APPELLATE CIVIL.

(35)

Before Mr. Justice West and Mr. Justice Pinhey.

1879
February 20. BABSHETTI (ORIGINAL DEFENDANT) APPELLANT, *v.* VENKATARAMANA (ORIGINAL PLAINTIFF), RESPONDENT.*

Contract—Mistake—Mulgeni—Enhancement of Rent—Practice—Jurisdiction —Small Cause Court

The defendant executed to the plaintiff in 1847 a *mulgeni kabulayat* (corresponding to a lease at a fixed rental) agreeing to pay to the plaintiff Rs. 150 annually. At the date of the execution of the *mulgeni* the Government assessment was Rs. 56-8-0, but in 1872 it was enhanced to Rs. 129-8-0, and a local fund cess of Rs. 4-9-0 imposed in addition. The plaintiff sued the defendant to recover from him the enhanced assessment and the cess.

Held that the plaintiff was not entitled to recover inasmuch as the defendant's liability was fixed by the terms of the *mulgeni* which was binding although it had been executed by both parties in the belife that the Government assessment would not be increased. A mistake as to existing facts may invalidate a contract; but an erroneous expectation which events entirely falsify has no effect.

In appeal an objection was taken that the amount claimed by the plaintiff being less than Rs. 500, the suit was cognizable by a Court of Small Causes, and that therefore there was no second appeal. *Held* that the suit might be regarded as one for arrears of rent at an increased rate and as such was not cognizable by a Court of Small Causes.

THIS was a second appeal from the decision of A. L. Spens, Judge of North Kanara, confirming the decree of the Subordinate Judge of Kumta.

The facts of the case were undisputed. The plaintiff was a *mulgar* or *rayat* under Government, and paid on his land an annual assessment of Rs. 56-8-0 until 1872, in which year North Kanara was surveyed. The plaintiff's assessment was then enhanced to Rs. 129-8, and he was also made liable to a local-fund cess of Rs. 4-9-0. His ancestor had sub-let the land in 1847 to the defendant at a fixed annual rental of Rs. 150, on a lease technically called in North Kanara *mulgeni*. In this suit the plaintiff sought to recover from the defendant the enhanced assessment and the cess payable in respect of his land for three years.

The Subordinate Judge awarded the plaintiff's claim. The District Judge upheld his decree, for reasons stated by him as follows :—

* Second Appeal, No. 422 of 1878.

"There can be no doubt that until very lately—*i.e.*, until the introduction of the present survey assessment—neither landlords nor tenants contemplated any enhancement of the assessment by the Government. I therefore cannot apply any rules, on the ground that the contracting parties were well aware, at the time of their agreement, that an increase of assessment might happen or was likely to happen. Nor do I think it fair to presume that either party had the slightest suspicion that anything would arise to affect their mutual agreement. It was generally believed, rightly or wrongly, that the assessment in the Kanara District was a permanent settlement, and this belief was strengthened by the fact that, universally or almost so throughout the district, no assessment had been enhanced for the last fifty years and more. But whether they believed it or not, there can be no doubt that the Government had the power to raise the assessment, and it has now been so ruled in the Kanara Land Assessment Case,(1) on the judgment in which case I rely for my decision in the presen case. There it has been decided that, in the absence of special terms to the contrary, Government may enhance the land revenue payable in respect of land held on *muli* tenure in Kanara. * * * * * * * * * *

The defendant might argue that when he obtained the lease the land was poor, that he improved it, and that either the condition of the original agreement should be the only conditions enforceable against him, or that he should be compensated for the improvements made by him. On the other hand, the *mulgars* may fairly argue that if the assessment on the land be enhanced, and they prohibited from proportionally enhancing the rent due to them, their right in the land would be extinguished * * * * * * * * * *.

Such being the state of things between the parties, and looking to the fact that the Government has stepped in between landlord and tenant, I have to see, under section 26, Regulation IV of 1827, whethetr here is any Act of Parliament or Regulation of Government applicable to this case, and, if there is not, to ascertain the usage of the country; and if there be no such usage or specific law, to determine the point at issue according to justice

(1) *Vyakunta Bapuji* v. *The Government of Bombay* 12 Bom. H. C. Rep. Appx. 1,

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equity, and good conscience. I know of no Act of Parliament, or Regulation of Government, or specific law, which applies to this case, nor has any such been pointed out to me. It has been stated that 'there is no usage of the country,' inasmuch as the recent revision of the assessment is a matter of the present time. But is this the fact? I think the quotations from the Kanara Land Assessment Case perfectly jusify me in determining that there is such usage, and that the maxim '*Nullum tempus occurrit regi*' applies, and does away with the objection that there has been no such usage for a period of fifty years and upwards whether this statement be a fact or not.

