy was unknown, the tenants and their predecessors had been in possession of the land for over a hundred years and had built upon it a substantial structure consisting of mud walls and tiled roofs, which had been in existence for very many years, the landlord at no time objecting to the construction of this building, the land together with structure had been held by the tenant's family generation after generation without let or hindrance and no rent had ever been paid to the landlord:

*Letters Patent Appeal no. 3 of 1938, from a decision of Mr. Justice Wort, dated the 22nd February, 1938.

(1) (1928) I. L. R. 56 Cal. 738.

(2) (1927) I. L. R. 8 Lah. 573; L. R. 54 Ind. App. 178

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Held, that the tenancy was permanent.

Musammat Sitara Shahjahan Begam v. *Munna*(1) and *Pramatha Nath Das Bairagi* v. *Champa Dasi*(2), followed.

Kamal Kumar Datta v. *Nanda Lal Dule*(3), distinguished *quoad hoc*.

Appeal by the plaintiff under clause 10 of the Letters Patent.

The facts of the case material to this report are set out in the judgment of Harries, C.J.

Sir Manmatha Nath Mukherji (with him *B. C. Mitra* and *Syed Ali Khan*), for the appellant.

Baldeva Sahay and *C. P. Sinha*, for the respondents.

HARRIES, C.J.—This is a Letters Patent appeal from a decision of Mr. Justice Wort in a second appeal reversing a decree of the lower appellate Court in favour of the plaintiff.

The suit out of which this appeal arises was brought by the plaintiff to recover possession of a small plot of land .11 acres in extent situate in the village of Shakranwan. According to the plaintiff, the land had been originally let to the defendants' predecessors upon the terms that it should be given up to the plaintiff's predecessors when the latter required it. In short, the plaintiff alleged a tenancy at the will of the landlord. According to the plaintiff's case, this tenancy had been determined by notice and accordingly possession was claimed.

The defence was that the tenancy was a permanent one, and, therefore, the plaintiff had no right to eject the tenant.

(1) (1927) 100 Ind. Cas. 479.

(2) (1928) I. L. R. 56 Cal. 275.

(3) (1928) I. L. R. 56 Cal. 738.

The trial Court held that the tenancy was permanent and dismissed the plaintiff's claim; but on appeal the lower appellate Court held that the tenancy was a tenancy at will and accordingly decreed the plaintiff's claim. In second appeal Wort, J. held that the tenancy was a permanent one and accordingly he reversed the decree of the lower appellate Court and restored the decree of the learned Munsif dismissing the claim in its entirety.

The origin of this tenancy is unknown. The lower appellate Court has found that the defendants' predecessors have been in possession of this land for over a hundred years and had built upon it a substantial structure consisting of mud walls and tiled roofs. This structure is found to be very old and must have been in existence for very many years. It is also found that possession of this land together with the structure thereon has been held by the defendants' family generation after generation without let or hindrance. No rent has ever been paid to the plaintiff and his predecessors for the said land and the latter has until the present proceedings made no attempt to eject the defendants or their predecessors. From these facts Wort, J. held that the inference to be drawn was that the tenancy was a permanent one. It has been argued before us that these facts do not support an inference of a permanent tenancy. It is clear that where a tenant alleges that his interest is a permanent one the onus lies upon him to establish such an interest. This is clearly laid down in the case of *Kamal Kumar Datta* v. *Nanda Lal Dule*(1). At page 741 Rankin, C.J. observed :—

" When a person claims to hold land as a tenant under a landlord it is for him to prove the existence, the nature and the extent of the interest which the owner of the full rights has granted to him."

(1) (1928) I. L. R. 56 Cal. 738.

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In the present case it is common ground that the defendants are tenants under the plaintiff, and it is for them to show the nature and the extent of the interest which they hold. This is conceded by Mr. Baldeva Sahay who appeared for the defendants.

