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KÁNE BÁBLE v. ANTÁJI GANGÁDHAR.

WESTROPP, C.J. :—The Joint Judge has omitted to find whether or not there was any participation of the plaintiff in the rents and produce of the property (for his share in which he now sues) at any time within twelve years before the commencement of this suit, which was instituted on the 26th July, 1875. Although the plaintiff may have mainly resided away from the locality of the property, yet he may, either by occasional residence with his brother Shivrám at the expense of the latter, or by leaving his wife or family with Shivrám at the expense of the latter, or by payments, have received a benefit out of the undivided estate. This point must be inquired into by the Joint Judge; and, in order that he may make that inquiry, the Court reverses his decree, and remands the cause for retrial by him. The costs of this second appeal must abide the result of the cause. The objection now made by the defendant's pleader, *vivâ voce*, as to want of parties, comes to late to be permitted. The Joint Judge may admit such evidence on either side on the question of participation in the rents and profits as may seem to him to be expedient for the proper determination of the cause.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

1887. *January* 8.

ABDULBHAI, (ORIGINAL DEFENDANT), APPELLANT, *v.* KA'SHI, DECEASED, BY HIS HEIR, DHONDI, (ORIGINAL PLAINTIFF), RESPONDENT.*

Mortgage, what is a—Requisites of a mortgage—Contract—Construction.

In 1862, A., in consideration of a debt of Rs. 150, passed to B. a writing called *karz rokhá* (or debt-note). It provided *(inter alia)* that B. should hold and enjoy a certain piece of land belonging to A. for twenty years, that at the end of that period the land should be restored to A. free from all claims for payment of the principal or interest of the debt of Rs. 150; that if B. planted vines, he should be at liberty to retain the land so planted after the lapse of the twenty years as a tenant at Rs. 50 *per annum*.

According to the terms of this agreement, B. continued in possession of the land till 1882, when A., treating the transaction as a mortgage, brought this suit for redemption.

Held, on the construction of the *karz rokhá*, that the contract between the parties was not a mortgage, and that the defendant had a right to retain occupation at least of the vineyard, subject only to a rent of Rs. 50 a year. There was no stipulation for interest, nor was there any agreement for the payment of Rs. 150 in any case.

It is not the name given to a contract, but its contents or the relations constituted by it, that determine its nature.

William v. *Owen*(1) and *Lakhmichand Walchandshet* v. *Chatur Dewchandshet*(2) followed.

* Second Appeal, No. 67 of 1885.

(1 My. & Cr., 303, 308. (2) Printed Judgments for 1884, p. 162.

THIS was a second appeal from the decision of G. Jacob, Acting Assistant Judge of Poona, in Appeal No. 121 of 1883.

The plaintiff and his deceased brother borrowed from the defendant a sum of Rs. 150, in consideration of which they executed in his favour a bond dated 2nd April, 1862. Under this bond the land in dispute was put into the possession of the defendant, and it was agreed that he was to enjoy it for twenty years, at the end of which period it was to be restored to the plaintiff, free from all claims on account of the principal or interest of the sum borrowed. It was also agreed that if the defendant planted vines or grew other trees on the land, and found it impracticable to remove the same at the end of the twenty years, he was to be at liberty to retain the land as a tenant at a yearly rent of Rs. 50.

The following is a translation of the material portions of the bond in question:—

"We have, for the purpose of paying to Táráchand Hatimal Márwádi, received from you, as debt, the principal sum of Rs. 150. These rupees are a loan, bearing no interest. As consideration for this is given to you the following:—There is our *mirás* land. * * * * * * * * Out of this one whole strip of garden and dry-crop land measuring acres 9-26, and paying Government assessment Rs. 8, situated in the middle and lying to the north of, and adjacent to, the strip of land of guava trees which belongs to the said Bháu (*i.e.*, kinsmen) is given to you. * * * * * This land, including both the dry-crop and garden land, together with the right of using the water of one-half of the well, *you are to cultivate and enjoy for twenty years. Thereafter we shall have not to pay you the amount which will be lost to you;* and you will have recouped yourself by your having cultivated the land. *Nothing shall remain due by us to you after the expiration of the said period.* You may grow any crop therein and enjoy the same during the period fixed. Should you plant vines, and grow such other crops of note therein; and should it be impracticable to remove the same from the land after the lapse of the twenty years, you are then to pay us annually, while you have a right over such crops, Rs. 50 in respect of our proprietary right, and you are to enjoy the profits of the crops of the land given to you. When we receive Rs. 50 in respect of our proprietary right after the expiration of the period fixed, we will pay the amount of the Government assessment. As regards the dues of the *hakdárs*, &c., the payment of the same will rest with you so long as the land will remain with you. Should we after the expiration of the period not receive from you the fifty rupees, you are to give up the land together with the crops and trees and the water therein, deliver the same into our possession, and then you are to walk away. Thereafter you will have no claim whatever over the same. The survey number given to you stands at present in the

