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[648] APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Bodilly.

PROMADA NATH ROY *v.* SRIGOBIND CHOWDHRY.*

[3rd March, 1905.]

Lease—Building lease—Lease from year to year—Ejectment, suit for.

Where a kabuliat did not specify any period during which a lease was to subsist but the land was to be held by the lessee from year to year at an annual rent, and in the event of a masonry building being erected on it rent was to be assessed at the prevailing rate; and the lessee built a structure on the land:

***Held*, that the parties contemplated the possibility of a *pucca* structure being erected on the land and therefore the lease was for building purposes and the Court could presume that the lease was intended to be permanent, and the plaintiff was not entitled to eject the defendant.**

***Jahoorulal Sahoor* v. *H. Dear* (1), *Ismail Khan Mahomed* v. *Jaigun Bibi* (2) followed; *Lala Beni Ram* v. *Kundan Lall* (3) referred to.**

***Held* also, that the absence of the words "maurasi, mokurari" in a lease did not necessarily indicate that it was not the lessor's intention to grant a permanent lease.**

[Cited. 13 M. L. T. 506=19 I. C. 721=1914 M. W. N. 67; Ref. 16 C. W. N. 564=14 I. C. 152; See also: 1918 M. W. N. 480.]

SECOND APPEAL by the (first) defendant Raja Promada Nath Roy.

This appeal arose out of an action brought by the plaintiff to eject the defendants from a piece of homestead land on the allegation that the defendants had no permanent interest in the land, and further that the tenancy had been determined by service of a six months' notice to quit. Defendant No. 1 alleged that no notice to quit had ever been served on him, and that, if served on him, it would be illegal and insufficient, that the suit was undervalued, and, if properly valued, would exceed the pecuniary jurisdiction of the Munsif's Court; that it was bad for misjoinder and was barred by limitation.

[649] Further he alleged that his interest in the lease was a permanent one and that he had a right to erect pucca structures on the land, that according to local custom he could not be ejected from the holding, and he claimed Rs. 1,000 as compensation, if ejected from the holding.

Defendant No. 2 denied all connection with the land in suit.

This suit came before Babu Ashutosh Chatterji, Munsif of Pubna, who on the 27th June 1901 decided that the defendant No. 1 had a permanent interest in the land in suit and was not liable to ejectment.

From this decision the plaintiff appealed to the Additional Subordinate Judge of Pubna, Babu Jogendra Chundra Maulik, who on the 12th May 1902 held that the potta and kabuliat did not create any permanent tenancy in favour of the defendant No. 1, nor protected him from eviction; that both defendants were liable to ejectment, and he therefore allowed the appeal.

The defendant No. 1 appealed.

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* Appeal from Appellate Decree, No. 1722 of 1902, against the decree of Jogendra Chunder Maulik, Additional Subordinate Judge of Pabna, dated the 12th of May 1902, reversing the decree of Ashutosh Chatterjee, Munsif of Pabna, dated the 27th of June 1901.

(1) (1875) 23 W. R. 399.
(2) (1900) I. L. R. 27 Cal. 570.
(3) (1899) L. R. 26 I. A. 58.

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32 C. 648=9 C. W. N. 563.

Babu *Lal Mohan Das* and Babu *Satish Chunder Ghose*, for the appellant.

Dr. *Rash Behari Ghose* and Babu *Priya Sanker Mojoomdar*, for the respondent.

