1879 JULY 23.

APPELLATE CIVIL.

4 B. 70 = 4 Ind. Jur. 520.

whatever to the contrary. The Joint Judge, however, has disbelieved the evidence of the payment, because the plaintiff's accounts do not, in his opinion, show that on the date of the sale the plaintiff had sufficient funds in hand to make so large a payment. On a reference to Exs. 78 and 79 it appears to us that the Joint Judge was mistaken; but, at any rate, after the plaintiff had proved that he had paid the greater part of the purchase-money, the circumstance that he failed to prove payment of every rupee was no ground for holding the sale fictitious. The Joint Judge lays stress upon the non-appearance of the plaintiff and the judgment-debtors in the Court of first instance. But the plaintiff could not be held responsible for the absence of the judgment-debtors: and it may be assumed that good reason was shown for his own non-appearance, for the Subordinate Judge took no notice of it, and made a decree in his favour.

The only other reason assigned by the Joint Judge for his conclusion is that it appears (as he says), from the decree of the Subordinate Judge that the house in dispute was not given into the possession of the plaintiff after the sale. If this were so, it might no doubt constitute evidence of collusion between the vendors and vendee. But we can find nothing of the kind in the Subordinate Judge's judgment, nor has it been shown to us that there is any evidence that the house in dispute was not transferred to the plaintiff. What the Subordinate Judge does say is that certain property mentioned in the deed of sale, other than the house in dispute, is proved to have been given into the possession of the plaintiff; and this circumstance he treats, and very properly, as evidence that the sale was a *bona fide* transaction.

For these reasons we are of opinion that the grounds stated by the Joint Judge for his reversal of the Subordinate Judge's decree do not constitute valid or legal grounds for such reversal; and we, therefore, reverse the Joint Judge's decree, and restore that of the Subordinate Judge, with costs on the defendant Jivanji throughout. [This case is also followed in 4 B. 70 (73).]

---

4 B. 79.

[79] APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice Kemball.

JESINGBHAI AND OTHERS (*Original Plaintiffs*), *Appellants v.* HATAJI AND OTHERS (*Original Defendants*), *Respondents.** [26th August, 1879.]

Landlord and tenant—Suit for contribution—Voluntary payment by landlord.

The plaintiffs were the registered holders of the village of Mankoli, in the Ahmedabad Collectorate, for which they obtained a *sanad* in 1864 under Bombay Act VII of 1863. The defendants were the descendants of the original owners of the village, who about 1768, finding themselves unable to meet the expenses attaching to the village, gave up their title to it to the ancestors of the plaintiffs on condition of retaining a third of the lands rent-free as their *vanta*, or share, subject to no other condition but a house-tax.

Held, that the circumstances did not constitute the relationship of landlord and tenant between the parties.

Held, also, that a settlement made by the plaintiffs without the defendants' consent was not binding on the latter, and any payment made by them to Government was a purely voluntary one, to which they could not ask the defendants to contribute.

Also, assuming that the relationship of landlord and tenant did exist between the parties, a suit by the plaintiffs against the defendants would not lie for contribution to any expenses to which the plaintiffs as landlords might have been put in defending or perfecting their title.

The fact that the defendants had for some years paid to the plaintiffs part of the amount of quit rent levied from the plaintiffs by Government, did not estop the defendants, when better informed of their rights, from contesting the title of the plaintiffs to any further payments.

[F., 6 B. 244 (250); R., 17 B. 407 (411); 2 Bom. L.R. 855.]

---

* Second Appeal No. 209 of 1879.

1879 AUG. 26.

APPELLATE CIVIL.

4 B. 79.

THIS was a second appeal against the decision of A. L. P. Larken, Assistant Judge of Ahmedabad, reversing the decree of the Subordinate Judge of Ahmedabad.

