

*Special Appeal No. 836 of 1865.*K. P. SULE *Appellant.*DHUNDI'RA'J VINA'YAK *Respondent.**Grant of land—Receipt of rent—Acquiescence.*

In a suit to recover possession of land, where it appeared that the defendant's father had, in A. D. 1801, obtained possession on a lease of 280 bighás from the Government of Kulábá, and that the plaintiffs' father had, in 1806, obtained a grant of ten unspecified bighás of the same land, but that he never asked to have them marked out and given to him *in specie*; and that he and subsequently his sons the plaintiffs were content up to the year 1856 to receive from the defendant's family, in respect of their grant, the rent formerly paid by them to the Government for the same: the District Court reversed the decree of the Munsif, and threw out the claim to recover possession of the land, on the ground that the plaintiffs must be taken, after such a lapse of time, to have acquiesced in the arrangement that a yearly rent was to be received without any particular land being marked out as theirs:—

Held that it was competent for the Assistant Judge to come to that conclusion, under the circumstances; and that there was no ground for saying that there was any error of law in his decision, which was accordingly affirmed.

THIS was a special appeal from the decision of C. B. Izon, Acting Assistant Judge of the Konkan, in Appeal Suit No. 72 of 1864, reversing the decree of Mukundaráo Bháskar, Munsif of Pen, in Original Suit No. 2460 of 1861.

Keshav and Lakshuman, sons of Pándúrang Sule, brought the suit for the recovery of ten bighás of land out of a field named Bhangári: stating that the same had been granted as inám to their father by His Highness the late A'ngriá of Kulábá, and that an order had been sent to the Pátíl and to the father of the defendant in A. D. 1806-7 to deliver over possession thereof; that in A. D. 1826-27 the Honorable Company's Government made a list confirming ináms to the defendant's father and his subordinates, which contained the item of Rs. 80-9-0 on account of the ten bighás granted to their father; that the defendant's father used to pay to them the amount accruing due from the ten bighás; but that it had been stopped since the year 1856-57.

1866.

July 16.

S. A. No. 836
of 1865.

1866.
July 16.
S. A. No. 836
of 1865.

The defendant pleaded possession for longer than sixty years ; that the rent merely of ten bighás was granted to the plaintiffs' father, which he did not object to ; that as no demand for it was made since the year 1856-57, it had not been paid ; and that the whole field having been granted under a kaúl to his father in 1800-1, the Kulábá Government had no right to grant as inám any land out of it ; and that a suit to recover possession of the land would not, therefore, lie.

The issues laid down by the Munsíf, were as follows:—
(1) whether the plaintiffs have properly valued their claim ;
(2) whether the claim is barred by the law of limitation ;
(3) whether the plaintiffs are entitled to recover possession of the land from the defendant.

The list, No. 57, confirming the ináms was produced by the defendant, and showed the amount of annual rent payable for the land in question to be Rs. 80-9-0 ; and the plaintiffs having valued their claim at eighteen times that amount, the Munsíf found the suit to be properly valued. And it being admitted that rent on account of the Inám was paid to the plaintiffs up to the year 1857, the claim was not barred.

As to the question, whether it was the land that was granted as inám to the plaintiffs' father, or merely the rent of it due to the Kulábá Government—the defendant retaining possession of the land—the Munsíf held that, as the whole field was held by the defendant's father from the Government under a kaúl or lease, which did not give the land away absolutely ; and as the same government subsequently granted to the plaintiffs' family ten bighás out of that field for maintenance, and, further, as it afterwards issued to the defendant's father an order directing the delivery of separate possession to the plaintiffs' father, it was put beyond doubt that the land *in specie* was granted to the plaintiffs' family. And although the plaintiffs' family admittedly never had possession—receiving only the rent—that did not amount to a relinquishment of the inám land by them. The Munsíf, accordingly, passed a decree in their favour.

The defendant appealed, urging that the rent only was granted to the plaintiffs' father by the sanad; that the land belonged to him, having been granted to his father on account of his having reclaimed it; that possession had never been taken, agreeably to the order directing delivery of the ten bighás, which order was, therefore, ineffectual; and that the Government had no right to grant the land in inám.

1866
July 16.
S. A. No. 839
of 1865.

The Assistant Judge laid down the following issues for decision:—(1) what is the meaning and scope of the sanad No. 4, that is, whether its purport was to grant the land; (2) if so, whether such grant was to any extent invalidated by the previous right of the defendant under the kaúl No. 12; (3) whether the fact that plaintiffs never had been in occupation, and never obtained the specification and demarcation of the land granted to them by the sanad, debars them from evicting the defendant; (4) whether the plaintiffs since 1856-57 ever demanded rent, and whether on such demand defendant refused to pay rent or not.

On the first issue the Assistant Judge was of opinion, upon the construction of the sanad and the order, both issued on the same day, that the land was clearly granted in inám to the plaintiff's father, Páñdurang Narsimhá; and that the plaintiffs were and are in the position of inámdárs. He, accordingly, held that the sanad No. 4 was a grant of ten unspecified bighás of land out of the khár Bhangári in inám to Páñdurang; and that it was intended to confer such possession as is usually conferred on inámdárs.

