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

SUTYABHAMA DASSEE (PLAINTIFF) *v.* KRISHNA CHUNDER CHATTERJEE AND ANOTHER (DEFENDANTS).* 1880 *May* 10.

Estoppel by pleadings—Ejectment Suit—Denial of Tenancy—Change of Defence on Appeal—Occupancy Right.

It is not open to a defendant to change the whole nature of his defence at the last moment, and to set up in a Court of appeal a plea which he has directly and fraudulently repudiated in the Court below.

In an ejectment suit, the defendants, from whom the plaintiff alleged that he had purchased the land from which he sought to eject them, and who had before suit by parol disclaimed the plaintiff's title, set up in their written statement an adverse title in themselves. The lower Court found the plaintiff's allegation to be true.

Held, that the defendants were estopped from contending on appeal that they were occupancy-ryots, and therefore not liable to be ejected; and that by their own conduct they had forfeited the rights which they claimed.

THIS was a suit to eject the defendants from certain lands. The plaintiff stated that these lands were sold to her in 1251 (1844) by the defendants, who, after the sale, continued in possession as her tenants; that such was the relation between them until 1279 (1872), when she called upon the defendants to quit, and on their refusing so to do, she brought this present suit.

The defendants denied the sale and their tenancy, and set up an adverse title, pleading also limitation.

The Munsif found that the plaintiff's title was good, and gave a decree in her favor.

The defendants appealed, and on the appeal set up an occupancy title.

The Subordinate Judge found that the defendants, after having defended the case in the Court below by denying the plaintiff's title, were estopped from claiming to be occupancy-ryots, and dismissed the appeal.

* Appeal under s. 15 of the Letters Patent against the decree of Mr. Justice Maclean, dated the 8th March 1880, in appeal from Appellate Decree No. 1223 of 1879, dated the 22nd July 1878, from the decision of Baboo Bhooputty Roy, Subordinate Judge of Burdwan, affirming the decision of Baboo Chunder Coomar Dass, Munsif of that district.

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The defendants appealed to the High Court, and the appeal was heard before a single judge who delivered the following judgment:

MACLEAN, J.—It appears to me that the plaintiff's suit was misconceived. Assuming the correctness of all that the plaintiff has alleged, she had no right to eject the defendants, or call in the assistance of the Court to turn them out.

The plaintiff's case was, that the defendants were tenants of upwards of thirty years' standing, though for about five years they had ceased to pay rent. Under these circumstances, if the plaintiff had sued for arrears of rent, coupled with a demand for ejectment, it is very possible that she might have obtained a decree; but it is impossible to forget that she has herself proved in the clearest manner that the defendants are ryots with a right of occupancy; and as such ryots can only be ejected in execution of a decree or order under the provisions of Beng. Act VIII of 1869, and as there is no provision in the law for ejecting save for nonpayment of rent or termination of a lease, the conclusion to which I come is, that the defendants are not liable to be ejected simply because they refused to vacate the land at the bidding of the plaintiff's servants.

In this view of the law, I must allow this appeal, reverse the decision of the Subordinate Judge, and dismiss the plaintiff's suit with costs.

The plaintiff appealed under s. 15 of the Letters Patent.

Baboo *Taruck Nath Sen* for the appellant.

Baboo *Bama Churn Banerjee* for the respondents.

The judgment of the Court (GARTH, C. J., and MITTER, J.) was delivered by

GARTH, C. J.—In this case we are unable to agree with the view which the learned Judge has taken.

The plaintiff brought her suit under these circumstances: She says, that the defendants sold to her the property in question, of which she is now seeking to recover khas possession, some thirty years ago; that, after they had sold it to her, they became her tenants at a certain rent; that, from that time up to about

five years ago, this rent was duly paid; that, upon their ceasing to pay her rent, she demanded it from them, but they then told her they were no tenants of hers, and that she was not their landlord,—in fact they set up an adverse title, and denied that they had ever sold her the land. Consequently, after waiting some time, she brought the present suit to eject them.

Upon this, the defendants, not content with their parol disclaimer of the plaintiff's title, set up in their written statement that the kobala under which they sold this land to her was a false deed; that they never sold the land at all, nor became the plaintiff's tenants, nor paid her any rent,—in fact, that they never had anything to do with her, and they then set up an adverse title in themselves.

Upon this written statement the issues were framed, and the trial proceeded. The Munsif found that the plaintiff's case was substantially true; that the defendants had repudiated the plaintiff's title, and that the plaintiff was entitled to recover possession on that ground.

