PRIVY COUNCIL.

Before Lord Phillimore, Lord Sinha, Lord Blanesburgh and Lord Salvesen.

DHANNA MAL AND OTHERS—Defendants

versus

MOTI SAGAR—Plaintiff.

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March 3.

P. C. Appeal No. 110 of 1925.
(High Court Civil Appeal No. 924 of 1918.)

Landlord and Tenant—Permanency of Tenancy—Jurisdiction in second Appeal—Decree for Enhancement of Rent—Res Judicata—Continued Payment of Enhanced Rent—Code of Civil Procedure, Act V of 1908, sections 11, 100, 101.

The landlord of a plot of bazar land in Delhi sued to eject the tenants, who pleaded that the tenancy was permanent. The tenancy had been created in 1871 at Rs. 12-8-0 rent *per mensem*, and there was no admissible evidence as to its terms. The tenants had erected buildings on the land. In a suit for enhancement of the rent brought in 1906, in which the tenants had pleaded that the tenancy was permanent, a District Judge had decreed an enhanced rent of Rs. 25 *per mensem*, but he arrived at no final conclusion whether the tenancy was permanent, as he expressed the view that that question was not material. Since that decree the enhanced rent had been paid.

Held, (1) that a finding by the District Judge in the present suit that the tenancy was permanent was not binding upon the High Court in second appeal under the Code of Civil Procedure, 1908, sections 100, 101, as the question was one of the proper inference in law from the facts as found ;

(2) that the nature of the tenancy was not *res judicata* by the decree in the suit of 1906 ;

(3) that having regard to the continued payment of the enhanced rent, which was inconsistent with the tenancy being permanent, and to other facts of the case, the tenancy was not permanent ; and that the High Court had rightly made a decree for ejectment, recognizing however the tenants' right to remove their buildings.

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Appeal by special leave from a decree of the High Court, made by Broadway and Abdul Qadir JJ., dated March 17, 1922, reversing a decree of the District Judge of Delhi, dated December 18, 1917, which reversed a decree of the Subordinate Judge of Delhi.

The respondent as ground landlord of a plot of land in Sadar Bazar Cantonment, Delhi, brought the present suit in 1915, to eject the appellants, the tenants, after notice. The defendants pleaded, among other defences, that the tenancy was permanent.

The facts appear from the judgment of the Judicial Committee. It may be added that the buildings which had been erected by the original tenants having been destroyed by fire in 1911, buildings (existing at the date of the suit) were erected after the landlord had given the tenants written notice that their holding was temporary and that they were not entitled to erect buildings.

The Subordinate Judge decided all the issues material to the present appeal in favour of the plaintiff, made a decree for ejectment, and ordered that the defendants should remove their buildings within a year.

On appeal to the District Court the decree was reversed and the suit dismissed. The District Judge, inferring that the land had been let for the purpose of building, and regarding the origin of the tenancy as unknown, held that the tenancy was to be presumed to have been permanent. He dismissed the suit.

On a second appeal to the High Court the decree of the Subordinate Judge was restored, subject to a modification, stated at the end of the present judgment, as to the buildings.

The defendants were out of time in applying for a certificate to enable them to appeal to the Privy Council but obtained from the Judicial Committee special leave to appeal.

1926, *Nov.* 5, 8.—*DeGruyther K. C.*, *Wallach* and *Ali Afzar*, for the appellants. Having regard to the facts that the land was let for the purpose of building, and the long period during which the tenancy

has continued, it should be presumed that the tenancy was permanent: *Afzal-un-nisa* v. *Abdul Karim* (1), approving *Casperz* v. *Kader Nath Sarbadhikari* (2). [Reference was also made to *Dunne* v. *Nobo Krishna* Mookerjee (3); *Barada Prosad Barman* v. *Prasanno Kumar Das* (4); *Ismail Khan* v. *Jaigun Bibi* (5); *Promada Nath Roy* v. *Srigobind Chowdhry* (6); *Muhammmad Alam* v. *Ajab* (7); *Karim Bakhsh* v. *Balak Ram* (8)]. Though the High Court was entitled to draw inferences of law, they were bound by the findings of fact in the District Court, including the finding that the land was let for building purposes.

