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no longer before that Court. It is different, where the appeal in the Appellate Court is one against the decree which is sought to be executed by the Court which made the decree in the first instance; for the appeal from the decree and the execution of the decree are, according to our procedure, treated as two [737] separate cases, and, whilst the appeal from the decree is pending before the Appellate Court, the proceedings in execution of the decree may go on before the First Court, which made the decree. There, therefore, special provision was needed to empower the Appellate Court, to stay execution; and such provision is to be found in s. 545 of the Code. Here, as I have pointed out above, the very case in which the decree is being executed, being before the Appellate Court, the Appellate Court has the power to stay execution in the same manner as the First Court, if the First Court had such power; and that the First Court has the power to stay execution of a decree is clear from clause (*c*) of s. 244 of the Code of Civil Procedure. On this ground, then, I think it clear that this Court has the power to order stay of execution in this case. It is, therefore, unnecessary to consider whether, s. 545, read with s. 647 of the Code of Civil Procedure, does not give the Appellate Court the same power. A Full Bench of the Allahabad High Court in the case of *Har Sankar Pershad* (1) held that the Appellate Court, in a case like the present, had power, under s. 338 of Act VIII of 1859 and s. 38 of Act XXIII of 1861, to stay execution; and the provision of law, just referred to correspond to s. 545, read with s. 647 of the present Code. But our attention has been called to the case of *Jadoo Monee Dasee* (2) in which a Division Bench of this Court took a different view. If it had been necessary to decide whether, under s. 545 read with s. 647, of the present Code, the Appellate Court has power to stay execution in a case like the present, perhaps, it would have been necessary to refer the matter to a Full Bench; but in the view we take it becomes unnecessary to go into that question.

Rule made absolute.

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[738] *Before Sir Francis W. Maclean, K.C.I.E., Cheif Justice and Mr. Justice Banerjee.*

A. CASPERSZ (*Plaintiff*) *v.* KADER NATH SARBADHIKARI AND OTHERS (*Defendants*).* [12th July, 1901.]

Landlord and tenant—Suit for ejectment—Tenancy, origin of which not known—Presumption as to a tenancy being a permanent one—Long possession, transfer of the holding by succession and purchase, erection of pucca buildings with the permission of the landlord, by successive tenants, whether sufficient for a presumption that the tenancy is a permanent one.

Although the origin of a tenancy may not be known, yet if there is proved the fact of long possession of the tenure by the tenants and their ancestors, the fact of the landlord having permitted them to build a *pucca* house upon it, the fact of the house having been there for a very considerable time, of it having been added to by successive tenants, and of the tenure having from

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* Appeal from Appellate Decree No. 210 of 1899, against the decree of T. W. Richardson, Esq., District Judge of 24-Parganas, dated the 30th of September 1898, modifying the decree of Babu Sasi Bhusan Chowdhury, Munsif of that district, dated the 22nd March 1898.

(1) (1876) I. L. R. 1 All. 178. (2) (1869) 11 W. R. 494.

time to time been transferred by succession and purchase, in which the landlord acquiesced or of which he had knowledge, a Court is justified in presuming that the tenure is of a permanent nature.

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THIS appeal arose out of a suit brought by the plaintiff to eject the defendants from certain premises in Kidderpore. The allegations of the plaintiff were that the defendants Nos. 1 and 2, who held the premises, were merely tenants-at-will and had no transferable interest therein; that defendant No. 3 by his purchase acquired no title in the said premises, and that notice to quit was served upon the defendants Nos. 1 and 2. The defendants Nos. 1 and 2 did not appear and contest the suit, but the defence of defendant No. 3 mainly was that the notice was invalid, that the tenancy was a permanent one by express as well as by implied grant, and that the plaintiff was estopped from asking for *khas* possession. It appeared that the defendant produced a *pottah* in support of his case, but the said document was found by both the Courts below not to be genuine. The Court of First Instance **[739]** having held that the tenure was a permanent one, dismissed the plaintiff's suit. On appeal the said decision was affirmed, by Mr. T. W. Richardson, Additional District Judge of 24-Perganas. Against this decision the plaintiff appealed to the High Court.

JULY 11 & 12—Mr. *O'Kinealy* and Babu *Uma Kali Mookerjee*, for the appellant.

Babu *Nil Madhub Bose* and Babu *Shib Chundra Palit*, for the respondents.

JULY 12. MACLEAN, C. J.—This is a suit for ejectment. The defence is that the defendants are not liable to be ejected, as their tenure of the land in question is of a permanent nature. The matter comes before us on second appeal, and we are, thorefore, bound by the findings of fact of the Court below.

