APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

BHAU MAHADU TORASKAR AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS *v.* VITHAL DATTATRAYA PENDHARKAR (ORIGINAL PLAINTIFF), RESPONDENT*.

1919. December 2.

Landlord and tenant—Hut built by tenant on lands demised for agricultural purposes—Conversion of the hut into a substantial building—Use of the building by the tenant for agricultural purposes—Conversion allowed.

A tenant, permanent or otherwise, of lands used for agricultural purposes, is entitled to erect even a substantial building for himself to live in and for agricultural purposes.

SECOND appeal from the decision of F. X. DeSouza, District Judge of Satara, confirming the decree passed by V. R. Guttikar, Subordinate Judge at Patan.

The plaintiff was owner of a piece of land which was used for agricultural purposes. The land was let out to the defendants for cultivation. The tenancy of the defendants was presumed to be permanent under section 83 of the Bombay Land Revenue Code, 1879.

The defendants had built a thatched hut or *chhappar* on a portion of the land, for themselves to live in. Subsequently, they took down the *chhappar* and constructed a substantial building on an extended area for their use.

The plaintiff objected to the new building and sued for a declaration that the defendant had no right to build on the land and for an injunction restraining the defendants from building the substantial house.

The lower Courts granted the declaration and injunction.

The defendants appealed to the High Court.

K. N. Koyajee, for the appellants :—The lower Courts have erred in supposing that erecting a pucca building

* Second Appeal No. 299 of 1918.

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where a kutcha hut once stood amounted to altering the character of the agricultural holding; and taking up some more space than before was also not illegal. Better housing is at the present day a crying need of the world everywhere and ought to be encouraged. The present pucca building is for agricultural purposes, such as residence in the fields for better watch and supervision and the keeping of cattle and agricultural implements. In *Shibdas Bandopadhya* v. *Ramandas Mukhopadhya*[1] and *Ramanadhan* v. *Zamindar of Ramnad*[2], cited by the learned Judge below, the buildings were erected for purposes alien to agriculture, and so they do not apply here.

S. R. Bakhale, for the respondent:—The lower Courts have held that the pucca building could not be and was not for agricultural purposes, and that is a question of fact. The present building is a dwelling house, and to reside in the fields is not an agricultural act. The custom in this part of the country has been to have huts in the cultivated fields and not pretentious pukka buildings.

MACLEOD, C. J.:—The plaintiff sued to get a declaration that the property in suit belonged to him, and that the defendants had no right to build on it, and prayed that the defendants might be ordered to remove their buildings on the suit property, and in default he might be allowed to remove the same. An issue was raised whether the defendants proved that they were *mirasi* tenants, and that was found in their favour. But the Judge came to the conclusion that they had no right to build on the plaintiff's ground, and gave the plaintiff the decree he had asked for.

In appeal the learned appellate Judge came to the conclusion that whether the defendants were *mirasi*

(1) (1871) 8 Beng. L. R. 237. (2) (1893) 16 Mad 407.

tenants or permanent tenants or annual tenants, the question with regard to the buildings was the same. He certainly pointed out that what the learned Judge in the trial Court really meant was that the defendants had become permanent tenants of the land under the presumption arising from section 83 of the Bombay Land Revenue Code, and such permanent tenants are not Mirasdars. But he confirmed the decree of the lower Court apparently on the ground that the defendants as tenants could not erect the building in question. That depends entirely upon the nature of the building, and both Courts apparently looked upon the nature of this particular building from the wrong point of view, and without proper reference to the previous history of the suit. On the land there was previously a thatched hut or *chhappar*. There were also *kuchha* huts which were put up by the predecessor of the defendant for the better cultivation of the land. The defendants pulled down the thatched hut or *chhappar*, and erected a new building on the site and also on a few feet of additional ground. No plan of this building was put in, but the evidence shows that the new building of stone, brick and mortar had a central court-yard and two *pucca* verandahs. The Judge came to the conclusion that it was far too ambitious to be used solely for storing implements, tethering cattle and other purely agricultural purposes, and judging from the standard prevailing in this part of country it was probably meant as a dwelling house. Then he considered that the law seems to have been well-settled that no tenant in this country is at liberty to erect a dwelling house upon agricultural holdings for other than agricultural purposes and thereby to alter the character of the holding.

