APPELLATE CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Beverley.

1895
May 21.

DUNIA LAL SEAL (PLAINTIFF) *v.* GOPI NATH KHETRY AND OTHERS (DEFENDANTS.)*

Land Acquisition Act (X of 1870)—Suit for compensation—Buildings on land—Ownership in land and buildings—Landlord and Tenant—Transfer of Property Act (IV of 1882), section 108, clause (h).

A plot of land was acquired under Act X of 1870 for the construction of a road within the town of Calcutta ; the tenants who had erected masonry buildings on portions of the land, and who were in possession at the time of the acquisition, claimed before the Collector the value of their interests ; but the owner of the land claiming the whole of the compensation money, the matter was referred to the District Judge, who found that the lands were originally granted for building purposes, and allowed a share of the compensation money, *viz.*, the value of the buildings, to the tenants. On appeal to the High Court by the owner of the land, on the ground that the respondents' tenures, which were of a temporary character, having come to an end when the land was acquired by the Municipality, the buildings standing on the land became his property, and that the tenants were not entitled to compensation,

Held, that the Judge came to a right finding on the facts, and that the owner of the land was not entitled to the buildings erected by the tenants without being liable to pay them compensation, even if the tenancy had come to an end.

Held also, that, as the land was acquired by the Corporation during the continuance of the lease, in the sense that the relationship of landlord and tenant was still subsisting between the parties, and having regard to section 108, clause (*h*), of the Transfer of Property Act, which applies to Calcutta as well as to the mofussil, the tenants were entitled to the compensation for the buildings. *Juggut Mohinee Dossee* v. *Dwarka Nath Bysack* (1) distinguished.

THE facts of the case are shortly as follow : A plot of land, with buildings on it, was acquired, under Act X of 1870, for the purpose of making a road within the town of Calcutta. The admitted owner of the land was one Dania Lal Seal. On a refer-

*Appeal from Original Decree No. 79 of 1893 against the decree of C. B. Garrett, Esq., District Judge of 24-Pergunnahs, dated the 16th of February 1893.

(1) I. L. R., 8 Calc., 582.

1895

DUNIA LAL SEAL v. GOPI NATH KHETRY.

ence by the Land Acquisition Collector to the Civil Court under section 15 of the Land Acquisition Act (X of 1870), Dunia Lal Seal claimed the whole of the compensation money, whilst Gopi Nath Khetry and others claimed a share of the amount on the ground that their ancestors had erected buildings upon the land and they had been in possession thereof for a long time, on payment of a monthly ground rent. The District Judge of 24-Pergunnahs found that the land had been originally granted for building purposes, and awarded the value of the buildings to the said Gopi Nath Khetry and others. From this decision the owner of the land, Dunia Lal Seal, appealed to the High Court.

Mr. *P. O'Kinealy* and Mr. *McNair* for the appellant.

Dr. *Rash Behary Ghose*, Babu *Sirish Chunder Chowdhry* and Babu *Sarat Chunder Rai* for the respondents.

Mr. *O'Kinealy*.—The claimants are simply lessees of the land who built houses thereon. In Calcutta buildings belong to the owner of the land. In this case there is no suggestion—not a shadow of one—that the tenancy is a permanent tenancy. The original lease was a temporary lease, the term of which expired, and a fresh lease was taken by the ancestors of the claimants and the rent was enhanced from time to time. There was no subsisting lease at the time of the acquisition of the land. The claimants could only claim fifteen days' notice to quit. It has been held in the case of *Juggut Mohinee Dossee* v. *Dwarka Nath Bysack* (1) that the law of equity and good conscience is applicable in Calcutta, and not Hindu or Mahomedan law amongst the Hindus or Mahomedans respectively. That being so in the present case, the claimants are not entitled to the compensation for the buildings. There is no evidence of the fact that, when the claimants took the lease, it was agreed between the parties that the houses would remain the property of the tenants on the expiration of the lease. Whatever might have been the original lease, the lease having come to an end, the tenants are not entitled to the compensation claimed. There was no agreement between the parties that the houses should remain the property of the tenants even after the expiration of the

(1) I. L. R., 8 Calc., 582.