As I have stated, the origin of this tenancy is unknown and the nature and the extent of the interest must be inferred from the facts which have been proved in this case. The inference to be drawn from the proved facts is not a question of fact but, on the contrary, is a question of law. This has been laid down by their Lordships of the Privy Council in the case of *Dhanna Mal* v. *Moti Sagar*(1). At page 185 Lord Blanesburgh observed:—

"They are well aware, moreover, that questions of law and of fact are often difficult to disentangle. It is clear, however, that the proper effect of a proved fact is a question of law, and the question whether a tenancy is permanent or precarious seems to them, in a case like the present to be a legal inference from facts and not itself a question of fact. The High Court has described the question here as a mixed question of law and fact—a phrase not unhappy if it carries with it the warning that, in so far as it depends upon fact, the finding of the Court on first appeal must be accepted. On these lines, which the High Court appear strictly to have observed, the appeal to that Court was competent, and it was in their Lordships' judgment open to the learned Judges there to entertain it as they did."

In that case the High Court had held in second appeal that an inference as to the nature of a tenancy from proved facts was a question of law, and their view was upheld by the Judicial Committee of the Privy Council. The case of *Dhanna Mal* v. *Moti*

(1) (1927) I. L. R. 8 Lah. 573: L. R. 54 Ind. App. 178.

Sagar(1) was discussed by a Bench of the Calcutta High Court in the case of *Kamal Kumar Datta* v. *Nanda Lal Dule*(2) where it was held that whether a long standing tenancy of unknown origin is permanent or not is an inference of law to be deduced from the facts proved in each case, it being on the tenant to prove the facts leading to such inference. The Bench further held that neither possession for generations at a uniform rent nor construction of permanent structure, in itself, can be taken as conclusive proof of permanent right.

It has been urged strenuously before us by Sir Manmatha Nath Mukherji that the facts of the present case are precisely similar to the facts in the case of *Kamal Kumar Datta* v. *Nanda Lal Dule*(2) to which I have referred, and it is contended that we should follow that case and hold that the facts proved in the case before us do not warrant an inference of permanent right. In *Kamal Kumar Datta* v. *Nanda Lal Dule*(2), Rankin, C.J. observed that each case must depend upon its particular facts, and in my view there is a clear distinction between the case before this Court and the case of *Kamal Kumar Datta* v. *Nanda Lal Dule*(2). In the latter case the land in question had been used for residential purposes for sixty years at least and the tenancy was nearly a hundred years old. The tenant and his family had held the land for generations at a uniform rate of rent which had never been enhanced. The buildings, however, on the land are described as mud huts, whereas in the present case the buildings, though of kachha construction, are very substantial and can in no way be described as mud huts. The learned Subordinate Judge accepted the report of the commissioner who had inspected the constructions and that report describes the buildings as consisting of twelve

(1) (1927) I. L. R. 8 Lah. 573; L. R. 54 Ind. App. 178.
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rooms and a shop with three verandahs and three courtyards. The roof of this building was tiled, and there were various signs in the building showing that it had been repaired from time to time with bricks. It is true that the building can be described as a *kachha one*, but the description given by the commissioner makes it clear that it was an extremely substantial kachha construction. There is, therefore, one very marked difference between the present case and the case of *Kamal Kumar Datta* v. *Nanda Lal Dule*(1). The question, therefore, arises whether the same inference must be drawn from the proved facts in the present case as was drawn from the proved facts in the Calcutta case.

In my view it is impossible to draw the inference that the tenancy in the present case is a tenancy at will or a tenancy determinable at short notice. It appears to me that the buildings which have been constructed on this plot and maintained by generations of this family are such that no one would have built if his tenancy was a precarious one. It must be remembered that the defendants' family were weavers and the family continued to ply that trade until to-day. They were certainly in the past humble folk who could not be expected to erect pakka constructions costing a considerable amount of money. The present buildings must have meant a very considerable outlay for people of this class and from the nature of the building I am bound to hold that the tenants built it because they knew that their interest in the land was secured and permanent. Had their interest been precarious, it is inconceivable that a building of this kind would have been erected by them.

The facts, as proved, show that the landlord never at any time objected to the construction of this

(1) (1928) I. L. R. 56 Cal. 738.

very substantial building, and though it is common knowledge that the value of land in villages has risen considerably they never made any attempt to obtain any rent from these tenants.