This action was instituted by Jesingbhai and others, alleging that they held a certain village, called Mankoli, in the Sanad Taluka of the Ahmedabad Collectorate, and that the defendants, whose ancestors were the original owners of the village, held *vanta* land measuring about 1,721 bighas within the limits of the said village. The plaintiffs further stated that every year they paid to Government the sum of Rs. 753-6-9 as the Government assessment on the village together with the local-fund cess, and they alleged that the defendants were bound to pay them [80] the sum of Rs. 195-7-9 per annum in lieu of the Government assessment on their *vanta* land. The plaintiffs also alleged that they had been in the habit of receiving the same from the defendants for a number of years, the last payment so received being in 1871. The defendants having since that year, stopped all payment, the plaintiffs sought to recover Rs. 586-7-3, with interest amounting to Rs. 108, in all Rs. 694-7-3.

The defendants contended that when in 1768 their ancestors conveyed to the ancestors of the plaintiffs the village of Mankoli they reserved to themselves a third of the village lands as their *vanta*, or share, of which they were sole and absolute proprietors and that beyond a house-tax of about Rs. 32 per annum they were not in any way liable to the plaintiffs.

The Subordinate Judge awarded Rs. 555-3-0, being the amount of the local-fund cess and Government assessment for three years, without interest.

Against this judgment both parties appealed, the plaintiffs claiming to obtain the full amount with interest, and the defendants contending that nothing was due by them to the plaintiffs except the local-fund cess at Rs. 53-12-9 and the house-tax at Rs. 39 per annum.

The Assistant Judge was of opinion that the defendants were not the tenants of the plaintiffs, and were not precluded from stopping the voluntary payments of assessment which they had been making for some years. He considered that the plaintiffs should have refused to pay the assessment for the lands held by the defendants. He, therefore, rejected the plaintiff's claim, except as regards the local-fund cess and the house-tax.

Nanabhai Haridas, Government Pleader, for the appellants.—The appellants are the inamdars and registered holders of the village and are responsible to Government for the assessment, the summary settlement and the local-fund cess which they pay directly to Government as regards the whole village, and the defendants have for a number of years paid their quota to the plaintiffs. On the introduction of the Summary Settlement Act the plaintiffs, as inamdars and registered holders of the whole village, got the usual notice, [81] and they paid the summary settlement in compliance with it. The consent of the defendants was not necessary, as they were mere tenants of the plaintiffs.

Gokuldas Kahandas, for the respondents.—When the village was assigned to the plaintiffs' ancestors by the defendants' ancestors, the latter reserved to themselves the absolute proprietorship of their *vanta*, as is shown by Ex. No. 72. This liability is restricted to the payment of the house-tax, which by no means indicates the relationship of landlord and tenant between the parties. The defendants were entitled to a separate

1879 AUG. 26. — APPEL- LATE CIVIL. — 4 B. 79.

notice in respect of their land under the Summary Settlement Act. The enhanced assessment paid by the plaintiffs was without their consent, and was a purely voluntary payment towards which they could not be legally asked to contribute: *Babshetti* v. *Venkatramana* (1), *England* v. *Marsden* (2). The Summary Settlement Act (Bombay) No. VII of 1863 does not contemplate that any portion of the quit-rent should fall on the subordinate holders. [Mr. Justice Kemball drew attention to s. 69 of the Contract Act (No. IX) of 1872.] That section applies to a case where the person who pays is bound by law to pay. In this case the defendants deny the plaintiffs' liability to pay for the lands held by the defendants in their own right.

JUDGMENT.

The judgment of the Court was delivered by

M. MELVILL, J.—The plaintiffs are the registered holders of the village of Mankoli, for which they obtained a *sanad* in 1864 under Bombay Act VII of 1863. The defendants are the holders of certain *vanta* lands in the village. What is the exact nature of the relation between the parties, it is difficult, from the very meagre evidence in the case, to ascertain. The only document forthcoming appears to be Ex. 72, and this the Courts below have relied upon. The conclusion at which those Courts have arrived from this document is that "the defendants are descended from the original owners of the village, who, in Samvat 1824, finding themselves unable to meet the expenses attaching to the village, gave up their title to it to the ancestor of the present occupant, on condition of retaining about one-third of the lands rent-free, as their *vanta*, subject to no other condition but a house-tax of [82] Rs. 32 per annum." Taking this to be a correct history of the relation between the parties, the question arises whether that relation is one of landlord and tenant, or whether the parties are independent owners of separate portions of the village.