1895

DUNIA LAL SEAL v. GOPI NATH KHETRY.

term of the lease, and even if there were any, that agreement ought to have been registered.

Dr. *Rash Behary Ghose* for the respondents.—The case of *Juggut Mohinee Dossee* v. *Dwarka Nath Bysack* (1) is distinguishable. It does not apply to the present case. It would have been applicable if in that case the purchaser from the widow had erected the building before the reversioners came into possession. In that case the building was erected after the land fell into the possession of the reversioners. In this case the tenants were in possession when the land was acquired. It has been held that where a landlord has not objected to buildings erected by a tenant for a period of twenty-five years, and during that time had received rent from the tenant, even if the Court were not justified in holding that the land had originally been granted for building purposes, the landlord would be precluded from ejecting the tenant without compensation. See *Yeshwadabai* v. *Ram Chandra Tukaram* (2). It has also been held that a tenant is entitled to remove the materials of a house built upon the land by him. See *Russick Loll Mudduck* v. *Loke Nath Kurmokar* (3) and *In the matter of the petition of Thakoor Chunder Paramanick* (4). The same rule has been incorporated in section 108, clause (*h*) of the Transfer of Property Act. Even supposing that the claimants were monthly tenants, yet, considering the fact that they would have remained tenants on the land but for the opening of the road, no jury would have come to the conclusion that the tenants had no interest at all. See *Ex parte Farlow, In the matter of the Hungerford Market Company* (5).

Mr. *O'Kinealy* in reply.—The case of *Ex parte Farlow* (5) relied on by the other side is not a case between a landlord and a tenant. To follow the principle as laid down in that case would be to make the landlord pay for his forbearance. The case of *In the matter of the petition of Thakoor Chunder Paramanick* (4) is one of Hindu law, so it does not apply to the present case. The

(1) I. L. R., 8 Calc., 582. (2) I. L. R., 18 Bom., 66.
(3) I. L. R., 5 Calc., 688.
(4) B. L. R., Sup. Vol., 595; 6 W. R., 228.
(5) 2 B. & Ad. 311 (346).

case of *Russick Loll Mudduck* v. *Loke Nath Kurmokar* (1) is no authority after the case of *Juggut Mohinee Dossee* v. *Dwarka Nath Bysack* (2). The manner in which section 108 of the Transfer of Property Act has been drawn shows that it is not applicable to a case like the present. Things attached to the earth must be removed, if at all, during the continuance of the lease. Section 108, clause (*h*) of the Transfer of Property Act does not apply in a case like this where there was a break of tenancy. Supposing the tenants had a right to take the materials of the building, they had plenty of time to do it, and, not having done so, they are not now entitled to compensation. In order to make the owner of the land liable to pay for the money spent by a tenant in improving the land in the belief that he has a good title thereto, fraud and deceit on the part of the owner must be clearly proved; see *Langlois* v. *Rattray* (3). Here nothing of that kind has been proved.

The judgment of the Court (PETHERAM, C.J., and BEVERLEY, J.) was as follows :—

This is an appeal from a decree of the District Judge of 24-Pergunnahs apportioning the compensation money awarded for a plot of land, 9 Mullick's Street, Calcutta, acquired under Act X of 1870, for the construction of the Harrison Road.

The appellant is the owner of the land in question, and the respondents represent tenants under him who had erected masonry buildings on portions of the land. The tenants claimed before the Collector the value of their respective interests in the land, but as the owner claimed to be entitled to the entire compensation-money, the matter was referred to the Judge under section 39 of the Act. The Judge has awarded to the respondents the value of the buildings which stood on the portions of the land occupied by them, and against this decree the owner appeals.