In the course of the trial, the plaintiff proved (in fact it formed part of her case to prove) that, at one time, the defendants, for many years, were her tenants, and paid her rent. It seems that they paid her rent sometimes in money and sometimes in produce.

The defendants then appealed to the Subordinate Judge. They again asserted that the defence set up in their written statement was true, and they contested the case again on the issues raised in the Court of first instance. But they contended also in the alternative, that if those issues were found against them, they then had a right to turn round and claim to be the plaintiff's tenants; and as she (the plaintiff) proved that they had been paying rent to her for so many years, they were entitled to a decree in this suit, upon the ground that they were occupancy-ryots, and that as such they could not be ejected. In fact, they tried to take advantage of a plea which they had directly repudiated in the Court of the first instance.

The lower Appellate Court considered that it was not competent for the defendants to set up that defence; that, having defended this suit upon the very ground that they were not

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the plaintiff's tenants, and had nothing to do with her, they were estopped by their own conduct from claiming to be her occupancy-ryots.

In this Court, however, the learned Judge appears to have taken a different view. He seems to think, that as the plaintiff proved in the Court of first instance that, for several years, the defendants had paid her rent, she had misconceived her suit, and that the course she ought to have taken was to have sued the defendants under the Rent Law for rent, and for ejectment in the event of its nonpayment. He, consequently, dismissed the plaintiff's suit with costs.

We are quite unable to take this view of the case. It may be, that if the defendants had merely verbally disclaimed their landlord's title before the suit, and had pleaded their occupancy title when the suit was brought, their parol disclaimer might not have affected their real rights; or even if the defence had been founded upon a *bonâ fide* mistake, and they had found out their mistake in the course of the trial, and had applied to withdraw their defence and plead their right of occupancy, it is possible that (subject to any question of costs) they might properly have been allowed to take advantage of their true position.

But that certainly was not the case here. The defendants knowingly and wilfully denied their landlord's title. They repudiated the kobala which they had themselves executed: they tried their best to defeat her rights, and set up an adverse title in themselves.

Under these circumstances, we think that, by their own conduct, they have forfeited the right which they now claim, and that the Court ought not to assist persons who knowingly attempt these frauds.

The rule of English law is, that where, by matter of record, a tenant disclaims his landlord's title, and sets up an adverse title either in himself or in some third party, he thereby forfeits his tenancy. But without laying down any absolute rule here with regard to forfeiture in such cases, we think we are clearly justified in a case of this kind in refusing to allow defendants to change the whole nature of their defence at the last moment,

and to set up in a Court of appeal a plea which they had directly and fraudulently repudiated in the Court below; *see Dabee Misser* v *Mungur Meah* (1). We, therefore, think it right to reverse the decision of the learned Judge of this Court, and to restore the judgment of the Court below. The appellant will have her costs of both hearings in this Court.

Appeal allowed.

APPELLATE CRIMINAL.

Before Mr. Justice Morris and Mr. Justice Prinsep.

THE EMPRESS *v.* BUTOKRISTO DASS AND ANOTHER.*

1880 *May* 3.

Conduct of Prosecution by Advocate or Attorney—Permission by Magistrate—Presidency Magistrates' Act (IV of 1877), s. 129.

With the exception of the Advocate-General, Standing Counsel, Government Solicitor, or other officer generally or specially empowered by the Local Government in that behalf, no person, whether counsel or attorney, can claim the right to conduct the prosecution of any criminal case without the permission of the Presidency Magistrate.

THE following letter of reference under s. 240 of Act IV of 1877 (The Presidency Magistrates' Act) was sent by the Chief Presidency Magistrate, with the object of eliciting an expression of opinion from the High Court on the question therein asked:—

"I have the honor, under s. 240 of Act IV of 1877, to refer, for the opinion of the High Court, the following question:—

"Under s. 129, Presidency Magistrates' Act, are counsel or attorneys entitled, as a right, to prosecute cases in the Presidency Magistrate's Court, or must they obtain the sanction of the Magistrate to do so?"

The opinion of the Court (MORRIS and PRINSEP, JJ.) was as follows:—

MORRIS, J.—In our opinion, under s. 129 of the Presidency Magistrates' Act, with the exception of the Advocate-General,

* Criminal Reference, No. 95 of 1880, made by F. J. Marsden, Esq., Chief Presidency Magistrate of Calcutta, dated the 26th April 1880.

(1) 2 C. L. R., 208.