On the second point the Assistant Judge found that the rights conferred on the defendant's family did not in any way invalidate the grant to the plaintiffs, on the ground that the kaúl (No. 12) mentioned no term during which the land was to be held, nor was it mentioned that it was to be held in perpetuity—the words used being that so much rice should be paid yearly (*sál dar sál*); that in the kaúl, Government had not made over any of its own rights: it did not confer the rights of an inámdár, but only possession of the land at a reduced rent; that if some of the rights con-

1866.
July 16.
S. A. No. 830
of 1865.

ferred by the previous grant were in conflict with some given by the subsequent one, the Government, which was absolute, might have so acted, and the last rather than the first sanad should then be looked to; but here the kaúl and the sanad did not conflict.

On the third and fourth points the following observations were recorded :—

“On the third point I find that the plaintiff is debarred from evicting the defendant now, in consequence of his never having taken any precise land into his possession. The grant was in 1806; and I think by this time he must be held to have acquiesced in the arrangement that he was to receive his yearly rent without any particular land being marked as his. No doubt at the time he might easily have enforced the order of the Government, and obtained some particular land being set aside as his. But at present from what land is the defendant to be evicted? Some unknown ten bighás out of two hundred and eighty.

“The mere fact of his never having had occupation of the land himself could not debar the plaintiff from evicting a tenant who refused to pay his rent. But it is widely different when the inámdár has suffered his right to lie dormant for sixty years, without ever taking the trouble to have the land marked out.

“On the fourth point no finding is at present required; but if it should be decided by a higher court, that even laches so long and peculiar on the plaintiff's part does not debar him from obtaining possession of the ten bighás, then it would become necessary to decide whether, in effect, defendant refused to pay rent, and so a cause for evicting him has arisen. The defendant pleaded that he was willing to pay rent; nor can I think the paper No. 36 at all sufficient to prove that he ever refused to pay. The issue, however, was not laid down by the Munsif.

“If my view of the case is right, plaintiff is only entitled to sue for rent, and not for possession of the land. I, accordingly, reverse the Munsif's decree, and throw out the claim.”

The special appeal came on for hearing this day before
COUCH, C.J., and NEWTON, J.

1866.
July 16.
S. A. No. 836
of 1865.

Dhirajlál Mathurádás for the appellant.—Although the land has not been marked-out, still the plaintiffs' title has been uniformly acknowledged by payment of rent. The principle of Reg. V. of 1827, Sec. 1, cannot apply to this case. Under the older decisions the right to one's mirás was never barred : it could be asserted at any time. It has by recent decisions been ruled, that any person holding for thirty years acquires a right by prescription, whether the land held be mirás or any other ; but that ruling cannot apply to this case, for here the respondent has not been holding *as proprietor*. The Assistant Judge was wrong in law in not awarding possession.

Shántáram Náráyán, *contra*, contended that the kaúl having been granted in 1801, the relation of landlord and tenant was, from that time, created between the defendant's father and the Government ; that the lease at the reduced rent was granted in consideration of improvements, and was a permanent lease ; that if the grant to the plaintiffs' father was of the land and of its possession, the claim to have it marked out was barred by Reg. V. of 1827, Sec. 4. But, apart from that, the Judge had found, from the long and silent acquiescence of the plaintiffs, an arrangement between the parties that the plaintiffs should take the rent, and the defendant hold the land, permanently. There was no refusal to pay rent ; and the Judge had expressed himself in favour of the defendant so far as the present finding went.

COUCH, C. J. —The facts of this case appear to be these : The kaúl was granted to the defendant's father in 1801 by the government of that time ; and he became a tenant under that government. Afterwards in 1806 came the grant to the plaintiffs' father, in which the kaúl of 1801 is not referred to.

It is doubtful whether the plaintiffs' father ever had a right to eject the defendant's father. Although it might be that an arbitrary government might not always respect its

1866.
July 16.
S. A. No. 836
of 1865.

engagements, we ought to presume that it would be doing what was fair and proper. Possibly the plaintiffs' father may have had a right to enforce the marking out and separate delivery of possession to him of the ten bighás; but after this lapse of time we cannot say what arrangement was intended to obtain between the parties. It is not for plaintiffs, who have been content to receive the rent for so long a period as fifty-five years, to turn round and call upon the defendant to give evidence of what that arrangement was.

Looking at the kaúl and the circumstances of the case, it was quite competent for the Assistant Judge to hold that the plaintiff was not entitled to recover the land. There is no ground for saying that he committed any error in law in deciding as he has done. If the defendant refuses to pay rent, the plaintiff may bring his suit to recover it; but we can make no order upon that subject in the present suit, which is merely to recover possession of the land.

We, therefore, affirm the decree of the Court below with costs.

Decree affirmed.

Special Appeal No. 844 of 1865.

BA'BA'JI' bin RA'MJI' *Appellant.*

KA'SIMBHA'I valad AZAMBHA'I and others... *Respondents.*

*Remand to District Court to correct a defect—Mistake of District Judge—
Second remand.*

An Acting District Judge having made a decree, reversing the decree of the Munsif who threw out the plaintiff's claim; omitted to pass a decree himself in favour of the plaintiff, which his finding showed he intended to do: the case was remanded on special appeal by the High Court to the District Court, with an order that a decree should be passed; but the District Judge (who had meanwhile returned to his appointment) re-opened the whole case, and passed a decree directly opposed to that of his predecessor, in which he confirmed the Munsif's decree:—

Held that the decree of the Judge should be reversed, and the suit again remanded, in order that he might pass a decree for the plaintiff, in accordance with the view of the case expressed by the Acting Judge, with which the High Court saw no ground, upon the special appeal before it, to interfere.