It is proved by the evidence that the respondents, or their predecessors in interest, have occupied portions of the land for many years, paying rent therefor to the appellant; that in one case forty years ago, and in the other twenty-five years ago, the

(1) I. L. R., 5 Calc., 686. (2) I. L. R., 8 Calc., 582.
(3) 3 C. L. R., 1.

1895

DUNIA LAL SEAL v. GOPI NATH KHETRY.

respondents, with the knowledge and permission of the appellant, erected masonry buildings on the land which they have since been letting out to tenants; that the respondents have no written leases, but that the rent has been varied from time to time, being fixed for short terms either by oral or written agreement between the parties. The respondents were thus in possession at the time the land was acquired by the Corporation.

Upon these facts the District Judge has found that the presumption arises that the lands were originally granted to the respondents for building purposes, and that they were entitled to hold them so long as they paid the rent which they agreed to pay. We think that these findings are borne out by the evidence, and under these circumstances we think that the respondents were clearly entitled to share in the compensation awarded for the land, though it may be open to question whether the mode in which the value of their interest has been ascertained was the correct one.

Mr. O'Kinealy on behalf of the appellant has contended that the respondents' tenures having come to an end when the land was acquired by the Corporation, the buildings standing on the land became the property of the owner of the land, and that the Judge was wrong in awarding the value of those buildings to the respondents. In support of this argument he has relied upon the case of *Juggut Mohinee Dossee* v. *Dwarka Nath Bysack* (1). In that case it was held that the purchaser of a Hindu widow's estate in land situated in Calcutta was not entitled to remove buildings erected by him on the land after the land fell into the possession of the reversioners. We think that that case is distinguishable from the present, inasmuch as at the time the land now in question was acquired by the Corporation, the respondents were actually in possession, whereas the *ratio decidendi* in the case of *Juggut Mohinee Dossee* v. *Dwarka Nath Bysack* (1) was based on the fact that the land had fallen into the possession of the reversioners. The learned Judges who decided that case certainly did not go so far as to hold that the buildings might not have been removed by the tenants of the limited estate while they were still in possession.

On the other hand, we have been referred to the ruling of a Full Bench of this Court *In the matter of the petition of Thakoor*

(1) I. L. R., 8 Calc., 582.

Chunder Paramanick (1), to the case of *Russick Loll Mudduck* v. *Loke Nath Kurmokar* (2) and to that of *Yeshwadabai* v. *Ram Chandra Tukaram* (3).

The rule laid down by the Full Bench was based on the usages and customs of the country, and was stated in the following terms :—

"We think it clear that according to the usages and customs of the country, buildings and other such improvements made on land do not by the mere accident of their attachment to the soil become the property of the owner of the soil ; and we think it should be laid down as a general rule that if he who makes the improvement is not a mere trespasser, but is in possession under any *bona fide* title or claim of title, he is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil, the option of taking the building, or allowing the removal of the material remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate he may possess."

In the case *of Juggut Mohinee Dossee* v. *Dwarka Nath Bysack* (4) the above rule was treated, not as a rule of Hindu law, but as a rule of equity and good conscience, applicable to the mofussil but not to Calcutta. Pontifex, J., pointed out that the rule laid down in Narada related to contracts for tenancies in which rent was paid, and did not apply to the case before him.

In the case of *Russick Loll Mudduck* v. *Loke Nath Kurmokar* (2) Wilson, J., held that in a question of tenancy created by contract between Hindus the parties were governed by Hindu law, and that the rule laid down by the Full Bench would apply even in the town of Calcutta.

In the Bombay case, which related to land in the town of Bombay, the position of the plaintiffs was very similar to that of the respondents in the case before us. They had held the

(1) B. L. R., Sup. Vol., 595 ; 6 W. R., 228.
(2) I. L. R., 5 Calc., 688.
(3) I. L. R., 18 Bom., 66.
(4) I. L. R., 8 Calc., 582.

