

APPELLATE CIVIL.

Before Sir M. R. Westropp, Knight, Chief Justice, and Mr. Justice West.

1881
July 28.

BA'LA'JI SITA'RAM NA'IK SALGAVKAR (ORIGINAL PLAINTIFF),
APPELLANT, v. BHIKAJI SOYARE PRABHU KANOLEKAR (ORIGINAL
DEFENDANT), RESPONDENT.*

Landlord and tenant—Lessor and lessee—Suit for rent—Notice of surrender of land by tenant—Splitting up of the cause of action—Son's liability on the father's contract of tenancy.

On the 22nd April, 1848, one Sabnis mortgaged certain land to the plaintiff. Soyare (the father of Bhikaji, the defendant), who was then tenant in possession of the land, attined to the mortgagee (plaintiff) by a *kabuliyat* dated the 1st June, 1848. Soyare died in 1870 in possession as tenant. In 1877 the plaintiff sued the defendant Bhikaji as heir of Soyare for three years' rent from 1871-72 to 1873-74. The defendant answered that he had had no possession or occupation of the land since the death of his father in 1870. It was decided in that suit that the defendant had occupied the land up to 1874, and a decree was made against him for the rent claimed. In July, 1878, the plaintiff brought the present suit for rent for the subsequent three years, *viz.*, from 1875-76 to 1877-78. The defendant answered that he had given up the land in 1871-72. He did not assert, either in the former or in the present suit, that he had given notice to the plaintiff of his intention to terminate his tenancy by surrendering the land to the defendant, nor did he allege that the plaintiff had assented to a surrender of it by the defendant without such notice. The lower Courts found the *kabuliyat* proved, but threw out the plaintiff's claim on the ground that he failed to prove the defendant's occupation of the land during the three years for which rent was claimed. In the second appeal it was contended for the plaintiff that the tenancy continued until the mortgage was paid off.

Held that Soyare became a yearly tenant of the plaintiff under the *kabuliyat*, but that he was not bound to continue his tenancy until the mortgage was paid off.

Held, also, that neither the plaintiff nor Soyare as yearly tenant could, without the consent of the other, terminate the tenancy without six months' notice ending with the cultivating year (30th June).

Held further that the defendant as the son and heir of Soyare was responsible on his father's contract of yearly tenancy, so far as he (defendant) had assets of his father, and in order to free those assets from a continuing liability under that contract he was bound to give a six months' notice of surrender to the plaintiff. The mere denial by the defendant in the former and present suit, that he had ever occupied the land, could not operate as such notice, and his non-occupation or non-cultivation alone could not relieve him from his liability to pay the annual rent to the mortgagee (plaintiff), unless the latter assented to a surrender or abandonment of the land by the defendant.

Held, also, that the right of the plaintiff to the rent for the year 1875-76 depended upon whether he might have included it in the former suit.

* Second Appeal, No. 488 of 1880.

The High Court reversed the decrees of the Courts below, and made a decree for the plaintiff for the rent for 1876-77 and 1877-78.

Venkatesh Nārāyan Pai v. Krishnāji Arjun (1) referred to and followed.

THIS was a second appeal from the decision of C. B. Izon, District Judge of Ratnāgiri, affirming the decree of P. V. Joshi, Second Class Subordinate Judge of Vengūrta.

This was a suit for rent. On the 22nd April, 1848, one Sabnis mortgaged the land in question to the plaintiff. Soyare (the father of the defendant Bhikāji) was then tenant in possession of the land, and he attorned to the plaintiff by a *kaḅulāyat* dated 1st June, 1848. In 1870 Soyare died in possession as tenant. In 1877 the plaintiff sued the defendant Bhikāji as heir of Soyare for three years' rent of the said land, *i.e.* from 1871 to 1874. In his defence Bhikāji denied that he had had possession of the land during the said three years, or that he had ever taken possession since his father's death in 1870. The Court, however, held in that suit that Bhikāji had occupied the land up to 1874, and a decree was made for the rent sued for. The present suit was for the rent for the three years 1875 to 1878. The defendant answered that he had given up the land in 1871-72.

The Subordinate Judge held the *kaḅulāyat* proved, but threw out the plaintiff's claim, on the ground that it was not binding on the defendant, and that the plaintiff failed to prove the land to have been occupied by the defendant during the years for which rent was claimed.

