

that property ought to have been included among those which the decrees of the Courts in India allowed the appellant to redeem.

They will accordingly humbly advise His Majesty that it ought to be declared that the respondent purchased Bisfi Kaithahi subject to the appellant's claim as second mortgagee, and that [40] the decree of the High Court ought to be varied accordingly, and the case remitted to the High Court with directions to modify its decree in accordance with such declaration in regard to the property which the appellant is allowed to redeem, the adjustment of costs consequent on the declaration, the taking of further accounts, and the fixing of a further period of redemption, and otherwise as the circumstances of the case may require.

There will be no order as to the costs of the appeal.

*Decree varied.*

Solicitors for the appellant: *Barrow, Rogers & Nevill.*

Solicitors for the respondent: *Sanderson, Aakin, Lee & Eddis.*

1904  
FEB. 24, 25.  
JUNE 7.  
JULY 12.

PRIVY  
COUNCIL.

32 C. 27=34  
I. A. 176=8  
C. W. N. 876  
=6 Bom. L.  
R. 754=8  
Sar. 688.

32 C. 41 (=31 I. A. 144=8 C. W. N. 889.)

[41] PRIVY COUNCIL.

UPENDRA KRISHNA MANDAL v. ISMAIL KHAN MAHOMED.\*

[On appeal from the High Court at Fort William in Bengal.]

[16th February and 26th July, 1904.]

*Landlord and tenant—Ejectment—Permanent tenure, presumption as to—Long continuous possession on payment of unchanged rent—Transfers of holding and erection of buildings on it—Kabuliyat, construction of—Recognition by landlord of transfers of holding.*

Suit for ejectment in which the defendant claimed a permanent tenure in the land in dispute founding his title upon a series of transmissions of it by sale and mortgage which went as far back as 1826, each transmission purporting to be of a permanent inheritable right, and upon the continuous possession of his predecessors in title at an unaltered rent.

The plaintiff, who was a lessee of the land under the Matwali of the Hooghly Imambara, alleged that the defendant was merely a tenant at will and that the transmissions were not recognized by his predecessors in title, and were not binding on him; and relied on a kabuliyat granted to the defendant by the Matwali in 1830 as being the origin of the defendant's holding:—

*Held*, (reversing the decision of the High Court), that on the true construction of the kabuliyat it was not the creation of a fresh holding, but a recognition of an already existing right over which the Matwali had no control, and that the receipts proving an uninterrupted payment of an unchanged rent, the defendant had made out his case.

See *Nilratan Mandal v. Ismail Khan Mahomed* (1).

[Fol. 10 C. W. N. 503; 34 Cal. 902=11 C. W. N. 865=6 C. L. J. 122=4 A. L. J. 570=2 M. L. T. 433=17 M. L. J. 397=9 Bom. L. R. 846; Rel. on: 9 C. L. J. 475=4 I. C. 173; 15 I. C. 110; Ref. 32 Cal. 51=31 I. A. 149=8 C. W. N. 835; 35 All. 368; 15 C. W. N. 752=13 C. L. J. 418=10 I. C. 325; 15 C. L. J. 220=13 I. C. 606=16 C. W. N. 567; 17 C. W. N. 1073=20 I. C. 363; 60 I. C. 753.]

APPEAL from a judgment and decree (September 4th, 1901) of the High Court at Calcutta which varied a decree (February 19th, 1900) of the Subordinate Judge of the 24-Pergunnahs.

\* *Present*: Lord Davey, Lord Robertson, and Sir Arthur Wilson.

(1) See p. 51.

1904  
FEB. 16.  
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32 C. 41=31  
L. A. 144=8  
C. W. N. 889.

The representative of Kali Krishna Mandal, the defendant, appealed to His Majesty in Council.

