Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Birch.

1877 *May* 16, *and* 1878 *Jan.* 18.

PROSUNNO COOMAREE DEBEA AND ANOTHER (PLAINTIFFS) *v.* SHEIKH RUTTON BEPARY AND OTHERS (DEFENDANTS).*

Landlord and Tenant—Erection of Buildings by Tenant-at-will or from year to year—Occupancy—Right of Landlord to determine Tenancy—Compensation—Act X of 1859, *s.* 6—*Duty of Judges of Lower Courts.*

There is no law in this country which converts a holding at will, from year to year, or for a term of years, into a permanent tenure, merely because the tenant, without any arrangement with his landlord, builds a dwelling-house upon the land demised.

The nature of a holding, as between landlord and tenant, must always be a matter of contract, either expressed or implied. If there is no express agreement, a tenant becomes a tenant-at-will or from year to year, and is liable to be ejected upon a reasonable notice to quit unless some local custom to the contrary is proved.

Adoito Churn Dey v. *Peter Dass* (1) followed.

THE plaintiffs in this suit sought to eject certain tenants from homestead lands on which was situate a house and some fruit-trees. They brought their suit upon a notice served on the defendants, in which they stated that they wanted the lands for the erection of a cutcherry, and claimed the right to re-enter on an agreement said to have been executed by the defendants' father. The defendants denied the agreement, and contended that they and their ancestors had held the lands in suit from a time previous to the Permanent Settlement, and therefore no suit in ejectment could lie. The written statement further stated that the defendants' father had raised earth upon the land and built the house now standing upon it. The Court of first instance rejected the agreement relied on by the plaintiffs as not genuine; it further held that the defendants had failed to prove occupation from before the Permanent

* Appeal under s. 15 of the Letters Patent against the decree of Mr. Justice Prinsep, dated 16th of May 1877, in Special Appeal No. 2467 of 1876, upholding the judgment of Baboo Bhoobun Chunder Mookerjee, Officiating or Subordinate Judge of Dacca.

(1) 13 B. L. R., 417; S. C., 17 W. R., 383.

Settlement, but found that the defendants had through their ancestors and themselves been in occupation for fifty or sixty years. The evidence in respect of the raising the earth and the erection of the house by the defendants' father was held not worthy of credit. The Court, however, further held that the lands not being in use for any agricultural or horticultural purpose, no right of occupancy could accrue, and the notice to quit having been duly proved, the plaintiffs, in the absence of any special contract whatever between the parties, were entitled in their general right as landlords to a decree. The lower Appellate Court reversed this decision on the ground that "by the law of this country the right of a homestead tenant to occupy his holding permanently becomes absolute so soon as he is allowed to erect his dwelling-house by his landlord, whether he holds under a verbal agreement or written lease."

The plaintiffs thereupon appealed to the High Court, the appeal coming on for hearing before a single Judge (PRINSEP, J.) The learned Judge was of opinion that the position of the plaintiffs in the suit could not be placed higher than that of a purchaser at a sale for arrears of Government revenue as prescribed by s. 37 of Act XI of 1859, and therefore, in the absence of any special right, the plaintiffs were not entitled to re-entry; further, that it being proved that the defendants or their ancestors had erected a dwelling-house and lived on the lands for fifty or sixty years, they had thereby acquired a tenancy which was *primâ facie* of a permanent character, and in support of this view referred to *Shib Das Bandopadhya* v. *Bama Dass Mookhopadhya* (1). The learned Judge also held that *Adoito Churn Dey* v. *Peter Dass* (2) was distinguishable from the facts in the present case, and for these reasons dismissed the appeal on the 16th May 1877.

A further appeal under s. 15 of the Letters Patent was accordingly preferred.

Baboo *Bussunt Coomar Bose* for the appellants.

The respondents were not represented.

(2) 8 B. L. R., 378. (2) 13 B. L. R., 417; S. C., 17 W.

1878

PROSUNNO COOMAREE DEBEA v. SHEIKH RUTTON BEPARY.

The judgment of the Court was delivered by

GARTH, C. J.—In this case we are of opinion that the appeal should be decreed. (The learned Judge stated the facts of the case and continued.) So that we must take the established facts to be, that the defendants, their father and grandfather, have been occupying this land for fifty or sixty years; that it has been used as a homestead, consisting of a house and fruit-trees; that there is no evidence as to the origin of the tenancy, nor (except as to the amount of rent) as to the terms of it; and that it does not appear who built the house or planted the fruit-trees. The notice to quit has been proved, and no objection has been taken that any longer notice to quit was required by law.

