[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 441 *of* 1874.

1875.
Dec. 22.

TA'RA'CHAND PIRCHAND (ORIGINAL PLAINTIFF, SPECIAL APPELLANT) *v.* LAKSHMAN BHAVA'NI (ORIGINAL DEFENDANT, SPECIAL RESPONDENT).

Mirás—Rázinámá—Extinction of Mirás right.

B, a *Mirásdár*, addressed a *rázinámá* to the Mámlatdár, resigning certain *mirás* lands in favour of *L* (to whom at the same time he delivered possession of the lands), and containing no reservation or qualification : *Held* that the transfer to *L* was complete and the rights of *B* wholly extinguished.

THIS was a special appeal from the decision of C. B. Izon, Joint Judge of Tanna at Násik, in appeal No. 68 of 1874 reversing the decree of the Subordinate Judge of Sinnar in original suit 775 of 1872.

The facts, which, for the purpose of this report, may be taken as proved, are as follows :—

One Haibati was the *Mirásdár* of a piece of land. After his death his son Bhágu, in August 1867, passed a *rázinámá* to the Mámlatdár in favour of the defendant Lakshman in the following terms :—

"To Shámráv Govind, Mámlatdár, on behalf of the Government, Táluká Sinnar.

[This *rázinámá* is passed] by Bháguji valad Haibat Halvar, Pátil of Mouje Muldhon. My representation is as follows :—

The land [situated] in the aforesaid *mouje* is in the name of my father Haibati valad Bháguji Halvar, Pátil. But the person named above is dead. I am his eldest son and heir. I am too poor to cultivate [the same]. Therefore I resign the land. The number of that *tike* (field) [is as follows] :—

Name of the Tike.	[Survey No.]	Acres.	[Assessment] Rupees.
1 Tike Govind Khila	64	20	3 12 0

The above land has been resigned from the Christian year 1867-68. Therefore, the Government should take away the [said] land from my name and transfer it to that of Lakshman valad

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Bhavánji Pavle, Pátil of the village mentioned above. I and the [other] person mentioned above agreed between ourselves and have made this *mobadlá* (transfer). This *rázinámá* for a *mobadlá* (transfer) is duly given in writing. The 26th day of the month of August in the Christian year 1867." At the same time Bhágu gave the defendant Lakshman possession of the lands comprised in the *rázinámá*.

Haibati's right in the land was sold in December 1869 at an auction sale at which one Táráchand was the purchaser. Tárachand then brought the present suit against Lakshman for recovery of the land with mesne profits. Lakshman contended that the *rázinámá* was a complete abandonment of all the rights of Haibati in the land, and that, consequently, he was himself the absolute owner of the land.

There was no evidence, nor was it contended in argument in either Court, that Haibati had been guilty of any fraudulent concealment of the fact of his being a *Mirásdár*, or that Lakshman was ignorant of that fact; the contrary inference might, however, fairly be drawn from the fact that Lakshman was himself Patil of the village in which were situated the lands comprised in the *rázinámá*. There was no evidence of the consideration paid by Lakshman for the transfer, and the point that there was none, was raised for the first time at the argument of the special appeal, but, as a fact, none had been paid.

The Subordinate Judge passed a decree in favour of the plaintiff; but the Joint Judge reversed his decision and decreed for the defendant.

The special appeal was heard by WEST and NA'NA'BHAI HARIDA'S, JJ.

Gokaldas Kahandas for *Dhirájlál Mathurádás*, Government Pleader, for special appellant:—The *rázinámá* No. 16 does not contain the words "No claim whatever of mine remains in the land," and is not, therefore, a complete relinquishment of the *mirás*. The *Mirasdár* consequently can resume possession of his land within 12 years. What Lakshman acquired by the *rázinámá* was merely a tenancy-at-will, determinable at the *Mirásdár's* pleasure within the period of limitation. There was no consideration for the *rázinámá*.

Ghanasham Nilkanth :—The *rázinámá* does not contain the words "No claim whatever of mine remains in the land"; but is nevertheless a complete abandonment of the grantor's rights. There is not a word of limitation, or of reservation. Section 42 of the Survey Act I. of 1865 (Bombay) makes the new occupant responsible for the assessment. The exemption of the grantor from the liability to pay assessment and the undertaking of the grantee to pay it, constituted the consideration for the *rázinamá*.