The appeal arose out of a suit brought by Ismail Khan Mahomed, the respondent to eject the defendant from certain land situate in Khidderpur in the suburbs of Calcutta. The [42] land in dispute formed part of an estate, now numbered 92, which constituted the zemindari estate of one Mannijan Begam the half sister of one Haji Mahomed Mohsin. In 1763 a survey was made of the village of Khidderpur which was then cultivated by tenants whose names were given; and survey papers for 1783 and 1791 showed the name of Jaga Nath Sarkar among the recorded tenants. Jaga Nath sold 3 bighas 14 cottahs of land to one Gadadhar Acharji whose interest was sold in execution of a decree and purchased by Raj Chandra Ghose. On 3rd November 1826 Raj Chandra Ghose executed a deed of sale in favour of Dwarka Nath Tagore of 2 bighas 18 cottahs, out of the 3 bighas 14 cottahs, for Rs. 5,000. On 11th November 1826, Dwarka Nath Tagore sold the 2 bighas 18 cottahs for Rs. 5,800 to Jaga Mohan Shaha, and on the 18th February 1830 the widow and brother of Jaga Mohan Shaha sold the same land for Rs. 5,600 to Udoy Narayan Mandal, the predecessor in title of the appellant. These deeds gave an estate of inheritance in the land, and a power of transfer. Udoy Narayan Mandal about the same time acquired 6½ cottahs of land which originally constituted the holding of one Joy Narayan Shaha on a rental of Re. 1, and was recorded in the zemindar's books as tenant on 25th February 1831. Udoy Narayan died in October 1841, and was succeeded by his son Ganga Gebind Mandal who died on 22nd December 1844 leaving four sons Kali Krishna Mandal the defendant, Radha Krishna Mandal, Shib Krishna Mandal, and Nil Gopal Mandal. Nil Gopal separated from the others in 1877 and his share in the tenure was on 17th November 1887 sold in execution of a decree and purchased by Madan Mohan Chowdhry who on 14th September 1888 sold it to Nobin Chandra Addy. Shib Krishna died in 1876 and his widow Apurba Kumari Dasi succeeded him. Radha Krishna died on 21st July 1886 and was succeeded by his two sons Upendra Krishna Mandal, the appellant and Gopi Krishna Mandal.

On 6th May 1890 a decree for partition was made in a suit brought by Nobin Chandra Addy, under which decree Kali Krishna the defendant and Upendra Krishna and Gopi Krishna, the sons of Radha Krishna, obtained an 8-anna share to be held jointly. Apurba Kumari Dasi obtained a 4-anna share, and the [43] other 4-anna share was allotted to Nobin Chunder Addy. The share allotted to Kali Krishna and his nephews consisted of the three plots, about 2 bighas in all, the subject of the present appeal. The 6½ cottahs purchased from Joy Narayan Shaha fell into the share of Nobin Chunder Addy who on 24th August 1897 sold his share to one Ghojam Akbar.

The lands in suit after being for many years cultivated became covered with tiled huts and other buildings owing to the extension of Calcutta and the building of docks at Khidderpur; they had all along been held at an unvarying rate of rent; the transfers and successions were alleged by the defendant to have been recognized by the zemindars and their representatives, and the buildings had been erected without any objection by them.

The plaintiff Ismail Khan Mahomed was the lessee of Khidderpur and other villages under a lease for 10 years dated 4th November 1895 executed by Syed Ashrafuddin Ahmad who was appointed Matwali of the

III.] UPENDRA KRISHNA MANDAL v. ISMAIL KHAN MAHOMED 32 Cal. 44

Hooghly Imambara on 25th June 1875. The property in suit was not part of the endowed property but was considered as being "kharij tauliat" or, outside the trust. By a resolution of the Government of Bengal dated 24th February 1876 the "kharij tauliat" estates were vested in the Matwali as a trust subject to the control of the Committee of Management. The successive Matwalis of the Imambara had realized an unvarying rent from the defendant's predecessors in title, and had recognized both the hereditary and transferable character of the holding.

On 3rd October 1898 Ismail Khan Mahomed gave Kali Krishna Mandal, and Apurba Kumari Dasi notice to quit the lands in their possession in April 1899, and as they then refused to give up possession he instituted the suit, out of which this appeal arose, treating the defendant as a tenant-at-will, and praying for delivery of possession. A similar suit was at the same time brought against Apurba Kumari Dasi.