1895

DUNIA LAL SEAL v. GOPI NATH KHETRY.

land for some years and had been allowed to erect buildings upon it. The defendant then attempted to treat them as monthly tenants, gave them notice to quit and sought to eject them without any compensation whatever. The Court appears to have thought that Act XI of 1855 would apply to the case, but as the defendants in that case claimed to retain the possession of the land and not merely to receive compensation for the buildings, it was decided that even if the Court was not justified in holding that the land had been originally granted for building purposes, the defendant was precluded from ejecting the plaintiffs without compensation.

In the face of these authorities we should not be prepared to hold upon the authority of the case of *Juggut Mohinee Dossee* v. *Dwarka Nath Bysack* (1) that even had the tenancy been determined, the appellant in the present case would have been entitled to the building erected by the defendants without being liable to pay them compensation.

The Transfer of Property Act (IV of 1882) applies to Calcutta as well as to the mofussil, and section 108 of that Act provides that in the absence of a contract or local usage to the contrary the lessor and the lessee of immoveable property, as against one another, possess certain rights and are subject to certain liabilities therein specified, and among the rights of the lessee clause (*h*) provides "that the lessee may remove at any time during the continuance of the lease," all things which he has attached to the earth (see section 3) provided he leaves the property in the state in which he received it. In the present case the land was acquired by the Corporation during the continuance of the lease in the sense that the relationship of landlord and tenant was still subsisting between the parties, and that being so, the respondents were, we think, entitled to the compensation for the buildings which was paid by the Corporation.

It is possible indeed that the tenants might have been found to be entitled to a larger amount of the compensation awarded had their claim been enquired into on a different basis, but as apparently they limited their claim before the District Judge to the estimated value of the buildings, it was not competent to the

(1) I. L. R., 8 Calc., 582.

lower Court to award them anything in excess of those amounts. As a matter of fact the appellant has been awarded the sum of Rs. 52,778-1-0 and the respondents the sum of Rs. 2,899 and Rs. 1,185, respectively. The proceedings on the record do not show how the total compensation money amounting to Rs. 56,864-1-0 was ascertained, but upon the evidence on the record we cannot but think that the respondents' interests in the lands have been cheaply purchased at the sums awarded to them.

1895

DUNIA LAL SEAL v. GOPI NATH KHETRY.

We must accordingly dismiss this appeal with costs.

Appeal dismissed.

S. C. G.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Beverley.

AGHORE KALI DEBI (JUDGMENT-DEBTOR) *v.* PROSUNNO COOMAR BANERJEE AND OTHERS (DECREE-HOLDERS.) *

1895 *May* 28.

Limitation Act (XV of 1877), schedule II, art. 179, clause 4—Application to receive poundage fee—Application for the return of a decree partially executed by the Court where transferred for execution—Civil Procedure Code (Act XIV of 1882), section 223—Step in aid of execution of a decree.

Neither an application by a decree-holder to receive poundage fees from him in respect of some of his judgment-debtor's property purchased by himself, nor an application, for the return to the decree-holder of a decree, made to a Court to which it has been transferred for execution, and by which it has been partially executed, is a step in aid of execution within the meaning of the Limitation Act, schedule II, art. 179, clause 4.

Krishnayyar v. *Venkayyar* (1) distinguished.

PROSUNNO COOMAR BANERJEE and another obtained a mortgage decree against Srimati Aghore Kali Debi on the 17th December 1887 in the Munsif's Court of Baruipore. The decree-holders made an application for the execution of his decree in the said Court in 1888. The decree was subsequently transferred for execution to the Munsif's Court at Alipore. On the 26th September 1888 they made an application for execution to the latter Court.

* Appeal from Order No. 213 of 1893, against the order of T. D. Beighton, Esq., District Judge of 24-Pergunnahs, dated the 4th of April 1893, reversing the order of Babu Shoshi Bhushun Bose, Munsif of Baruipore, dated the 10th of December 1892.

(1) I. L. R., 6 Mad., 81.