In support of their case the defendants first set up a *pottah*, which purported to show that the tenure was of a permanent nature. That document has been found by both the Courts below not to be genuine. But then the defendants say that, even if the *pottah* be not genuine, they have been for a very long time in possession of the land in dispute, that it has been from time to time transferred by succession and purchase from one tenant to another, that *pucca* buildings have, many years ago, been erected upon it by successive tenants, and that that has been done with the permission and knowledge of the landlord, and that, upon these facts, the Court would be justified in inferring or presuming that the tenure was of a permanent nature. To which the appellant replies that as the defendants in the first instance based their case upon a fraudulent *pottah*, it is not open to them to set up the alternative case upon which they now rely. I do not think this contention can properly prevail. When parties to a litigation set up a false document, as here, that circumstance no doubt induces the Court to view the evidence which they tender upon some other part of the case, with great care and possibly with some suspicion, but it does not prevent the parties from setting up such alternative case, nor prevent the Court from duly weighing and considering the evidence adduced in support of it. In this connection I may refer to the observations of their **[740]** Lordships of the Judicial Committee of the Privy Council in the case of *Ranee Surnomoyee* v. *Maharajah Sutteeschunder Roy Bahadoor* (1). The passage I refer to is at page 149 and runs

(1) (1864) 10 Moo. I. A. 123.

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thus: "When false witnesses or forged documents are produced in support of a case, the fact naturally creates suspicion as to the case itself; and if the evidence on which their Lordships' act depended in any decree for its credibility or weight on such witnesses, or document, they would have paused as to their conclusion." The fact is not so, however, in the present case; their Lordships believe they have to deal with a just cause, foolishly and wickedly attempted to be supported by false evidence." That disposes of the first point.

The second point is that, having regard to the language of para. 15 of the defence, this alternative case has not been sufficiently or properly pleaded. This, to my mind, savours of too much refinement, for it is reasonably clear that the defendants intended to raise this case, and it is equally clear from the second issue in the First Court, which runs as follows: "Whether the Adhikaries held the tenure as a permanent one either by express or implied grant; if so, is the suit maintainable?" that the plaintiff was aware that this case was raised and was in no wise misled by the pleadings. Moreover, evidence was gone into on the question without objection, and the appellants have not even raised this point as one of their grounds of appeal, and so it cannot be discussed without our permission. To my mind it is a mere afterthought, and there is nothing in it.

I now pass to the substantial question in the case, and, that is whether upon the facts found by the Court below, the Court was justified in presuming that the tenure was of a permanent nature. The Judge sums up the matter as follows: "In the absence of all documentary evidence, I must hold that the long possession of the vendor defendants and their ancestors, and the fact that the landlord permitted a *pucca* house to be built upon the land by the tenant, which house has stood for a very considerable time, raises the presumption that the original grant was some kind of permanent building grant." I must also refer to one or two other **[741]** passages in his judgment. He says "there can be no doubt on the evidence that the house on the land in dispute has been built by successive tenants," and a little earlier in relation to the question of transfer he says, "At any rate the landlord acquiesced, and it is admitted that, for at least two generations, the Sarbadhikaris have occupied the land as tenants of the estate, paying a rent which was increased at irregular intervals from Rs. 5 in 1239 to Rs. 18-10 in 1291." I may point out in passing that acquiescence is not a question of fact, but of legal inference from the facts found; and upon it the judgments of the Appellate Courts are not final (*see* I. L. R. 21 All. 504.) However, it has not been suggested that the inference *qua* the question of acquiescence was not in the present case well founded.

Upon these findings of fact it is urged that the Court below was not justified in presuming that the tenure was of a permanent nature. Now in substance what facts are found? We have the fact of the long possession by the defendants and their ancestors, the fact of the landlord having permitted them to build a *pucca* house upon it, that the house has been there for a very considerable time, that it has been built (this probably means added to) by successive tenants, and that the tenure has from time to time been transferred by succession and purchase, in which the landlord is found to have acquiesced, or of which he could not have been ignorant as he accepted rent from the transferees. In my opinion these facts are sufficient to warrant the Court in presuming that the

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tenure was of a permanent nature, and the authorities appear to me to support this view. I will first refer to the case of *Baboo Dhunput Singh* v. *Gooman Singh* (1), and the passage which I propose to read is at page 466: "And, upon the proof here given of long and uninterrupted enjoyment, accompanied by the recognition of its hereditary and transferable character, it is almost impossible to suppose that a suit by the zemindar in the Civil Court to disturb the possession of the respondent, could not be successfully resisted."

I now pass to the case of *Gungadhur Shikdar* v. *Ayimuddin Shah Biswas* (2). This case in its circumstances is not dissimilar [742] from the present; it is not suggested that the lands in the present case were let out for agricultural purposes and the Court said: "In this case we think there was quite sufficient ground to justify the Court below in presuming a grant of a permanent nature in favour of the defendants' ancestors. It is conceded that the land in question was never let for agricultural purposes. It was apparently let upwards of 60 years ago for building purposes, because it is found that after the grant (whatever it was) these buildings, which are of a substantial character, were erected some 60 years ago by the defendants' ancestors, and that they and their ancestors have lived there ever since. Under these circumstances, we think that the Courts below were at liberty to presume, if they thought fit, that the land was granted for building purposes, and that the grant itself was of a permanent character." In the present case we have the element of pucca buildings, built a very long time ago by the ancestors and predecessors in title of the defendants and apparently added to by successive tenants.