The defence (*inter alia*) was that the defendant was not a tenant-at-will liable to ejection, but held a permanent interest in the land; that he had acquired a permanent right of occupancy in the land under the Rent Law and by long adverse possession; that the lands in suit were not endowed property of the Imambara [44] and the plaintiff had acquired no right under his lease to eject; and that the buildings on the land were erected with the acquiescence of the superior proprietor who was estopped from ejecting, at any rate without compensation.

The issues now material were:—

3. Whether the plaintiff has acquiesced in the permanent rights of the defendant; and is the plaintiff estopped from maintaining this suit?

4. Whether there are pucca buildings on the land, and can the defendant be ejected?

5. Whether the defendant is an occupancy raiyat; and whether he has acquired maurasi and mokurrari rights? The present suit and that against Apurba Kumari Dasi were heard together. At the hearing the plaintiff produced a kabuliyat executed by Uday Narayan Mandal in favour of the then Matwali of the Hooghly Imambara dated 18th February 1830, to the following effect:—

"Situated in the village of mouzah Khidderpur, within kismut pergunnah Magura, under the possession of the Saheb, former holding of Jagomohan Shaha, deceased, fixtures and structures, আমলা বাড়িগাছা purchased by me under a bill of sale signed by Rambha Bewa, widow and Ram Kanai Shaha, brother of the deceased Shaha, amounting to 2 bighas 18 cottahs (two bighas eighteen cottahs) of rent-paying jammai land, at an annual jamma of Rs. 20, 4 annas, 2 gundabs, which rent I shall pay year after year into the Sircar of the Saheb. I shall maintain the boundary of the said land. I shall not be able to make any objection on the ground of decrease in the area of land by measurement, road, gurb, etc. On these terms, by executing this kabuliyat, I have obtained a pottah."

The pottah obtained by Uday Narayan was not produced. The Subordinate Judge on the 3rd, 4th and 5th issues found that the tenure was permanent relying on the ancient documents on which the defendant based his title, and on the kabuliyat of 18th February 1830 which was objected to by the defendant. As to this kabuliyat he said:—

"The plaintiff produced a kabuliyat by Uday Narayan Mandal after the defendant had closed his case. This kabuliyat was not included in any list of documents previously filed by the plaintiff, but it was produced by plaintiff's lessor. In that kabuliyat Uday Narayan says, 'for the *amla* and *acala* purchased by me, as per kobala, executed by my vendors for rent-paying lands 2 bighas odd, I shall pay 20 rupees odd per annum.' There was a great deal of contention over the

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32 C. 44=31  
I. A. 144=8  
C. W. N. 383.

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32 C. 41=31  
I. A. 144=8  
C. W. N. 889.

construction [46] of this kabuliyat. The kabuliyat is very vaguely worded ; but the meaning is that Uday Narayan agreed to pay a certain annual rent for properties as stated in his vendor's kabuliyat. The plaintiff contended that Uday Narayan meant to say that he had purchased only the structures ; but the bulk of the structures were the tiled huts owned by the sub-tenants : the pucca building was a godown as proved by defendants' witness ; and the plaintiff also filed a photograph of the building which has been recently rebuilt, but in those days it was out of repair as proved by defendant's witnesses, and hence it is absurd to suppose that Uday Narayan paid Rs 5,800 for a dilapidated godown. The previous kobalas and Uday Narayan's kobala (which is referred to in the kabuliyat) show that the lands were sold and Uday Narayan gave a kabuliyat for the things he had purchased which were the *amiah aolad* and the rent-paying lands."

The Subordinate Judge's conclusion in the case was as follows :—

"The conduct of the parties, therefore, leaves no doubt that the tenures were treated as permanent tenures, but at the same time, the present Matwali is not bound by the acts of his predecessor and he can resume the lands, but he must bear the legitimate consequences of the conduct of his predecessors, namely, he must make good to the defendant the damages which they are going to sustain by the very long acquiescence on the part of his predecessor. If the Matwali had sued for eviction immediately after Dwarka Nath Tagore's purchases, facts would have been adduced of which the present defendants are wholly ignorant, but they have laid out their money and for 73 years they have been led to believe that their rights are permanent. Hence the plaintiff must make good to the defendants their share in the purchase money."

