what he did. But the Courts in deciding the question of agency must look to the general evidence on the record as to the mode of dealing pursued by Gyanath and by those whom he alleged to be his principals.

The Subordinate Judge says that it is proved that certain part payments, on account of this cotton, were made by the defendants. It seems doubtful whether the Subordinate Judge intended to say more than that payments on account were made for the defendants by Gyanath. How this may really be, I cannot say: but it is evidently most important that it should be ascertained with the utmost accuracy and distinctness, how and by whom and when those payments on account of the cotton purchased by Gyanath, were made. If payments were made by the defendants direct, as if they sent hundis to the sellers of the cotton, it would go far to prove their liability. If, on the other hand, the payments were merely made by Gyanath, and it is not proved that they were made with the defendants' cognizance or by their order, it would prove nothing as against them. The case is one of some nicety and importance in itself, and the Court must try it with care and accuracy. The parties should be allowed to adduce further evidence, if they desire to do so.

Before Mr. Justice Kemp, and Mr. Justice Glover.

RADHA KRISHNA (DEFENDANT) *v.* W. C. O'FLAHERTY (PLAINTIFF).*

1869
July 9

Landlord and Tenant—Damage by Fire—Negligence—Notice by Landlord of a Defect in the Building.

The plaintiff hired a thatched bungalow of the defendant, entered into possession and after living in the house sometime, lit a fire in the fire-place in one of the rooms The chimney took fire, and the plaintiff's furniture was destroyed. He subsequently ascertained that the chimney had been thatched over, of which fact he had been all along ignorant.

Held, the landlord defendant was liable in damages for the loss sustained by him.

* Special Appeal, No. 920 of 1869, from a decree of the Judge of Patna, dated the 19th January 1869, reversing a decree of the Officiating Subordinate Judge, dated the 21st May 1868.

1869

BINDUBASINI DEBI v. PATIT PABAN CHATTA-PADHYA.

Per KEMP, J.—The landlord should have given the defendant notice of the defective construction of the chimney. The defendant had a right to assume that it was properly built.

THE plaintiff in this case hired a thatched bungalow from the defendant in August 1867. He had occupied the house for four months, when one day in December he lit a fire in one of the rooms which contained a fire-place. The thatch which went over the chimney, as the plaintiff afterwards discovered, took fire, there being no vent through the chimney, and plaintiff's furniture was destroyed. Plaintiff brought this suit for damages. The Court of first instance dismissed the suit on the ground that as the plaintiff had occupied the house for four months, he ought to have known that the chimney was defective. The lower Appellate Court reversed the decision, and decreed the plaintiff's suit, holding that the tenant was fully justified in taking it for granted that the chimney was built in a workman-like manner; that he had no notice of the defect; and that he was not guilty of any negligence in lighting the fire.

Mr. *Gregory* and Baboo *Srinath Das* on behalf of the appellant.—There is no implied contract between a landlord and tenant, that the house is fit for the purposes for which it is let: *Hart* v. *Windsor* (1), *Sutton* v. *Temple* (2) overruling *Smith* v. *Marrable* (3). There is no implied duty on the owner of a house, which is in a ruinous and unsafe condition, to inform a proposed tenant that it is unfit for habitation; and no action will lie against him for an omission to do so, in the absence of express warranty or active deceit: *Keates* v. *Cadogan* (4). Negligence or no negligence on the part of the tenant in lighting the fire, the landlord is not liable to his own tenant for nor-repair, etc., nor for any loss or damage thereby occasioned to him. See Woodfall's Landlord and Tenant, page 494.

Mr. *Mackenzie* for the respondent.—The negligence alleged is a matter of fact, involving no point of law, and the fact

(1) 12 M. and W., 68.

(2) 12 M. and W., 52.

(3) 11 M. and W., 5.

(4) 10 C. B., 591.

having been found against the appellant, the finding cannot be interfered with in special appeal. It being within the knowledge of the defendants, as appears on the evidence, that the chimney was defective in its construction, he should have given notice of the fact to the plaintiff, who otherwise was entitled to assume, as he did assume, that it was properly built. As regards the cases from Woodfall cited by Mr. Gregory, they refer to the non-liability of landlords in England for repairs (except under express covenants), and have no application to a case like the present.

KEMP, J.—The defendant is the special appellant in this case. It appears that the plaintiff hired a thatched bungalow from the defendant at a monthly rent of 30 rupees. We are not told whether there was any lease executed ; but it appears that the negociations respecting the hiring of the bungalow were carried on between the plaintiff and the son of the defendant. The plaintiff entered the house in the month of August 1867.

On the sixth of December or thereabouts the plaintiff lighted a fire in one of the rooms of the house, and the consequence was that owing to the chimney being in an incomplete state, the thatch of the bungalow caught fire, the building was destroyed, and with it the plaintiff's furniture including a billiard table. The plaintiff brings this suit to recover the value of his furniture which he estimates at Rs, 1,396-7 annas, the principal item being the aforesaid billiard table. The plaintiff's case is this, that he was not aware until the 6th of December when he lit the fire that the chimney was not built so as to admit of the vent of the chimney passing through the roof; that assuming that the chimney was constructed in a proper manner, he lit the fire ; and that as he has been endamaged by the defendant's not giving him previous notice of the defect in the chimney, he is entitled to recover the amount claimed.

The defendant's answer is to this effect. In his written statement he does not say that he gave any special notice to the plaintiff of the defect in the chimney, but he says that as the plaintiff made certain alterations in the bungalow to suit his convenience, he must have been well aware that the chimney

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RADHA KRISHNA v. W. C. O FLAHERTY.

was in an incomplete state, and that therefore the plaintiff was guilty of an act of negligence, and that he must bear the consequences thereof. The first Court dismissed the plaintiff's case, and held that because the plaintiff occupied the bungalow for four months he ought to have acquainted himself with the defect in the construction of the chimney; and that not having done so he has only himself to blame for the loss incurred. The second Court, the Judge of Patna, has reversed this decision, holding that the tenant, the plaintiff, was fully justified in taking it for granted that the chimney was built in a workmanlike manner; that he had no notice to the contrary from the landlord; and that the tenant, the plaintiff, has been guilty of no act of neglect. The Judge on the question of the amount claimed found that it was a reasonable claim, and gave the plaintiff a decree with costs and interest. I think that the decision of the Judge is a correct one, and that this appeal must be dismissed. The landlord attempted to prove that he had given notice to the tenant of the defect in the chimney, but he completely failed to prove that notice. It seems to me that when the landlord attempted to prove more than he had advanced in his original written statement, he was conscious of the defect in the chimney, and that he ought to have given notice to the tenant of that defect, more particularly as the bungalow is one with a thatched roof. The Judge has found as a fact that the plaintiff was guilty of no act of negligence; and I think that it is but reasonable that a party should assume that where there is a fire-place in a room, and a chimney which admittedly extended at all events to the roof of the house, there was also a proper vent to it. As the finding of the Judge, therefore, is a finding on a question of fact, I would dismiss the special appeal with all costs payable by the special appellant.

GLOVER, J.—I concur in thinking that this special appeal should be dismissed with costs, because it appears to me that the Judge's finding that the plaintiff was not guilty of any negligence, is a substantial finding of fact with which we could not interfere under any circumstances, in special appeal.