"I therefore decide that the defendant is bound to pay the enhanced assessment, or else give up the land, and sue for compensation for improvements or other loss he may have suffered."

The defendant appealed.

For the respondent a preliminary objection was taken, viz., that the amount claimed by plaintiff being less than Rs. 500, the suit was cognizable by a Court of Small Causes, and that there was therefore no second appeal.

The Court, however, held that the suit might be regarded as one for arrears of rent at an increased rate, and, as such, was not cognizable by a Court of Small Causes.

Feb. 20.—*Shamrav Vithal* for the appellant.—The decision of the Judge is opposed to the express terms of the agreement entered into by the parties. Those terms supersede any usage of the country to the contrary, supposing such usage to exist, as has been found by the Judge. Assuming that a mistake existed as to the power of Government to enhance the assessment, the Judge was in error in holding that such a mistake as to facts not in existence could operate to very the terms of the agreement.

Nánabhai Haridas for the respondent.—We rely on the usage found proved by the Judge, and the circumstance that the agreement was based on a mistake of fact. Both the plaintiff and the defendant were mistaken as to the power of the Government to enhance the assessment. None of them expected such a contingency. If the *mulgars* in Kanara are prevented from recovering

the enhanced assessment from their tenants, their holdings will be valueless.

The judgment of the Court was delivered by

WEST, J.—The plaintiff's claim in this case may properly be regarded as one to recover arrears of rent at a rate exceeding that engaged for in the *kabulayat* by the same sum that the Government assessment which the plaintiff himself now has to pay exceeds what he paid when the *mulgeni* contract was made. The agreement itself makes no provision for an increased rent under any circumstances; on the contrary, it expressly provides against any increase. If the assessment had been lessened instead of augmented, the tenant could not have claimed any diminution of his rent; nor, on the other hand, can he on ordinary principles be subject to an increase because of the greater burden now imposed on his landlord. The decisions in the case of *Bai Aval* v. *Narottam Lalldas*(1) and in other cases have rested on this principle, and it would obviously be introducing a new term in to the contract to make rent under particular circumstances variable, which it is expressly stipulated shall be invariable. Had the rent been fixed by reference to an existing assessment, so as to entitle the landlord to so much as (existing) assessment and so much as *munafa* or profit rent, there might, indeed, be room to suppose that this *unafa* was meant by both parties to be the measure of his annual profit. Such a stipulation is to be found in some *mulgeni* leases, and may probably be implied in others, but here it is absent; it is excluded by its inconsistency with the terms expressed, and we are not at liberty to interpolate it.

It is urged, however, that the parties, having both expected that the Government assessment would remain unaltered, must be supposed to have contracted on that supposition, and that if the tenant is not liable for an enhanced rent in consequence of the enhanced assessment, there must have been such an error or misapprehension as would vitiate the contract. It would be rather late now to pronounce a lease void for mutual error which has been acted on ever since 1847; but, in trust, the influence of error is to be admitted in such cases only where it was of such

(1) Printed Judgments for 1873, p. 122.

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a kind that it must be supposed to have made the contractin parties' will quite different from the immediate result attained.(1) It is not enough that there was an error "as to some point, even though a material point,—an error as to which does not effect the substance of the whole consideration": *per* Blackburn, J., in *Kennedy* v. *Panama Mail Company*.(2) In the recent case of *Peria Sami* v. *Representatives of Salugar*(3) the Judicial Committee said: "The grant, whatever its effect, was not necessarily avoided, because subsequent events disappointed the expectation in which it was made." A mistake as to existing facts may make a contract void, when an erroneous expectation, which events entirely falsify, has no influence at all. In the present case, accordingly, the circumstance that both the parties to the lease supposed (if they did suppose) that the assessment would never be increased, did not prevent their united will from forming a contract, any more than from making the terms of the contract, when thus concluded, from being binding, in spite of any future change of cirumstances. Of these they took the risk on each said; and the Governmet in providng for a new assessment not having provided for a distribution of the increased burden, we are not authorized to distribute it. We must, therefore, reverse the decree of the District Court, with costs.

Decree reversed.

(1)See Saving System, vol. III, App. s. vi.; Coleb. Dig., bk. ii, ch. iv, t. 54.
(2) L. R. 2Q.B, at. p. 588, (3) L. R. 5 Ind. Ap. 73,