His decree was for ejectment, only on payment of a proportionate amount of the original purchase money as compensation.

From this decree all the parties appealed to the High Court ; and a Division Bench of that Court (RAMPINI and GUPTA, JJ.) disposed of all the appeals in one judgment. They held that the tenure was not a permanent tenure : and that there had been no acquiescence, and they varied the decree of the Subordinate Judge, and gave the plaintiff a decree for ejectment without payment of any compensation to the defendants.

On the question as to the nature of the tenancy the High Court said :

"There is nothing to show that it was ever treated as a permanent interest either by the plaintiff or his lessor, and they are not bound by the acts of the defendants or their vendors.

"The holding seems to have been created by the kabuliyat, Ex. 11, dated the 18th February 1880. This certainly does not create a permanent holding in the land. There are no words in it implying that the holding is [46] hereditary or the rent fixed in perpetuity. The kabuliyat is addressed to the Matwali of the Hoggaly Imambara, who had only a limited interest as manager in the property, who could not grant and whom the tenant, Uday Narayan Mandal, must have known could not give him a permanent lease even though the property is not wakf. There is mention in this kabuliyat of a deed of sale executed by Rambha Bewa and Ram Kanai Shaha on the same date, which deed of sale has been produced and is Ex. F. But in the kabuliyat this deed of sale is referred to as a deed of sale only of the "fixtures and structures" (*amiah aolad*) on the land and not of the land itself. There are other deeds produced by the defendants, which according to them prove the existence of the holding before the date of the kabuliyat and which therefore it is said support their contention that the kabuliyat of 1880 was not a lease creating a holding, but one confirming a holding already in existence."

After referring to the deeds mentioned as showing the defendant's title the judgment continued :—

"The holding, if it existed before 1880, is not carried back by these deeds more than four years, and if there was, as alleged by the defendants, a practice of surrendering the holding on mutation, as proved by Ex. G. then this is an additional reason for concluding that the kabuliyat, Ex. 11, did not confirm an old holding but created a new one. The learned pleader for the defendant however relies on the possession of the holding by the original tenant and his family ever since 1880 or

1826 and on the fact that the rent has never been altered during this period. It cites the case of *Dhunput Singh v. Gooman Singh* (1), as an authority for this argument. It is sufficient for us to say that that case relates to land situated in the interior of the province where the provisions of Act X of 1859 were in force. It relates to agricultural land with regard to which the Legislature has thought it right to make special provisions for the protection and encouragement of cultivators by granting them fixity of tenure. The land in dispute in this case is homestead land situated in the suburbs of Calcutta, and within municipal limits, occupied by temporary tenants, and the only pucca house on which was formerly the residence of a prostitute and is now the place of business of a seller of liquor. The Legislature has never thought fit to introduce any measures for the protection or encouragement of such classes of persons. In regard to homestead and building land there has always been, and is, perfect freedom of contract, and a lessee of such and if he wishes for a permanent interest in it, must be careful to stipulate for such an interest. Further, it cannot be said that in this case the land may have originally been of an agricultural character far from the boundaries of the land mentioned in the deeds produced by the defendants, it is apparent that the land from the first was covered with houses. Finally, this appears to us to be a case in which the origin of tenancy is known and in which, therefore, there is no necessity or room for presumptions in favour of the occupant.

"In these circumstances we think the Subordinate Judge was right in holding that the plaintiff is entitled to evict the defendant."