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name of Tárachand Márwádi; we will get the same transferred to your name. The same will remain in your name up to the termination of the period, and then we are to receive from you Rs. 50 in respect of our proprietary right; and you are to get the said number of the land transferred to our name, and you are to grow crops therein, and enjoy the same. As to whatever crops you will grow thereon, out of the same you are to give to us a portion of the pluckings thereof according to the usual practice among the people. Should you in the dry-crop land, which is given to you for cultivation, take the water by the side of the road to Koregáo and with the same grow crops therein, as to whatever expenses may have to be incurred for raising the water by means of a water-course or channel we will pay the same. Should you plant mango-trees, &c., you are to enjoy the same so long as you hold the land, and thereafter we are to enjoy the same. You are to pay the Government assessment for the time the land will remain with you. Whether you grow crops or not, should you take or buy manure in the village, and should the same be required to be brought to the land, we will bring the same. As to whatever sticks or stakes you will cut, we will remove the same to the land from the place where you cut the same. As to the labour to be bestowed on the land together with the supply of water, the same will rest with you so long as the land will remain with you. Should you meet with any disturbance from our creditor during the period of the twenty years we will answer for the same, and will not allow you to sustain any loss thereby. As to whatever damage may be thereby done to the crops, we will make good the same to you, as will be determined by the opinion of independent persons. After the expiration of the twenty years you should go on paying Rs. 50 every year in respect of our proprietary right up to the time the land may remain with you. In the year in which the Rs. 50 payable to us annually in respect of our proprietary right will not be received by us, you are then to leave off the crops and go out of the meadow. As to the vines which you may plant during the time the land will continue to be held by you, you are to give us, every year, fifteen *sers* of grapes therefrom as the portion due to us out of the pluckings in respect of our proprietary right. Should you plant mango and guava trees, we will take five hundred fruits every year. Should the cistern for receiving water of the well and the well itself have to be repaired, the expenses for the same will be borne by us. The water of the well should be taken by us half and half by turns. Should we have to plant garden trees in the portion of the land of the above survey number which has remained with us, we will take water into our piece of land during the time that may remain to make up the time of your turn after you shall have done taking the same for your gardening purposes. We will not take water to the detriment of your crops. The number which is now transferred to your name is to stand in the name of one of you for twenty years. And after the expiration of the twenty years you are to have the said number transferred to our name, and thereafter we will execute a separate agreement to you for the management of the crops. *It has been agreed, that after the lapse of the period, no amount is to remain payable by us, and that you are to be considered to have received your amount.* This bond is duly given in writing."

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Treating the transaction as a mortgage, the plaintiff brought the present suit in 1882 to redeem the land in dispute.

The defendant pleaded that he had planted vines and fruit trees of various kinds, and that so long as the trees remained, he was entitled to retain possession of the land on payment of Rs. 50 *per annum* to the plaintiff.

The Subordinate Judge held, on the authority of *Gopál Sitárám Gune* v. *Desái*[1], that the document embodying the agreement between the parties was a lease, and not a mortgage, and that the defendant was entitled to hold the portion of the land, on which the trees stood, at a yearly rent of Rs. 50 so long as the trees remained. He therefore, passed a decree awarding to the plaintiff possession of only a portion of the land in dispute.

The Acting Assistant Judge amended this decree, in appeal, by awarding to the plaintiff the whole of the land claimed. He was of opinion that the contract between the parties was one of mortgage, and that on the expiration of the stipulated period of twenty years the plaintiff was entitled to redeem, the mortgage-debt having been paid off out of the profits of the land. As to the further agreement under which the defendant was to retain possession as a tenant on a yearly rent of Rs. 50 while the fruit trees were bearing, he held that such an agreement was void, as limiting the time within which the plaintiff might exercise his right of redemption according to the terms of the mortgage-bond.