Dunne K. C., *Sir George Lowndes K. C.* and *Dube*, for the respondent. There was no evidence that the land was let for building purposes. The District Judge merely inferred that from the fact that the land was bazar land. The question whether the tenants had established that the tenancy was permanent was one of inference of law from the facts; the High Court had jurisdiction in second appeal: *Nafar Chandra Pal* v. *Shukur Sheikh* (9). The tenancy was not of unknown origin, as it was not one as to which evidence could not be produced to prove the terms. Having regard to the payment of rent at an enhanced rate, and other facts of the case, a permanent tenancy was not proved: *Ram Ranjan Chakerbati* v. *Ram Narain Singh* (10), *Upendra Krishna Mandal* v. *Ismail Khan Mahomed* (11), *Nilratam Mandal* v. *Ismail Khan Mahomed* (12), *Seturatnam Aiyar* v.

(1) (1919) I. L. R. 47 Cal. 1. L. R. 46 I. A. 131.
(2) (1901) I. L. R. 28 Cal. 738.
(3) (1889) I. L. R. 17 Cal. 144.
(4) (1912) 16 Cal. W. N. 564
(5) (1900) I. L. R. 27 Cal. 570
(6) (1905) I. L. R. 32 Cal. 648.
(7) 34 P. R. 1882.
(8) 112 P. R. 1886.
(9) (1918) I. L. R. 46 Cal. 189: L. R. 45, I. A. 183.
(10) (1894) I. L. R. 22 Cal. 533: L. R. 22 I. A. 60.
(11) (1904) I. L. R. 32 Cal. 41: L. R. 31 I. A. 144.
(12) (1904) I. L. R. 32 Cal. 51: L. R. 31 I. A. 149.

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Venkatachala Gounden (1). In *Afzal-un-nisa* v. *Abdul Karim* (2) the landlord had given receipts which admitted that the tenancy was permanent.

By the decree for enhancement of rent in the suit of 1906 it was *res judicata* that the tenancy was not permanent; the view of the District Judge in that suit that an enhancement was consistent with a permanent tenancy was erroneous.

DeGruyther K. C. in reply. If under the former decree there was any *res judicata* it was that the tenancy was permanent. The District Judge so found and there was no appeal. The cases relied on for the respondent relate to agricultural land, to which different considerations apply.

The judgment of their Lordships was delivered by:—

LORD BLANESBURGH—This suit relates to a plot of land about 2,250 square yards in area situate in the Sadar Bazar in Delhi. The land belongs to the respondent. At the commencement of the suit it was in the occupation of the appellants at a rent of Rs. 25 per mensem. The buildings upon the land are the property of the appellants. The suit by the respondent as plaintiff is a suit in ejectment and for arrears of rent. The great question between the parties is as to the nature of the appellants' interest in the land. Were they, as the respondent contends, mere tenants at will, or, as they themselves assert, are they entitled to a permanent inheritable right therein subject to the payment of a fixed rent?

The Subordinate Judge of Delhi decreed the suit. On appeal by the defendants the District Judge of

(1) (1918) I. L. R. 43 Mad. 567: L. R. 47 I. A. 76.

(2) (1919) I. L. R. 47 Cal. 1: L. R. 46 I. A. 131.

Delhi dismissed it. On the 17th March, 1922, the High Court of Judicature at Lahore, on second appeal by the plaintiff, reversed the decree of the District Judge and restored that of the Subordinate Judge, with a modification relating to the buildings on the land, to which their Lordships will refer later. This appeal to the Board is against the decree of the High Court. The appellants ask that the order of the District Judge be restored and that the suit against them be dismissed.

The appeal was elaborately argued before the Board, and the questions involved are very fully discussed in the judgments of the Courts in India. As a result, the effective issues are now reduced in number and simplified in character, and they can be dealt with by their Lordships, as they hope, with comparative brevity. It will be convenient at once to clear away certain matters preliminary in character which were much discussed in the Courts below.

The land in question had been let in or about the year 1871 by one Karim Bakhsh to a firm of Jais Raj and Khem Raj. The respondent is the successor in interest of Karim Bakhsh, and the appellants are the successors in interest of the firm. With a view of establishing that the appellants had become mere tenants at will of his, the respondent tendered in evidence at the trial a declaration, dated the 10th September, 1871, signed by one Ghasi Ram, Gumashta and manager of the firm, purporting to set forth the terms of the tenancy of the land which on that day had been granted to the firm by Karim Bakhsh. The authenticity and authority of the declaration have not been proved, but its reception in evidence was objected to *in limine* by the appellants on the ground that the declaration was, or purported to be,

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a lease or counterpart of a lease which, under section 17 of the Indian Registration Act, had to be, and had not been, registered. This objection was upheld by the trial Judge and by both of the higher Courts in India. Their Lordships are in entire agreement with all the learned Judges on this point. The declaration, in their view, being unregistered, cannot, even if proved, be receivable in evidence in this suit. Accordingly, they dismiss from their minds both the declaration and its contents.