In appeal the District Judge confirmed the decree of the first Court. He observed: "This Court in a previous case held that the defendant occupied up to 1874. But it does not follow that he continued to occupy after that year. * * There is no evidence that defendant did cultivate the land, and it is impossible to go on presuming that he did so, because his father held the land as tenant."

The plaintiff appealed to the High Court.

G. N. Nādkarni for the appellant.—The District Judge did not give proper effect to the *kaḅulāyat*, which created a tenancy

(1) See *supra*, p. 160.

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in favour of the plaintiff as long as the mortgage existed. The defendant, after the death of his father, continued to occupy the land on the terms contained in that document. He was bound to give notice to the plaintiff of his relinquishing the tenancy, if he ever relinquished it at all. There is neither allegation nor evidence in the case that the defendant ever gave such notice to the plaintiff. He is estopped by the decree in the former suit from disputing the plaintiff's right to claim rent.

Máneksháh Jahángirsháh for the respondent.

WESTROPP, C.J.—The plaintiff is mortgagee under date 22nd April, 1848, from a person surnamed Sabnis, of the lands mentioned in the plaint. Soyare, the father of the defendant, as tenant in possession of the land at the time of the mortgage attorned, by a *kabuláyat* of the 1st June, 1848, to the mortgagee the plaintiff. We do not think that Soyare became more than tenant from year to year of the plaintiff under the *kabuláyat*. He was not bound to continue his tenancy until the mortgage was paid off, although the contrary has been here contended. As tenant from year to year, however, neither the plaintiff nor Soyare could, without the consent of the other, terminate such tenancy without six months' notice ending with the cultivating year. Soyare died in possession as tenant in 1870. The defendant Bhikáji, as his son and heir, would, so far as Bhikáji had assets of his father, be responsible on his father's contract of yearly tenancy, and, in order to free those assets from a continuing liability under that contract, would be bound to give a six months' notice of surrender to the plaintiff—*Venkatesh Náráyan Pai v. Krishnáji Arjun*⁽¹⁾—a Ratnágiri case. Further, it appears that in a suit brought early in 1877 by the present plaintiff against Bhikáji, as heir of Soyare, for rent for 1871-72, 1872-73 and 1873-74, the latter defended himself on the ground that he had not possession or occupation of the lands during those years, and that he never did take possession thereof since his father's death in 1870; but it was decided in that suit that Bhikáji did occupy the lands up to 1874, and a decree against him for the rent then sued for was made, and that decree stands in full force

(1) Printed Judgments for 1875, p. 361.

and unreversed. It has not been asserted at any time on behalf of Bhikáji that he has given notice to the plaintiff of his (Bhikáji's) intention to terminate his yearly tenancy by surrendering the lands to the plaintiff. The mere denial by Bhikáji in the former and in the present suit, that he has ever occupied the lands, cannot operate as such notice; and although it may be true (as found by the District Judge) that Bhikáji has not occupied or cultivated the lands since 1874, such non-occupation or non-cultivation cannot alone relieve him from his liability to pay the annual rent to the mortgagee, his lessor, the plaintiff, unless the latter assented to a surrender or abandonment of the land by Bhikáji. There is not any allegation of such an assent by the plaintiff.

Under these circumstances we must reverse the decrees of the Courts below, and make a decree for the plaintiff for the annual rent for the years 1876-77 and 1877-78. The right of the plaintiff to the rent for the year 1875-76 will depend upon whether the plaintiff might have included the rent for that year in his former plaint. The suit in which that plaint was filed, is numbered 19 of 1877, but the plaint may possibly have been presented before 1877 and at a date earlier than the termination of the cultivating year 1875-76, in which case the rent for 1875-76 could not have been properly included in it, and may be recovered in this suit. If, however, as *prima facie* would seem to be the case, the plaint was not presented until the year 1877, the rent for 1875-76 ought to have been included in the former suit, and cannot be recovered in the present suit. Our doubt, as to the time at which the plaint in the suit of 1877 was presented, arises from the fact that suits have recently been transferred from one Court to another in the Ratnágiri District, and, consequently, the number of the suit is not always a safe guide to the time of the presentation of the plaint. The District Judge should, in conformity with what has been said above, determine whether or not the plaintiff is entitled to a decree for the rent for the year 1875-76. The defendant must pay the costs of the suit and of both appeals.

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Decree reversed.