GHOSE AND BODILLY, JJ. This was a suit in ejectment after notice to quit; and the question that arises in this appeal is whether the lease, that was granted to the defendant, was intended to be a lease in perpetuity, so long as the lessee paid rent for the land leased out to him. The lease was granted in Jaisth 1296 B.S. corresponding to May 1889. The land demised is situate within the municipal town of Pubna, and the lessee, or rather his agent, had actually built upon the land, though it was a cutcha building, and was at the time residing there. The period for which the lease was to subsist was not specified. The material terms of the lease are as follows:—"You having applied for a settlement and potta on assessment of rent on the said land, I agree to it and grant this potta assessing the said land with a rent of Rs. 3-6 per annum. You have, of your own accord, executed and submitted a kabuliat admitting the said **[650]** quantity of land and amount of rent: you will pay the rent, etc., at the above rate kist by kist, year after year;" and later on: "you will on no account be at liberty to take any objection regarding remission of rent or in payment of the rent. You have built on the said land a *bashabati* (lodging) for the accommodation of your mukhtear. You will never be at liberty to do anything that may render the land in question unfit to be dwelt on. If the said land be wholly or partially acquired by Government, I shall get the full price thereof. You will retain possession of the boundaries of the said land. Should any excess land be found on a fresh measurement to be in your possession you will be bound to pay an additional rent for the same without objection." And the document concludes as follows:—"And should masonry houses, etc., be built on the land in question, rent will be assessed at the rate prevailing in the said mehal" and so on. Now, having regard to the wording of the lease, it seems to be plain enough that the parties contemplated the possibility of a pucca structure being erected on the land demised; the erection of such a structure, including the extent thereof, being left entirely with the lessee, and being not dependent upon the permission of the lessor; it being simply provided that in the event of a pucca structure being erected, the rent payable for the land was to be at the prevailing rate. Having regard to these circumstances, we may well hold that the lease was a lease for building purposes; and, if it was a lease for building purposes, the question arises whether the parties intended, when they entered into this transaction, that the lessor should be at liberty to eject the lessee at any time he pleased, provided only he gave him a reasonable notice to quit. The parties to this transaction were, on the one hand, a zemindar, Rao Jogendra Narain Rai, and, on the other, the Raja of Dighapatia, then a minor under the Court of Wards, acting through his manager. Is it probable that the parties intended that, even if the Raja built upon the land a pucca structure, he could only do so at the risk of losing the land and the pucca structure as well, excepting perhaps the materials, if the lessor pleased, at any time afterwards, that the land should be vacated by the lessee, and that it should come back to his *khas* possession? We think not.

[651] Several cases have been referred to by the learned vakils on both sides in the course of argument, but we hardly think it necessary to discuss them with a view to determine what may have been the true

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intention of the parties, when they entered into the transaction in question. The cases, however, establish that where a lease is given for building purposes, the Court may well presume that it was intended to be a perpetual grant. We may refer to one or two of them. In the case of *Jahoorulal Sahoo* v. *H. Dear*, (1) the learned Judges (Glover and Mitter JJ.) upon this matter expressed themselves as follows :—" We are inclined to think that as no evidence has been given to show what was the nature or duration of the grant made to the pensioner Serjeant Webb, it may fairly, under the circumstances, be presumed to have been a lease of the land for building purposes ;" and later on they observed : " It is not denied that the land was given to Serjeant Webb for the purpose of building a house to live in, and there is no evidence that, when it was given and the house built, any term was fixed for the tenancy ;" and later on : " We think that it was for the plaintiff to prove that the grant to Serjeant Webb was of a temporary nature, and that this not having been proved, the tenure must be held as having been one granted for the usual building purposes, and cannot be taken away from the vendee of the original owner's heir so long as he continues to pay the rent assessed on it." Then in the case of *Ismail Khan Mahomed* v. *Jaigun Bibi* (2), it would appear that the learned Judges, who had to deal with it, upon a consideration of all the leading cases upon the subject, were of opinion that, if a lease is given for building purposes, a permanent tenancy may be inferred from the length of possession by the tenant and his predecessors, though there may not be the words that are usually used in documents conveying a permanent grant, such as maurasi, mokurari and such other terms. As already noticed, the lease in this case does not specify any period during which it is to subsist. The land was to be held by the lessee from year to year at a certain yearly rent, and in the event of a masonry building being erected on it, the lessee would be liable to pay **[652]** the prevailing rate of rent. And it seems to us, looking at the document as a whole, that the absence of the words maurasi, mokurari and so forth, which are usually found in grants in perpetuity, does not indicate that it was not the intention of the lessor to grant a permanent lease. Our attention has, however, been called to one of the conditions in the lease, that condition being that, if the land be wholly or partially acquired by Government, the lessor and not the lessee should obtain the full compensation that might be allowed for it. No doubt that is a circumstance which deserves consideration, and it may be that the parties contemplated that, in the event of a pucca structure being built upon the land, the lessee having paid no bonus for the grant would be fully compensated by the value of the building that might be awarded by Government. We have considered this condition as bearing upon the question of the intention of the parties ; and we may say that, notwithstanding this condition, we are not prepared to hold that it was not a lease for building purposes, and that it was in the contemplation of the parties that even in the event of the lessee building a pucca structure upon the land (for the argument of the other side must come to that) the lessor would be at liberty to turn him out at any time he pleased. The learned vakil for the respondent has called our attention to the case of *Lala Beni Ram* v. *Kundun Lal* (3). That case, in our opinion, hardly bears upon the question we have to determine in this case. There, the lessee had no power to