The case last cited virtually followed the case of *Prosunno Coomar Chatterjee* v. *Jagun Nath Bysack* and others (3), where this passage occurs: "No doubt, if land is let for building pucca houses upon it, or if the tenant with the knowledge of the landlord, does in fact lay out large sums upon it in buildings or other substantial improvements, that fact, coupled with a long-continued enjoyment of the property by the tenant or his predecessors in title might justify any Court in presuming a permanent grant, especially if the origin of the tenancy could not be ascertained." There I pause to observe that the origin of the tenancy has not been ascertained in the present case. If there were any document, a *pottah* for instance, which showed the original nature of the tenancy, very different considerations would arise. "But the mere circumstance of a tenant occupying buildings upon property would not justify such presumption, unless it could be shown that they were erected by him or his predecessors, because a landlord might let property of that kind in the same way as agricultural land, at will, or from year to year."

[743] There is only one other case, a recent case, that of *Ismail Khan Mahomed* v. *Jaigun Bibi* (4), which I need refer to in this connection. That was a regular appeal and the Court could go and did go into the evidence. There I find this statement of the law: "When the origin of a tenancy and the circumstances attending its creation are not known, evidence of the mode of dealing with the land demised and of the acts and conduct of the parties generally, constitutes the best and indeed the only evidence to prove the nature of the tenancy. If that had been the case, the evidence of the mode of dealing with the property, such as we

(1) (1867) 11 Moo. I. A. 433.
(2) (1882) I. L. R. 8 Cal. 960.
(3) (1881) 10 C. L. R. 25.
(4) (1900) I. L. R. 27 Cal. 570.

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have here, might, perhaps, have been sufficient to raise the presumption of a permanent tenancy. But where, as in this case, we know when and under what circumstances the tenancy was created, evidence such as has been adduced is not sufficient for that purpose. Indeed, the circumstances attending the creation of the tenancy positively militate against any inference that it was intended to be permanent." These authorities appear to me to establish that upon the facts found, the Court below was justified in presuming that the tenure was of a permanent nature. I need not refer to the well-known case of *Ramsden* v. *Dyson* (1) and to the Privy Council case of *Beni Ram* v. *Kundan Lal* (2), which have been cited by the appellant, for we are not, in the present case, dealing with the point which was there decided.

In my opinion the appeal fails and must be dismissed with costs.

BANERJEE, J.—I am entirely of the same opinion.

Appeal dismissed.

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28 C. 744.

[744] *Before Sir Francis W. Maclean, K.C.I.E., Chief Justice and Mr. Justice Banerjee.*

PROMOTHO NATH MITTER AND ANOTHER (*Defendants*) *v.* KALI PRASANNA CHOWDHRY AND OTHERS (*Plaintiffs*).* [8th May, 1901.]

Putni interest—Merger of putni interest in zemindar, who purchases it—Regulation VIII of 1819, sale held under—Transfer of Property Act (IV of 1882), ss. 111, cl. (d), 117 and 2, cl. (d).

A *putni* interest created after the passing of the Transfer of Property Act is determined on a purchase of the same by the zemindar, even at a sale held in execution of a decree.

THIS appeal arose out of a suit brought by the plaintiffs for recovery of arrears as well as for apportionment of rent due to the zemindari interest purchased by them. The allegations of the plaintiffs were, that one Brindaban Chuckerbutty and his three brothers were the owners of certain shares in two *zemindaris*, who sold their shares to one Mohun Lal Mitter, the predecessor in interest of the defendants Nos. 1 and 2, and obtained from him four *pottahs* of intermediate tenures, *viz.*, *putni* and *miras ijaras* on the 1st June 1884; that these four intermediate tenures were subsequently sold for arrears of rent and were purchased by Adya Sundari, executrix to the estate of the said Mohun Lal Mitter; that on the 13th January 1896 they, the plaintiffs, purchased the said *zemindaris* at a sale held for arrears of Government revenue; that according to the terms of the *putni kabuliat*, the defendants Nos. 1 and 2 were liable to pay the Government revenue, and the cesses, which they did not pay from the Pous *Kist* of 1302 B. S.; and so, inasmuch as on the *kabuliats* there was, no apportionment of rent due on account of these *zemindaris*, the suit was brought. The defence *inter alia* was that the suit for rent was not maintainable in the form it was brought; that the prayer for a division of the *jamma* and for ascertainment of the proportion, in which the *jammas* were payable, was contrary to

* Appeal from Original Decree No. 58 of 1899, against the decree of Babu Chandra Kumar Roy, Subordinate Judge of Backergunge, dated the 22nd of December 1898.

(1) (1865) L. R. 1 E. & I. App. 129. (2) (1899) I. L. R. 21 All. 496.