That may be perfectly correct. But a tenant might well be allowed to erect a building on his holding in order that he may live there himself, and that is

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certainly the law in England, and I cannot see if the defendants in this case pulled down the *chhappar* or hut and utilized the space and a small additional space for buildings where they themselves would live when they wanted to be on the land for cultivation purposes, that it was contrary either to the provisions of the Transfer of Property Act which could only be applied by analogy, or to any other law that I am aware of.

The head-note of the case of *Ramanadhan* v. *Zamindar of Ramnad*[a] shows that the Zamindar sued for an injunction to compel the defendant, who held agricultural lands comprised in the Zamindari with occupancy rights, to demolish a dwelling house which he had erected thereon for purposes not connected with agriculture.

Apart from that, the customs of the country may vary in different districts. It may be the custom in one district that the agriculturists should all live in the villages and that no building could be erected in the land. In other districts it may be the custom for agriculturists to erect buildings on the land in order that they may stop there during the cultivating season. That is what has happened in this case. The only ground on which the judgment can be supported would be that this building was of such a substantial character that it was far too good to be used for agricultural purposes. But that is not the question. If it is put up for agricultural purposes, it does not matter how much the builder had spent on it. The plaintiff has not been able to show that this building erected on the old site could not possibly be used, and would not be used, for agricultural purposes, and he would have to prove that before he could possibly succeed. In my opinion the order of the lower appellate Court was wrong. The appeal must be allowed and the suit dismissed with costs throughout.

(a) (1893) 16 Mad. 407.

HEATON, J.:—I also think the suit must be dismissed with costs throughout. After reading both the judgments of the Courts below I find myself unable to understand why the claim was allowed. It seems that the plaintiff is the landlord and the defendant is his tenant and according to the assumption of the first appellate Court, which we must accept at least for the purposes of the argument, the defendant is a permanent tenant. He is not a Mirasdar in the sense of a person who possesses the occupancy rights. He is only a tenant, though a permanent one, and he is an agricultural tenant. He had huts on the land. He has replaced those huts by a substantial permanent structure which covers apparently very much the same area that was covered by the former huts including the small intervals between them. But I understand from the judgments or from the actual measurements given in the judgment of the lower appellate Court that this substantial building does not cover an area so large that it would justify any one in saying that it was there not for agricultural purpose, but for some other purpose. Nevertheless the Courts came to the conclusion that plaintiff, the landlord, is entitled to have this permanent structure removed because, so far as I can make out, it is a dwelling house. It is too good to be merely a place for housing cattle, keeping agricultural implements and so forth. But for a man to build a dwelling house on land which he cultivates is not contrary to any agricultural purpose. As a matter of fact agriculture, speaking generally, is facilitated by residence on or very near to the land which is cultivated. It can be better conducted by a farmer who lives in that way than by one who lives at a considerable distance away in the village site. It is not shown in the judgments, it is not even suggested, that this substantial structure which the defendant put up was put up not in order that he might live there and conduct

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his agricultural work from there, but for some other purpose of profit. So the impression remains, whether it was intended or not, that both the Judges in the Courts below have decided that the plaintiff's right to remove the structure arises from the circumstance that it is a dwelling house and not a shed. It seems to me that to hold that for a farmer to build a dwelling house on a portion of his agricultural land for his own residence, and in such a way as to facilitate his agricultural work, is necessarily contrary to the intention of an agricultural tenancy, is to come to a very remarkable and an unreasonable decision. I am unable, therefore, to find that the orders made by the lower Courts follow from the facts which they have found, and I think that this appeal as proposed must succeed and that the suit must be dismissed with costs.

Appeal allowed.

R. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

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December 5.

TAHRAMIYA WALAD PIRASAHEB PATAYIT AND ANOTHER (ORIGINAL DEFENDANTS NOS. 19 AND 24), APPELLANTS *v.* SHIBELISAHEB WALAD FAKIRSAHEB DUNGE AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS NOS. 1 TO 3, 23 AND 25), RESPONDENTS[*].

Indian Limitation Act (IX of 1908), Schedule I, Articles 134 and 148—Mortgage—Transfer from mortgagee—Suit for redemption—Mortgagor's right of redemption not defeated by reason of mortgagee's transfer.

In 1882, certain lands were mortgaged with possession by the plaintiff's father. In 1883, the mortgagee mortgaged the lands to the predecessor-in-title of the defendants representing himself as absolute owner. In 1916, the plaintiff having sued for redemption, the defendants contended that the suit was barred under Article 134 of the Limitation Act, 1908.

[*] Appeal from Order No. 49 of 1918.