(1) (1875) 23 W. R. 399.
(2) (1900) I. L. R. 27 Cal. 570.
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build, but he chose to build upon it and the lessor stood by, and the question was raised whether the lessor was estopped in equity from bringing ejectment by reason of the tenant having erected a pucca structure upon the land ; and the Judicial Committee observed that the lessor was not so estopped. And they observed : "If there be one point settled in the equity law of England, it is that, in circumstances similar to those of the present case, the mere erection by the tenant of permanent structures upon the land let to him, in the knowledge of and without interference by his lessor, will not suffice to raise the equitable right against the latter, which has been affirmed by the Courts below." There, as we have already [653] indicated, the lessee had no right whatsoever to build, but he chose to build at his own risk ; and clearly there was no equity on his side.

For all these reasons we are of opinion that it was the intention of the parties to grant a permanent lease of the land demised, and that the plaintiff is not entitled to obtain ejectment in this case. The result, therefore, is that this appeal is allowed, the decree of the Court of Appeal below is set aside and that of the Court of first instance restored with costs.

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32 C. 654 (=1 C. L. J. 364.)

[654] APPELLATE CIVIL.

Before Mr. Justice Harington and Mr. Justice Mukerjee.

NAWBUT PATTAK *v.* MAHESH NARAYUN LAL. *

[11th April, 1905.]

Suit, maintainability of—Civil Procedure Code (Act XIV, of 1882), ss. 43, 111.—Set-off—Previous suit—Omission to claim set off in the previous suit in respect of the sum due—Effect of such omission—Cross suit.

In a previous suit brought by *A* against *B*, the latter had claimed a set-off in respect of a portion of the sum due to him upon adjustment of accounts between the parties, and had omitted to claim a set-off in respect of the remainder.

In a subsequent suit brought by *B* against *A* for the remainder, the defence was that the suit was not maintainable.

Held that, *B*, having claimed a set-off in respect of a part of the cause of action in the previous suit brought against him, was debarred under s. 43 of the Civil Procedure Code from bringing this suit.

[Ref. 19 I. C. 918=17 C. L. J. 365 ; 12 C. L. J. 351.]

APPEAL by the plaintiff Nawbut Pattak.

Mohesh Narayan Lal instituted a suit against Nawbut Pattak, in which the latter claimed a set-off in respect of Rs. 175, being a part of the sum due upon adjustment of accounts between him and Mohesh Narayan, which was allowed by the Court. Nawbut Pattak subsequently instituted a suit claiming Rs. 1,238 and odd, being the remainder of the sum found due upon the said adjustment of accounts. The defendant pleaded *inter alia* that the suit was barred by sections 12 and 13 of the Civil Procedure Code, and at the hearing of the suit it was urged that section 43 of the Code was also a bar to the suit. The lower Court gave effect to the objections raised by the defendant and dismissed the plaintiff's suit. Against this decision the plaintiff appealed to the High Court.

*Appeal from Original Decree No. 112 of 1903, against the decree of W. H. Thomson, Subordinate Judge of Rajmahal, dated the 27th of January, 1902.