Upon these facts, the Munsif has decreed in favour of the plaintiffs.

The Subordinate Judge has reversed that decision, and has delivered a judgment which, in our opinion, is not only contrary to law, but which we cannot refrain from characterizing as being wilfully perverse and disrespectful to this Court.

He begins by saying, that he is aware of numerous decisions of the High Court, in which it has been held, that, as homestead tenants have no right of occupancy under s. 6 of the Rent Act, they are to be adjudged tenants-at-will and liable to ejectment at the landlord's pleasure.

He then, professing the utmost deference and veneration for this Court, proceeds to lay down the law and pronounce a judgment directly in opposition to the decisions to which he refers; and—without even condescending to examine those decisions, or attempting to distinguish them from the case with which he is dealing—takes upon himself to lay down the proposition broadly, that, "by the law of this country the right of a homestead tenant to occupy his holding permanently becomes absolute so soon as he is allowed to erect his dwelling-house by his landlord, whether he holds under a verbal agreement or a written lease," and professing to act upon this rule he reverses the Munsif's judgment and dismisses the plaintiffs' case.

Now it must be noted in the first place, that here it is not found as a fact, that either the defendants or their ancestors

built the house which stands on the land in question. The Munsif negatived the defendants' statement in that respect, and the Subordinate Judge does not find it to be proved.

1878

PROSUNNO COOMAREE DEBEA v. SHEIKH RUHMON BEPARY.

But apart from this consideration, there is no law, of which we are aware, in this country, which converts a holding-at-will, or from year to year, or for a term of years, into a permanent tenure, merely because the tenant, without any arrangement with his landlord, chooses to build a dwelling-house upon land demised.

Such a law, if it existed, would, in a large number of cases, lead to great injustice and inconvenience, and would often leave landowners entirely at the mercy of their ryots. Small kutcha dwellings in this country may be erected in a short time and at a very trifling expense; and if a landlord, as soon as he or his agent discovers such a dwelling to have been erected, were obliged on the one hand to turn the tenant out, or make him pull down his house; or, on the other hand, as the only alternative, to allow the tenants permissive holding to become a permanent tenure, the consequences would often be disastrous to tenants, or very unjust to landlords.

The truth is, that the terms of a holding, as between landlord and tenant, must always be matter of contract, either expressed or implied. If they enter into an express agreement of tenancy, either written or verbal, such agreement generally defines the terms of the holding. If, on the other hand, a tenant is let into possession without any express agreement, and pays rent, he becomes a tenant-at-will, or from year to year; or, in other words, holds by the landlord's permission upon what may be the usual terms of such a holding by the general law, or by local custom; and in such a case, he is, of course, liable to be ejected by a reasonable notice to quit.

Occasionally there are local customs by which special terms and incidents are engrafted upon the contract of tenancy; but the existence of the custom in such cases must be a matter of proof, and no Judge has a right to act upon such customs unless their existence is duly established.

In this case no such custom is even suggested, and as there was no express agreement of tenancy and no evidence of its origin, the defendants must be considered as holding from year to year, and liable to be ejected by a proper notice to quit.

1878

PROSUNNO COOMAREE DEBEA v. SHEIKH RUTTON BEPARY.

The Subordinate Judge has cited several texts from Menu and Vrihaspati, which appear to us to have nothing to do with the question. They apply to cases of *forcible* and *criminal* trespass and dispossession, and do not profess to regulate the ordinary relations between landlord and tenant, or to deal with cases of dispossession by legal process.

What the Subordinate Judge says with regard to the statutory law of this country is also beside the question. The Legislature has, undoubtedly, in several instances, protected from sale or confiscation lands held under *bonâ fide* leases at fair rents for building purposes, continuing to be used for those purposes. But these enactments have nothing to do with the present case, in which, as far as we can see, no building agreement of any kind was ever made between the parties.

The truth is, that if a tenant wishes to build dwelling-houses upon his land, he should take care to make a proper arrangement accordingly with his landlord. He has no right to hire his land for one purpose, upon an ordinary permissive holding from year to year, or at will, and then, by using it for another purpose, to convert it, at his own option and without consulting his landlord's wishes, into a permanent tenure. Such a law, if it were in force, would be manifestly unjust to the landlord, and would lead to much litigation and inconvenience.