Up to March, 1904, the rent paid for the land by the tenants had been Rs. 12-8-0 per mensem. In that month the respondent's father, who had by purchase become the ground landlord, served the then tenants—in substance, the present appellants—with notice requiring them to pay an enhanced rent of Rs. 25 *per mensem* or vacate the land, and on the 9th January, 1905, filed a suit against them in the Court of the Subordinate Judge at Delhi claiming to recover arrears of rent at that rate of Rs. 25. This claim the defendants resisted, setting up, in terms to which their Lordships will later refer, a tenancy which had not then expired, and which, for present purposes only, may, without prejudice, be conveniently enough described as a permanent tenancy.

This suit was on the 16th January, 1906, decreed by the Subordinate Judge. He held that the tenancy was not a permanent one, and that the plaintiff was entitled to enhance the rent to the extent which he claimed. From that decree the defendants appealed to the Divisional Judge. In the course of his judgment on the appeal, that learned Judge stated that on the question whether the tenancy was permanent or not he was disposed to differ from the view of the lower Court. He went on, however, to say, that in his

view, it did not follow from the fact of the tenancy being permanent that the rent could not be enhanced, and he agreed with the lower Court in thinking that it should. Accordingly he affirmed the decree and dismissed the appeal. Thereupon an application for review of his order was made by the plaintiff on the ground that, although the decree was in his favour, the learned Judge had held that the defendants were permanent tenants, and that he had so held owing to a misapprehension of counsel's argument upon the subject. The Divisional Judge refused this application for review, while acknowledging that he had apparently misunderstood the argument addressed to him by the plaintiff's counsel. He stated that in the circumstances he would have been prepared to allow the application if he had thought that it lay. In his judgment, however, such an application could only be made by a person aggrieved by a decree, and he added that it could not possibly be said in that case that the granting of a decree

> "for enhancement of rent implies that the defendants are permanent tenants. If the decree could be said to involve any implication at all as to the nature of the tenancy, the implication would be the other way, namely, that the tenancy is not permanent. It is only the judgment by which the plaintiff is aggrieved. He is in no way aggrieved by the decree, and, therefore, he cannot apply for a review."

In the result the enhanced rent was decreed. No appeal against the order decreeing it was made by the defendants, and that rent has been paid by the tenants ever since.

Both parties now claim this decree as a *res judicata* in their favour. The appellants rely upon it as a pronouncement unappealed from and binding upon the respondent that their tenancy is permanent. The respondent relies upon it as a decree, now binding,

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that the tenancy is one with respect to which an order enhancing the rent can in proper circumstances be made, and that such a tenancy, whatever else it may be, cannot be a permanent tenancy.

Both of these contentions have been rejected by the Courts in India, and again their Lordships are in complete agreement with the learned Judges in this conclusion. It is impossible, in their Lordships' judgment, as a matter of ordinary fairness—to go no more deeply into the question—that after the plaintiff's application for review was refused for the reason given the previous expression of opinion of the District Judge that the tenancy was permanent could be relied upon by the defendants for any purpose whatever. The learned Judge, treating his pronouncement as entirely irrelevant, must be taken to have withdrawn it as the expression of a concluded opinion. For similar reasons the learned Judge's decree affirming the enhancement of rent, however unjustifiable in point of law it was, if the tenancy were really permanent, cannot, their Lordships think, be treated as a pronouncement binding as between these parties that the tenancy was not permanent.

The order enhancing the rent is, however, not without importance in the present litigation. The defendants, if their contention that the tenancy was permanent had been well founded, could have had that order discharged on appeal. They did not appeal, and they cannot now be heard to say that a less rent than the Rs. 25, which they have since paid without protest, was alone properly payable. It may well be that neither party to the 1905 litigation was eager to put prematurely to the test the question so stoutly litigated in the present proceedings, but, as is shown by the plaintiff's application for review, and

by the defendants' submission, without appeal, to pay an enhanced rent, the hesitation on the part of the defendants was in this matter more pronounced than the reluctance of the plaintiff. The actual increase of rent was not a very serious matter, and it is not improbable that the defendants were content to submit to it, accompanied as it was by the District Judge's provisional expression of opinion favourable to their main contention, rather than risk an appeal, the result of which might have deprived them of that opinion for whatever it was worth. Their Lordships are unable to appreciate the contrary reasoning in this matter of the learned District Judge.