Against this decision the defendant preferred a second appeal to the High Court.

G. B. Rele for the appellant.

Ráv Sáheb *V. J. Kirtikar* for the respondent.

WEST, J:—The document (exhibit No. 10,) which embodies the contract between the parties in the present case, is certainly headed *karz rokha* or debt-note. But, as pointed out by Westropp, C.J., in *Subhábhat* v. *Vásudevbhat*[2], it is not the name given to a contract or to the memorial of it that determines the nature of the contract. It is the contents of the agreement, the jural relation constituted by it, that determines whe-

(1) I. L. R., 6 Bom., 674. (2) I. L. R., 2 Bom., 113.

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ther it is really a conveyance, a lease, a mortgage, or a contract of some other nature. In the present instance, the plaintiff's father owing the defendant Rs. 150 gives to him certain land for twenty years in consideration thereof. He also engages that, if the defendant shall plant vines, he shall be at liberty to retain the land so planted after the twenty years as tenant at Rs. 50 a year. There are subsidiary agreements on which it is not necessary to dwell.

For the plaintiff it is contended that this transaction was essentially a mortgage, and that it being a mortgage, the agreement for a tenancy of undefined duration after the lapse of the twenty years was void, as fettering the right of redemption necessarily incident to a mortgage. On the other hand, it might be said that the granting of the lease was an indication that a mortgage, at least in the ordinary sense, could not really have been intended. Certainly there was nothing plainly inequitable in the agreement, that if the defendant went to the expense of planting a vineyard, and so adding greatly to the value of the property, he should enjoy the fruits at a reasonable rent. But the principal question is, whether the agreement really constitutes a mortgage or not; and, if we apply the test of mutuality of remedy insisted on by Lord Cottenham in *Williams* v. *Owen* [1], we are forced to say it is not a mortgage. There is no stipulation for interest; there is no agreement for the payment even of the Rs. 150 in any case. In the event of the grantee's disturbance by a right paramount to the grantor's, the stipulation is for the payment only of damages. On such an agreement as this the grantee could not have based any claim for payment of Rs. 150, or any part of it. The land was granted for a term instead of the money, and the grant extinguished the debt. The words added by way of greater precaution, that on restoring the land after the twenty years the grantee should have no claim for money on the grantor, could not create such a right for him at any intermediate period. There was no such right, and where there was no debt, there could not be a mortgage:—see *Lakhmichand Walchandshet Gujar* v. *Chatur Dewchandshet Gujar* [2].

(1) 5 My. & Cr., pp. 303, 308. (2) Printed Judgments for 1884, p. 162.

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The only obstacle to the operation of the clause of tenancy being thus removed, the defendant had a right to retain occupation at least of the vineyard, subject only to a rent of Rs. 50 a year. We, therefore, reverse the decree of the Assistant Judge, and restore that of the Subordinate Judge, with all costs on respondent.

Decree reversed.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

1887.

January 26.

SHANKAR BISTO NA'DGIR AND ANOTHER, (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* NARSINGHRA'O RA'MCHANDRA AND ANOTHER, (ORIGINAL DEFENDANTS), RESPONDENTS.*

Execution of decree—Limitation—Effect of dismissal of application for execution duly made—Act XV of 1877, Art. 179, paras. 4 and 5 of Schedule II.

If an application for execution of a decree is duly made so as to satisfy the terms of article 179, paras. 4 and 5, of Schedule II of Act XV of 1877, but is dismissed, such dismissal does not prevent the application from furnishing a point of time for the beginning of a new term of limitation.

THIS was an appeal from the order of Ráv Bahádur G. V. Bhánap, First Class Subordinate Judge of Dhárwár, in *darkhást* No. 137 of 1883.

One Bisto Shankar obtained a decree for possession of certain lands on 30th April, 1878.

The first *darkhást* or application for execution was made on the 16th September, 1880. A warrant was issued for delivery of possession of the lands decreed; but the decree-holder not being present to take possession, the application was struck off the file by the Court on the 27th September, 1881.

The next *darkhást* was dated 22nd April, 1882. The officer in charge of the warrant for execution reported that one lot of the lands decreed could not be identified, the boundaries as stated in the decree not corresponding with those of the land pointed out by the decree-holder. Thereupon his pleader requested the Court to dispose of the *darkhást* without proceeding further in

* Appeal No. 111 of 1885.