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under which such tenures as those held by the defendants were transferable in Zilla Hooghly.

As to the stipulation in the kabuliat which restrained the tenant from erecting *pucka* houses upon the land in question, it is very clear from the oral evidence that that restriction imposed some forty years ago had been tacitly abandoned by the landlord. The parties in occupation of this land, which confessedly was let for building purposes, had been allowed gradually to pull down the temporary buildings first erected, and substitute in their place more permanent ones. I think where this is sanctioned, there must be implied a right on the part of the tenant to convey his interest to other persons. Then I am very much inclined to agree with Mr. Justice Kemp in the latter part of his judgment, where he says that the conduct of the landlord, in standing by and allowing the defendants to erect those buildings eight years previously, and remaining silent at that time, leads to the conclusion that he had permitted them to erect buildings of that kind, and did thus admit the tenure to be of a kind which according to the custom of the country was transferable. I am therefore also of opinion that the decision of the Division Bench ought to be affirmed.

MACPHERSON, J.—I also think that the decision of Mr. Justice Kemp ought to be affirmed, because I think that there is some evidence that the tenure under which the defendants held was, according to the custom of the district, transferable.

Appeal dismissed.

Before Mr. Justice E. Jackson and Mr. Justice Ainslie.

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March 6I.

BURGAPRASAD MISSER AND ANOTHERS (DEFENDANT) *v.* BRINDABAN SOOKUL (PLAINTIFF).*

Execution—Land occupied and House built thereon, and inhabited, by permission of Owner—Assignable Interest—Suit for Possession—Landlord and Tenant.

The plaintiff permitted B. to erect a thatched dwelling-house with mud walls on a piece of land belonging to the plaintiff, and B. dwelt in it for more

See also 14 B.L.R 204. 8 B.L.R. 242.

* Special Appeal, No. 1978 of 1870, from a decree of the Subordinate Judge of Tippera, dated the 15th July 1870, affirming a decree of the Sudder Moonsiff of that district, dated the 25th September 1869

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than forty years. *Held*, that B. had an assignable interest in the house and land, which could therefore be seized and sold in execution of a decree against B., and that the purchaser who had obtained possession could not be dispossessed at the suit of the plaintiff.

THE plaintiff allowed one Sitaram Dobay to build a mud house as a *bashabari*, or lodging, on a piece of land described in the plaint as plot No. 1 belonging to the plaintiff. Sitaram left the land on the 2nd Baisakh 1275 (13th April 1868). In the same month one Sidigopal Misri obtained a decree against Sitaram, and in execution of it had the mud house, together with the land of plot No. 1, sold, describing it to be the lakhiraj holding of his judgment-debtor, and purchased it himself. Shortly after his purchase, Sidigopal sold the land, plot No. 1 and the mud house, to the defendant. The plaintiff brought this suit to recover possession of this land and the mud house from the defendant. The defence was, that Sitaram had a lakhiraj right in this land; that he had been in possession of and dwelling on this land by erecting a building on it for a considerable time; and that the plaintiff had neither possession of nor any right to it.

The Moonsiff found that the land really belonged to the plaintiff, who had allowed Sitaram Dobay to erect lodgings on plot No. 1; that Sitaram accordingly dwelt there for upwards of forty years, without any opposition from the plaintiff, but acknowledging that he held it under the plaintiff; and that Sitaram Dobay had no lakhiraj interest in the land. But the Moonsiff held that although the plaintiff was the proprietor of the land, and the holding of Sitaram was permissive and subordinate, yet when he had without opposition allowed Sitaram for upwards of forty years to live on that land by erecting a dwelling-house and planting trees on it, the holding must be taken to be a permanent one; that a wrong description as to title given by the decree-holder against Sitaram to this property at the time of auction-sale did not give the plaintiff any right to eject the purchaser; that whatever description might have been given at the sale, the purchaser was entitled to have what was the true right, title, and interest of Sitaram in the property sold; and that since the interest of Sitaram had become a permanent one,

the tenure must be taken to be a transferable one liable to be sold, and as such the plaintiff had no right to eject the defendant, though he had a right undoubtedly of taking rent from him. In this view of the case the suit for khas possession of plot No. 1 was dismissed, without prejudice to the plaintiff's right of receiving rent.

Against this decree of the Moonsiff the plaintiff appealed, and the Subordinate Judge of the Zilla who heard the appeal reversed the decree of the Court below, and gave a decree that the plaintiff should recover khas possession of plot No. 1.

The Subordinate Judge was of opinion that the holding of Sitaram was by sufferance, and the permission of the plaintiff was only personal to Sitaram, and that the plaintiff was under no obligation to continue this indulgence to the defendant, who was not entitled to retain possession against the consent of the proprietor.

The defendant preferred this special appeal against the Judge's decision to the High Court.

Baboo *Durga Mohan Das* (with him Baboo *Rash Behari Ghose*) for the appellants, contended that taking into consideration the conduct of the plaintiff and of Sitaram, the length of time the land was in Sitaram's possession, the long silence of the plaintiff, the use to which this land was put, and the fact of capital having been sunk on it by Sitaram in the erection of a dwelling-house, it established that the tenure was intended to be and really was a permanent one, unless the plaintiff could show some express agreement to the contrary. With regard to the purchase by the defendant, he urged that the mere fact of the land having been given for building purposes made it transferable, and in support of this contention he cited the case of *Beni Madhab Banerjee* v. *Jai Krishna Mookerjee* (1).