[47] *L. DeGruyther*, for the appellant, contended that his tenure was a permanent one, and that this has been shown by the documents on which he found his title. The High Court were wrong in their estimate of those documents, and of the effect to be given to them: this was shown by the construction they put upon the kabuliyat of 18th February 1830 which referred to the deed of sale, given to Udoj Narayan Mandal by his vendors, of the same date. The kabuliyat clearly referred to Udoj Narayan as having purchased the land under that deed as well as the buildings on it, and it did not create a new holding but confirmed the tenure then existing. The appellant had shown, it was submitted, that the transfers of, and successions to, the property had been recognized by the zemindars and their representatives who had allowed buildings to be erected on it, and that the land had been held all along at an unvarying rate of rent. Under those circumstances there was a presumption that it was held on a permanent tenancy. Reference was made to *Dhunput Singh v. Gooman Singh* (1); *Suttosurrun Ghosal v. Mohesh Chunder Mitter*; (2) *Ram Ranjan Chakerbati v. Ram Narain Singh* (3) and *Bhaiya Ardawan Singh v. Udey Pratab Singh* (4). The tenure, it was submitted, was originally an agricultural tenure, and a right of occupancy had been acquired in it by the holders. Act X of 1859 was not subversive of the old law in force previous to its passing. By that law certain ryots were entitled to hold their tenures as long as they paid a certain rent, and that was the law enacted in Act X of 1859, s. 6, relating to occupancy ryots. The payment of a yearly rent was not inconsistent with the tenure being permanent. Certain classes of ryots, before the passing of Act X of 1859, had rights inconsistent with the absolute ownership of the zemindars: see *Thakourance Dossee v. Bisheshur Mookerjee* (5). The acceptance of a pottah by such a ryot did not alter his rights so far as their permanency was concerned: it was considered to be a confirmatory pottah, and as evidence of the acknowledgment by the zemindar that the lands [48] were held on a permanent tenure: see *Ram Chunder Dutt v.*

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32 G. 41=31  
I. A. 144=8  
C. W. N. 889.

(1) (1867) 11 Moo. I. A. 433, 434, 463. (4) (1896) I. L. R. 23 Cal. 838, 846;  
(2) (1868) 12 Moo. I. A. 263. L. R. 23 I. A. 64, 72.  
(3) (1894) I. L. R. 22 Cal. 533, 543; (5) (1865) B. L. R. Sup. 202, 213,  
L. R. 22 I. A. 60, 66, 67. 230, 232.

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32 C. 41=31  
I. A. 144=3  
C. W. N. 889.

*Jugesh Chunder Dutt* (1). As to the permanency of the tenure reference was also made to *Ismail Khan Mahomed v. Aghore Nath Mukerjee* (2); and *Winterscale v. Sarat Chandra Banerjee* (3). The appellant's claim to the land was also made out, it was contended, by adverse possession since 1830, and *Rampal Singh v. Balhaddar Singh* (4) was cited. The respondent had no title to eject the appellant.

*Cohen K. C. and W. C. Bonnerjee* for the respondent contended that nothing more than a tenancy at will was created by the kabuliyat of 18th February 1830. There was nothing in it to show that the tenant was to have a permanent tenure. Such a document, if intended to give a permanent tenure would have been in different terms. The kabuliyat, more over, was executed by the then Matwali, who had no power to grant a permanent tenure, as he could not bind his successors. Neither then nor since had the successive Matwalis ever recognized the tenant of the disputed land as holding a permanent tenure, and then acquiescence in his so considering it had not been proved. *Ismail Khan Mahomed v. Jaigun Bibi* (5) was cited. No question of limitation or adverse possession arose, and both Courts below had concurrently found the facts in favour of the respondent. Their decision, it was submitted, should be upheld.

*DeGruyther* replied.

The judgment of their Lordships was delivered by

LORD ROBERTSON, The lands in dispute in this suit, which are about two bighas in extent, are situated in Khidderpur, a suburb of Calcutta within municipal limits. They are now covered for the most part with tiled huts and a one-storied building occupied as a house or shop. Some apparent complications are introduced into the case by a sub-division of the property; but this partition may be disregarded for the purposes of the present question.

The disputed ground admittedly falls within the confines of a lease granted to the respondent in 1895 by Syed Ashraf-ud-din [49] Ahmed, who was Matwali of the Hooghly Imambara; and the theory of the suit of ejectment brought by the respondent is that the appellant is a tenant-at-will. The appellant's answer is that he has, as against the respondent, an independent permanent right to the ground in dispute.