WEST, J. :—Haibati's son Bhágu, it is clear, passed to the Mámlatdár a *rázinámá* of the land in dispute in favour of the defendant Lakshman. Táráchand, as subsequent purchaser of Haibati's rights, now seeks to eject Lakshman, asserting that, as the land is *mirás*, the resignation by Bhágu conferred no more than a precarious right of occupation terminable at the will of Haibati or of the successor to Haibati's interest. It is plain, however, that Bhágu gave up possession of the land in dispute to Lakshman. Lakshman's possession is *primâ facie* evidence of complete ownership throwing the burden, according to Section 110 of the Indian Evidence Act, of showing that it is held on some inferior title, upon him who seeks to dislodge the possessor. Under the English Common Law "if the defendant pleads livery and seizin from the plaintiff, the plaintiff cannot reply that the livery was conditional without showing the deed, inasmuch as the plaintiff is estopped to defeat his own livery by a naked averment and parol evidence only": 1 Gilb. on Evidence, 86. The creation of a greater interest than a lease of three years, except by a writing, was afterwards prevented by the Statute of Frauds, and hence it comes that the formal delivery of possession does not now in England raise the natural presumption which formerly attended it; but the Statute of Frauds is not in operation amongst Hindus at Násik, and he who delivers possession there, without evidence of anything more, places himself in such a position that the ordinary presumption operates against him. Under the Hindu law there must, to constitute a complete title, and therefore a complete transfer of title, be *juris et seisinæ conjunctio* according to Sir T. Strange; but under that law, too, a title may be inferred from possession, so that he who hands over possession gives room for this inference

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to arise (1). The nature of the possession granted, or rather of the right in virtue of which the physical detention of the property is transferred, is to be sought in the accompanying agreement, or rather expression of will, on the part of the grantor. Here he hands over possession and gives in a *ráziná má* in favour of Lakshman, not limited by any qualification whatever. It is argued that the *Mirásdár's* right to resume possession may have been reserved; but to this, if to any case, the maxim applies *expressa nocent, non expressa non nocent.* If Bhágu intended to reserve any portion of his right, he should have said so. In *Church* v. *Brown* (2) Lord Eldon said: "The safest rule for property is that a person shall be taken to grant the interest in an estate, which he proposes to convey or the lease he proposes to make; and that nothing which flows out of that interest, as an incident, is to be done away by loose expression, to be construed by facts more loose; that it is upon the party, who has forborne to insert a covenant for his own benefit, to show his title to it." If, being a *Mirásdar* with rights as such, Bhágu, concealing this circumstance, induced Lakshman to take up the land and relieve him from the burden of the assessment, he was bound to make good the apparent title which he conferred on Lakshman, and so was any one else who came in, like the plaintiff here, by a title created subsequently to the transfer to Lakshman. The transfer to Lakshman, therefore, seems to have been complete, and the rights of Bhágu wholly extinguished. For these reasons we confirm the decree of the Joint Judge with costs.

Decree confirmed.

(1) 1 Str. H. L. 31., 2 *Id.* 20., 1 Coleb. Dig. 131 CXIII.

(2) 15 Ves. 258. *See* p. 268.

Note.—In *Suryabhau* v. *Bukajee* (2 Morr. S. D. A., 189) the late Sadr Diváni Adálat held that when a *Mirásdár* abandoned his land, and the Collector made it over to an *Oopree*, such *Oopree* did not, by thirty years' possession, acquire a title against the *Mirásdár* under Regulation V. of 1827, Section 1.—See also *Apa* v. *Jaghoo* (1 Morr. Sel. Dec. 51). But these cases were overruled in *Salu* v. *Ravji* (1 Bom. H. C. Rep. 41) in which it was held that the Regulation applied. See also *Arjuna* v. *Bhaván* (4 Bom. H. C. Rep. A. C. 133) in which it was held that limitation under Act XIV. of 1859 ran against a *Mirásdár* abandoning possession of his land.

In *Joti* v. *Balu* (reported *infra*) a rule directly opposite to that enunciated in the present case was laid down, viz. that a *Mirásdár* who has given in a *ráziná má* has a right to recover his land if he sues within the period of limitation, unless in that document it is expressly stipulated that he has abandoned his *mirás* rights.