Baboo *Rames Chandra Mitter* (with him Baboo *Chandra Madhab Ghose*) for the respondent, contended that the plaintiff, from a friendly feeling, merely allowed Sitaram to build a lodging-house on a small parcel of land, and that there was nothing to show that

(1) *Ante*, p. 152.

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the plaintiff had either intended or in fact had created a tenure in Sitaram's favor for the purpose of dwelling, which was supported from the fact, as alleged by the plaintiff, that this small space of land was within the compound of the plaintiff's house. He urged that the opinion of the Chief Justice in the case cited by the appellants was a mere *obiter dictum*; that it referred to *pucka* buildings and not thatched houses, and that in that case it was pleaded that there was a tenure originally created, whereas in this case there was no tenure of any kind pleaded.

He next contended that whatever equitable rights Sitaram might be said to have acquired were personal to him and could not be transferred.

AINSLIE, J.—In execution of a decree against one Sitaram Dobay, certain land with the mud houses built thereon was sold and purchased by the defendant in the present suit. It was then described as the ancestral lakhiraj land of the judgment-debtor. The plaintiff has brought this suit to establish his title to the land.

It has been found by the Courts below that the land was not the lakhiraj of Sitaram Dobay, but formed a portion of the property belonging to the plaintiff. The claim includes two plots of land, but we have now to deal only with the first plot.

The Moonsiff held that as Sitaram Dobay had been in occupation of this land by living thereon for a period of something like forty years, the plaintiff was not entitled to eject the purchaser, but could only take rent from him. The Subordinate Judge reversed that finding of the Moonsiff, and held that the plaintiff was entitled to take possession of the land itself.

The question which we have to consider is, whether the judgment of the Moonsiff or the judgment of the Subordinate Judge on this point is the correct one. It appears to us that this question turns upon the consideration whether Sitaram Dobay himself was liable to be dispossessed at the will of the plaintiff; and if not, whether his right to occupy the land with the buildings was not a right which had become transferable. The case of *Beni Madhab Banerjee* v. *Jai Krishna Mookerjee* (1) has been cited by

(1) *Ante*, p. 152.

the appellant, in which the late Chief Justice, Sir Barnes Peacock, has expressed an opinion which seems to us to bear directly upon this case. He says:—"Independently of this, speaking "for mysef, I should say that if one man grants a tenure to "another for the purpose of living upon the land, that tenure, "in the absence of any evidence to the contrary, would be "assignable. I know of no law which prohibits a man who "gets land for the purpose of building from assigning his inter- "est in it to another."

It is said by the respondent that this is not a case in which the plaintiff created a tenure in favor of Sitaram, in order that he might live upon the land, but that he merely gave him permission to occupay a certain space within the *bashabari—i. e.*, within the compound of his own house. No doubt it is found by the Moonsiff that the house erected by Sitaram immediately adjoins the house of the plaintiff. But it does not follow that the land upon which it stands is a part of what may be called the compound of the plaintiff's house. Although the land in suit may be adjoining that occupied by the plaintiff, the occupation of it by Sitaram or any one else need not necessarily interfere with the occupation by the plaintiff of his own house and of the land attached to it. There is nothing to show that it does so.

It is said that the plaintiff allowed other persons to build in the same way in which he allowed Sitaram to do so, and that when they vacated their houses he again took possession of the land. Some evidence to this fact has been read. But there is no evidence put forward to show that in any one instance the holder of any such land has attempted to assign his right to others and has been interfered with by the plaintiff, and failed in carrying out such assignment; nor do we know under what circumstances the houses were vacated. The Subordinate Judge has not found, and apparently there is nothing to show that the permission granted by the plaintiff to Sitaram was given with any reservation of right to oust him at will, or was limited to him individually; and therefore we think that it must be taken to have been a permission to build and occupy in the ordinary way, and that this occupation having continued for a very long period

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of time, it is impossible to suppose that the plaintiff had any power to turn Sitaram out at a moment's notice, or that Sitaram had not power to transfer his right to any other party. The appeal accordingly is decreed, the decision of the Subordinate Judge is reversed, and that of the Moonsiff is restored and affirmed.

The appellant will have his costs in this Court and in the lower Appellate Court.

JACKSON, J.—I quite agree with Mr. Justice Ainslie. No doubt it is very difficult to define the rights of parties in cases of this sort, where there is no written document, but a mere permission to occupy, and where occupation has been unaccompanied by any payment of rent. Everything must depend upon the circumstances of the case. No doubt allowing a servant to occupy a portion of the dwelling-house by erecting a temporary building thereon, would confer upon him no tenant rights whatever, probably even allowing a relation to build any temporary building within a portion of the premises would confer upon him no tenant right whatever. But the present case appears to me quite distinct from all such cases. It is not the case, as I understand it, of a person being merely allowed to occupy a piece of land in the defendant's compound; it was not given to him for any temporary purpose; he has been in possession about forty years; he has built upon it, he has planted trees upon it, and in fact he has exercised all the usual rights of an occupier upon the land. It seems to me, therefore, that his holding is not a temporary holding. I think it was rightly put in this case that if the plaintiff could not have turned out Sitaram Dobay, he cannot turn out the present defendant. But I am by no means satisfied that under the circumstances the plaintiff could have ejected Sitaram Dobay. I think the first Court was quite right in saying that the plaintiff's proper course was to sue for rent. I would therefore set aside the Appellate Court's decision, and restore that of the first Court.

The respondent will pay the costs of this and the lower Appellate Court.

Appeal dismissed.