Various questions, much discussed in the Courts below, have been eliminated from the controversy, and it is no longer necessary to discuss the Bengal Tenancy Act, which does not apply. The true matter of controversy is whether the appellant has made out that he and his predecessors have held under a grant of a permanent, transmissible and inheritable right.

The case of the appellant rests, in the first place, upon a series of transmissions of the property by sale and mortgage which go back as far as 1826, and the continuous possession of his predecessors in title at an unaltered rent. It is unnecessary to examine these transmissions in detail; it is sufficient to say that what is sold and bought and what is mortgaged purports in each case to be a permanent inheritable right. The answer of the respondent is that these transactions are not recognised by his predecessors in title and are not binding on him; and the

(1) (1873) 12 B. L. R. 229, 235.

(2) (1908) 7 C. W. N. 734, 742.

(3) (1908) 8 C. W. N. 155.

(4) (1902) I. L. R. 25 All. 1, 13, 14;

L. R. 29 I. A. 203, 211, 212.

(5) (1900) I. L. R. 27 Cal. 570.

respondent has produced a kabuliyat, dated 18th February 1830, which he represents, and the High Court has held, to be the creation of the present holding of the appellant. Its terms therefore require close examination; and their Lordships are of opinion that, so far from supporting, it goes to negative the respondent's case.

The kabuliyat is, in the first place, presented to the Matwali by one Udoy, who announces himself as the purchaser under a bill of sale. But then, say the learned Judges, the bill of sale is referred to as a sale only of the fixtures and structures. This, however, is quite a mistake; what is described in the bill of sale as "situate in the village of mouzah Khidderpur within kismut pergunnah Magura under the possession of the Saheb," is "former holding of Jagomohan Shaha deceased, fixtures and structures," Jagomohan Shaha having been, in fact, the predecessor (and husband and brother) of Udoy's vendors. And the kabuliyat goes on to describe the subject of his purchase (which the High Court think was only fixtures and structures) [50] as "amounting to 2 bighas 18 cottahs," and afterwards as "the said land." The whole document is only some 20 lines of print, and is free from any ambiguity.

This kabuliyat is, therefore, a distinct recognition by the Saheb of the bill of sale as a transmission of the right. If, but only if, the kabuliyat was the origin of the appellant's title and was a fresh grant by the Matwali, the limited nature of the grantor's own rights would have to be considered. But the true view of the kabuliyat is that it is a recognition of an already existing right, over which the Matwali had no control. Accordingly, this having occurred so long ago as 1830, and the receipts proving uninterrupted payment of the same rent, the question is whether (in the absence of evidence to the contrary) the appellant has not made out his case, and their Lordships consider that he has.

Their Lordships will, therefore humbly advise His Majesty that the appeal ought to be allowed and the decrees of both Courts set aside, and the suit dismissed with costs in both Courts. The respondent will pay, the costs of the appeal.

*Appeal allowed.*

Solicitors for the appellant: *Watkins & Lempriere.*

Solicitor for the respondent: *W. W. Box.*

32 C. 5 (=31 I. A. 149=8 C. W. N. 885).

[51] PRIVY COUNCIL.

NILRATAN MANDAL v. ISMAIL KHAN MAHOMED.

[On appeal from the High Court at Fort William in Bengal.]

[7th and 8th June, and 26th July, 1904.]

*Landlord and Tenant—Ejectment—Presumption as to Tenancy being Permanent—Long continuous possession on payment of unchanged rent—Transfers of holding, and erection of buildings on it—Recognition by landlord of transfer of holding—Surrender by tenant—Construction of pattah and kabuliyat.*

Suit for ejectment in which the defendant claimed a permanent tenure in the land in dispute basing his title upon a series of transmissions of it by sale or mortgage which went as far back as 1852, each transmission purporting to

*Present*: LORD DAVEY, LORD ROBERTSON AND SIR ARTHUR WILSON.

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32 C. 41=31  
I. A. 144=8  
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