The plaintiffs' case appears to be that the defendants are their tenants. It is difficult to see how, if this be the case, they can claim to recover from the defendants a contribution on account of the payment which they have to make to Government in consideration of the *sanad* granted to them under Bombay Act VII of 1863. No doubt all tenants, and especially those who hold at a small quit-rent, are interested in the preservation of their landlord's title from attack; but it would be a strange theory that, because a tenant is interested in the preservation of his landlord's title, he is therefore bound to contribute to any expenses to which his landlord may have been put in defending or perfecting his title. It is unnecessary to say more on this point, because the Court below has found that the relation between the plaintiffs and defendants is not that of landlord and tenant, and we can see no reason for saying that that decision is incorrect.

The only alternative is to regard the parties as owners of the lands which they respectively hold in the village. Such being their position, the plaintiffs were not the "holders" of the land in the possession of the defendants, within the definition of that term in Bombay Act VII of 1863; and a settlement made by the plaintiffs with the Government would not be binding on the defendants, unless made with their consent. The notice under Act VII of 1863 was, no doubt, properly served on the plaintiffs, because they were registered in the Government land register as holding

(1) 3 B. 754. (2) L.R. 1 C.P. 529.

all the lands in the village (s. 6, cl. 3); but they were not, in fact, the holders of land, which was not in their own possession, nor in that of their tenants, sub-tenants, or agents (s. 32), in none of which relations the defendants can be held to have stood. When, therefore, the plaintiffs received the notice, they ought to have communicated it to the defendants, and obtained their consent to their (the plaintiffs') acting on their behalf; and if such consent was refused, they might have left the defendants to fight their own battle with the Government. But [83] it is not alleged that the plaintiffs did anything of the kind; and we must, therefore, assume that they took upon themselves to negotiate with the Government for lands of which they were not the owners. If they voluntarily undertook to pay, and have since paid, the quit-rent on such lands, we cannot say that they are entitled to recover the amount so paid from the owners of the lands. It is true that the defendants have apparently for some years paid to the plaintiffs the amount, or part of the amount, levied from them as quit-rent by the Government; but we cannot hold that such payments estop the defendants, when better informed of their rights, from contesting the title of the plaintiffs to any further payments, or from asking the Government to modify the plaintiffs' *sanad*, and to grant a *sanad* to themselves in respect of the land in their possession. It appears that such a demand has been made by the defendants; and we think that the plaintiffs would, if well advised, acquiesce in that demand, and so escape any further payments on account of the land held by the defendants. We confirm the decree of the Court below with costs.

Decree confirmed.

---

4 B. 83.

APPELLATE CIVIL.

Before Mr. Justice M. Melvill and Mr. Justice Kemball.

NARU AND ANOTHER (*Original Defendants*), *Appellants v.* GULABSING (*Original Plaintiff*), *Respondent.* *
[1st September, 1879.]

Mortgage—Possession—Registration—Sale in execution of decree—Rights of purchaser—Priority—Right to redeem—Parties to suit.

By two deeds, dated respectively the 22nd February 1868, and 7th September 1872, and duly registered, A mortgaged the lands in dispute to B for a term of years which expired in 1880. On 10th October 1873, A executed a *razinama* in favour of B relinquishing all his right in the said lands, and B next day executed a *kabulayat* to Government for the lands, which thenceforward were entered in B's name. Previously to the second mortgage and *razinama* to B, *viz.*, on 21st March 1870, A had by a duly registered deed mortgaged the same lands to the plaintiff, who in 1874 brought a suit against A upon his mortgage and obtained a decree, under which he sold the mortgaged property, and became himself the purchaser [84] thereof. Before, and at the time of the institution of this suit, B was in possession of the mortgaged land, but was not made a party to the suit. In 1877 B sold the land to C by a duly registered deed. In a suit brought by the plaintiff against B and C to recover possession of the land so purchased by him, as above mentioned, at the sale in execution of his own decree.

Held, that B's possession at the date of the plaintiff's suit upon his mortgage was sufficient to put the plaintiff on inquiry, and to constitute legal notice to him that the equity of redemption was at that time vested in B, and it was

---

* Second Appeal, No. 240 of 1879.