A third question, more formidable in character, must be disposed of before their Lordships further proceed. The learned District Judge, on appeal here, dismissed the respondent's suit, finding that the appellants' tenancy was permanent. It is thereupon contended by the appellants that this finding was one of fact by the learned Judge not open to review either by the High Court on second appeal or by this Board.

Now their Lordships would be the last to seek to abridge the effect of sections 100 and 101 of the Code of Civil Procedure or weaken the strict rule that on second appeal the appellate Court is bound by the findings of fact of the Court below. 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

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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.

With the actual conclusion of the High Court their Lordships find themselves in agreement. They have heard in argument nothing which would lead them to disturb these findings, and it would be unprofitable again to discuss at length all the circumstances which influenced the learned Judges in the matter.

Their Lordships will refer only to three outstanding things which have deeply impressed them. The first is the sale deed of the 23rd August, 1885—the only transaction of the kind that has taken place—by which Lachman Das, the then proprietor of the tenant firm, sold for Rs. 4,000 to Lala Mul Chand, the firm's entire interest in the *amla* then erected on the land and in the land itself. The assurance of the *amla* is absolute: the vendor's covenants for title are unqualified. As to the land, however, the vendees are to be responsible for loss or damage which might be caused to them in case the owner of the land raises a dispute or sets up a claim against them: the vendor is to have no concern therewith. This reserve, so soon after the original letting, strikes their Lordships as highly significant.

The Board also is struck with the terms of the written statement put in by Mul Chand and the other defendants in the 1905 proceedings. There is no proper allegation of a permanent tenancy there set up. The allegation is that the plaintiff is not en-

titled to enhance the rent so long as the defendants' building stands on the land : the plaintiff cannot eject the defendants so long as the building in question exists. In a statement on the defendants' behalf the allegation is that at the time of the erection of the building there was an oral agreement between the proprietors of the land and the defendants' predecessors in title that they would pay a fixed rent of Rs. 12-8-0 so long as the house to be erected was in existence. That is all. How far these pleas, even if they had been proved, were consistent with any permanent tenancy after the destructive fire of 1911 has not been investigated.

Lastly, their Lordships cannot get over the continued payment of the enhanced rent of Rs. 25 *per mensem* ever since the decree in the 1905 suit. It is not now in contest that such an enhancement of rent is entirely inconsistent with the notion of a permanent tenancy, and the continued payment by the appellants of that rent is a circumstance from the serious import of which they cannot now escape.

On the whole case their Lordships, agreeing with the High Court, are of opinion that no permanent tenancy has here been established.

By the order of the High Court the present appellants were permitted to elect within a period of three months whether, in lieu of removing them, they would accept for the buildings on the land the sums of Rs. 23,480 offered therefor by the respondent. Their Lordships have not been informed whether this matter has been left in abeyance pending the decision of this appeal. If it has, it would be proper, they think, that the period of election should be extended for three months from the date of His Majesty's Order in Council. With that variation the order of

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the High Court should, in their Lordships' judgment, be affirmed, and this appeal be dismissed with costs.

And their Lordships will humbly advise His Majesty accordingly.

A. M. T.

Appeal dismissed.

Solicitors for appellants: *T. L. Wilson & Co.*

Solicitor for respondent: *H. S. L. Polak.*

APPELLATE CIVIL.

Before Mr. Justice Campbell and Mr. Justice Tek Chand.

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March 4.

CHANDA SINGH AND OTHERS (PLAINTIFFS) Appellants

versus

MST. BANTO AND ANOTHER (DEFENDANTS) Respondents.

Civil Appeal No. 2718 of 1923.

Custom—Ancestral property—Mention of name of common ancestor in settlement pedigree-table insufficient to prove property is ancestral—Succession—to non-ancestral property of adopter on death of the adopted son—Rule of Reversion—whether applicable—Kang Jats of mauza Burewal, District Amritsar.

The land in dispute belonged to one J. S., a *Kang Jat* of *mauza* Burewal in the Amritsar district, and on his death descended to L. S., his daughter's son, who had been duly appointed as the heir of J. S. On the death of L. S. the land was taken possession of by *his* daughters. Plaintiffs, who were the collaterals of J. S. (adopter) in the sixth degree, sued the daughters of L. S. (adoptee), alleging that the land was their ancestral property and on L. S. dying sonless it reverted to them. In support of their contention that the land was ancestral the only fact which the plaintiffs were able to prove was that the name of the common ancestor from whom they and J. S. (adopter) were descended, was mentioned in the pedigree-table prepared in the Settlement of 1865.

Held, that the plaintiffs had failed to prove that the property in dispute was ancestral, the mere mention of the name of the common ancestor in the settlement pedigree-