The case of *Adoito Churn Dey* v. *Peter Dass* (1), decided by L. S. Jackson and Glover, JJ., is in its circumstances very similar to the present, except that in that case it was proved (which it has not been here) that the defendant had built a kutcha-pucka wall upon the land of the value of Rs. 500, and that the defendant's father and grandfather had occupied the disputed land by raising houses upon it for upwards of two generations, embracing a period of thirty or thirty-two years. Nothing is said in that case as to the defendant or his predecessors having paid any rent; but we must assume that they did so, otherwise they would have acquired an independent title by adverse possession.

In other respects the tenancy was an ordinary one, as it is here, for no fixed period, and in the absence of proof to the

(1) 13 B. L. R., 417; S. C., 17 W. R., 383.

contrary, it was held to be permissive, that is, as we understand it, at will, or from year to year.

Under these circumstances, it was held by the learned Judges, that the defendants were liable to be ejected in the ordinary way, and that the fact of their having built the wall, and of their ancestors having erected the houses, placed them in no better position than they would have been under their original holding. See also to the same effect the cases of *Kylash Chunder Sircar* v. *Woomanund Roy* (1) and *Ramdhun Khan* v. *Haradhun Paramanik* (2).

In some instances, no doubt, either from expressions used in the contract of tenancy, or from the fact of land having been let by a landlord expressly for the purpose of the tenant building pucka houses upon it, such circumstances, coupled with a long and uninterrupted possession by the original grantee and his descendants, have been held to raise a presumption that the tenure was intended to be permanent; but such cases often create doubt and difficulty, and it is always far safer for a tenant, if he means to build, to have the terms of his tenure clearly defined by a written instrument.

Had the Subordinate Judge properly considered the facts of this case, and treated with due deference the decision of this Court, to which he has himself referred, he would not have fallen into error. Unless the subordinate judiciary in this country will loyally defer to the opinion of the High Court, and submit their own views and prejudices to the High Courts' judgment, it is quite impossible that uniformity in the law, which is one of the highest objects to be attained in the administration of justice, can ever be arrived at.

As regards the decision of the learned Judge of this Court, which is now under appeal, we are quite unable to appreciate the grounds upon which he has attempted to distinguish the facts of this case from those of the authorities to which he has referred. In those cases, as in this, there was no evidence, that the tenant held for any particular time. He held at a rent in the ordinary way, and did not give any evidence to show that his holding was of a permanent character, or for any defined period.

(1) 24 W. R., 412. (2) 9 B. L. R., 107.

1878

PROSUNNO COOMAREE DEBEA v. SHEIKH RUTTON BEPARY.

Under these circumstances, his tenancy was considered to be at will, or from year to year; or, in other words, permissive at his landlord's pleasure. We consider that the case of *Adoito Churn Dey* v. *Peter Dass* (1) is wholly undistinguishable from the present.

The judgments of both Appellate Courts are reversed, and the judgment of the Munsif restored with costs in each Court.

Before Mr. Justice Kemp and Mr. Justice Morris.

1878
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MAHOMED ARSHAD CHOWDHRY (DEFENDANT) *v.* SAJIDA BANOO (PLAINTIFF).*

Mahomedan Law—Widow's Rights—Return.

By the Mahomedan law of inheritance, in default of other sharers and in the absence of distant kindred, the widow is entitled to the 'return,' to the exclusion of the fisc.

THIS was a suit brought by the widow of one Nawab Ali Chowdhry for recovery of possession of certain lands, part of the estate of her husband, who died on the 21st of July 1867. The plaintiff claimed as sole surviving heir of the deceased. In the written statement, the defendant represented himself as a "cousin in the collateral line" to the said Nawab Ali Chowdhry, and among other defences denied the right of the plaintiff to more than a fourth share of her husband's estate. The parties to this suit were of the Suni sect of Mahomedans. The Court of first instance found on the facts that the defendant was not of the same family with Nawab Ali Chowdhry, and that, in the absence of any other heir, the plaintiff was entitled to all the properties left by her husband, the said Nawab Ali Chowdhry. The defendant appealed to the High Court.

Mr. *H. Bell* (with him Moulvi *Serajul Islam* and Moulvi *Mahomed Yousuff*) for the appellant.

* Regular Appeal, No. 249 of 1876, against the decree of Ram Coomar Pal Chowdhry, Roy Bahadoor, Subordinate Judge of Zilla Sylhet, dated the 25th of May 1876.

(1) 13 B. L. R., 417; S. C., 17 W. R., 383.