It has been argued that the fact that no rent was paid for this land strongly suggests that the tenancy was a tenancy at will. The fact that no rent is payable is entirely consistent with a tenancy at will; but a tenancy at will cannot be inferred when it is known that the tenant who was paying no rent constructed such a substantial building as that which stands on this land. Failure to demand rent may be due to the inactivity or kindliness of the landlord; but there is nothing in this case to suggest that the landlord was either inactive or kindly disposed towards the defendants. The learned Munsif found as a fact that the plaintiff and his father had been extremely vigilant and had dispossessed the tenants of their kasht land. The lower appellate court makes no reference to this finding and, therefore, I do not base my decision upon it. However, it is clear that there is nothing in the findings of the lower appellate Court to suggest that failure to demand rent was due to anything other than the fact that no rent was payable for this land. The fact that land with a house upon it has been held for many years at a uniform or nominal rent has frequently been relied upon to support an inference of a permanent tenancy of land. In my view the fact that for a hundred years no rent has been demanded or paid is equally good ground for inferring a permanent tenancy, particularly when it is found that the land together with the buildings upon it has devolved from generation to generation of the same family.

It has been strenuously argued that an inference of a permanent tenancy should not be drawn even where substantial buildings have been erected unless

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such buildings are of pakka construction. Had the present buildings been pakka, the case would have been beyond all argument; but in my view the true test is not whether the buildings are pakka but whether the buildings are of a substantial nature. In *Kamal Kumar Datta* v. *Nanda Lal Dule*(1) the question whether the existence of pakka buildings are necessary to support an inference of permanency was discussed by Rankin, C.J. At page 745 he stated:

"In *Abdul Hakim Khan Chowdhury* v. *Elahi Baksha Saha*(2) Chakravarti, J., as a result of his analysis of previous decisions, considered that the absence of permanent pucca buildings on the land would ordinarily be fatal to a claim for permanency. What I think he meant by this statement was that unless permanent pucca buildings existed on the land the tenant would not as a rule be able to point to anything more than matters which can be explained by the reluctance of a landlord to eject a reasonable tenant, i.e., to point to any other element showing that the tenant's long occupation at a uniform rate of rent is unequivocally referable to a permanent right. In my opinion, it cannot be laid down that the existence of permanent structures is the only unequivocal or unambiguous fact for the purpose of an inference in favour of the tenant".

The necessity or otherwise of the existence of pakka structures to support an inference of permanency was also considered by Iqbal Ahmad, J. in the case of *Musammat Sitara Shahjahan Begum* v. *Munna*(3). According to the learned Judge, a pakka building is a building more permanent than a kachha one, but a mere difference in the degree of permanence could not alter the nature of the tenancy. The fact that a kachha house had been in existence for a period

(1) (1928) I. L. R. 56 Cal. 738.
(2) (1924) I. L. R. 52 Cal. 43.
(3) (1927) 100 Ind. Cas. 479.

of more than sixty years and had passed by succession to the heirs of the lessee who originally built the house, might be enough to lead to the presumption that the lease was a permanent one.

In the case of *Pramatha Nath Das Bairagi* v. *Champa Dasi*(1) a Bench inferred that a tenancy was a permanent one though there was no evidence that there had ever been any pakka building or structure erected on the land.

As I have stated earlier, each case must depend upon its particular facts. Normally the existence of unsubstantial kachha structures would not lead unequivocally to an inference of permanency; but where it is found that the structures, though kachha, are of a most substantial nature and are such as no poor man would be likely to build upon land unless his interest in the land was secured, then an inference of permanency is the only one which can be drawn. The inference of permanency can only be drawn where the facts point irresistibly to such a conclusion. Where the facts are equally consistent with permanency or a tenancy at will, then permanency cannot be inferred; but where the facts are inconsistent with a tenancy at will and consistent only with a permanent tenancy, the latter is the only inference which can be drawn and the permanency of the tenancy must legally be inferred. In my judgment the facts of the present case unequivocally and irresistibly point to a tenancy of a permanent nature, and that being so, I hold that the decision of Wort, J. is right and must be affirmed.

I would, therefore, dismiss this appeal with costs.

KHAJA MOHAMAD NOOR, J.—I agree.

Appeal dismissed

S. A. K.

(1) (1928) I. L. R. 56 Cal. 275.