

1891 and sale. A cart or donkey load of earth may be bought any day in the
 MARCH 24. bazar. This earth is certainly moveable property, and it has become so
 APPEL- by reason of its having been severed from the earth to which it was once
 LATE attached, and to which it will again become attached when deposited
 CRIMINAL, thereon. Under the Penal Code, it does not matter by whom the severance
 15 B. 702. is effected; and "a person is said to cause a thing to move by separating
 it from any other thing," while "a moving effected by the same act
 which effects the severance may be theft" (Explanations 3 and 2 to
 s. 378). In my opinion, earth, that is soil, and all the component parts of
 the soil, inclusive of stones and minerals when severed from the earth,
 are moveable property capable of being the subject of theft. Whoever,
 therefore, severs such earth from the earth, with the dishonest intention
 specified in s. 378, can be said to commit theft.

Their Lordships reversed the Magistrate's order of acquittal, and
 directed a retrial of the case by the same Magistrate.

15 B. 704.

APPELLATE CIVIL.

Before Mr. Justice Bayley and Mr. Justice Jardine.

RAMABAI SAHEB PATWARDHAN (*Original Plaintiff*), *Appellant v.*
 BABAJI AND OTHERS (*Original Defendants*), *Respondents.**
 [23rd April, 1891.]

Landlord and tenant—Lease, construction of—Perpetual tenancy.

Where the terms of a lease did not appear to create a perpetual tenancy, there
 being no circumstances in the evidence from which the Court ought to infer that
 the intention of the parties was to create such a tenancy.

Held, that the lease was not a perpetual lease.

Gangabai v. Kalapa (1) and *Gangadhar Bhikaji v. Mahadu* (2), referred to.

[R., 8 O.C. 61 (63).]

SECOND appeal from the decision of A. S. Moriarty, Assistant Judge
 of Satara.

Ejectment for non-payment of rent.

The plaintiff sued to eject the defendant from certain land [705] for
 non-payment of rent. The plaintiff alleged that the land had been let in
 1872 to the defendant for a year for Rs. 60; that he had continued to hold
 at that rent ever since; that in April, 1886, he had been given notice to
 pay rent at the rate of Rs. 125 per annum, or to vacate. The enhanced
 rate had not been paid, and hence this suit.

The defendant alleged that he held under a perpetual lease, which had
 been granted to his father and one Mahadu *bin* Subhana, each of whom
 took a moiety. He contended that the plaintiff was entitled only to recover
 rent, and that she had no right to put an end to the lease.

The following is the translation of the lease relied on by the defend-
 ant:—

"To Parsu, son of Narayan Bhaigavda (inhabitant of) kasba Tasgaon.
 —The Sur year one thousand two hundred and thirty-four (A.C. 1833-34).

* Second Appeal No. 67 of 1890.

(1) 9 B. 419.

(2) P. J. for 1889, p. 321.

There is a piece of *sheri* land near Yerala and forming part of a *kunbava* situate at the kasha aforesaid. The same was let from the last year (one thousand two hundred) thirty-three (A.C. 1832-33) to Mahadu, son of Subhana Chavan, and you together for being cultivated by you both, and a *takid* (order) was addressed to Mahadu. Whereas you now represent that as there may arise differences hereafter between you both, you may also have *takid* (order). Wherefore both of you should together pay the *chavdi* (land tax) money and deliver *jwari* grain on account of *ghugri* (1) from year to year, and bestowing toil and labour on the land in a proper manner have peaceable enjoyment (thereof). In case of *asmani sultani* (evils from the skies or the king), no remission will be given. In case the assessment be not kept down, your possession will be disturbed. Do you know this. Be this known. Lunar date the 7th of *Rajab*."

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The Subordinate Judge found that the lease was a perpetual lease, and that the plaintiff had no right to enhance the rent. He dismissed the suit.

The plaintiff appealed to the District Court, and the Assistant Judge confirmed the decree of the Subordinate Judge.

The plaintiff appealed to the High Court.

Branson (with *Mahadev Chimnaji Apte*), for the appellant:—The only question is whether the lease relied on by the defendant creates a perpetual tenancy. The mere fact of long possession cannot create a permanent tenancy. The document lets [706] the land to Parsu, but it does not contain any provision with respect to his heirs. It does not provide that the lessee shall enjoy the land "from generation to generation," or "*nirantar*" (in perpetuity), &c. Under the terms of the lease, the lessee was merely to enjoy the land on payment of rent from year to year. Such a document creates only an annual tenancy—*Kalapa v. San Kalapa* (2); *Gangadhar Bhikaji v. Mahadu* (3).

We gave notice to the defendants to pay enhanced rent, or to give up the land. The present suit was filed after the expiration of one year from the date of notice.

Both the lessor and the lessee are dead, and the lessee's heirs are now holding. The lessee being dead, his heir is merely a tenant at will; or, even assuming that he is a tenant from year to year, we have given him one year's notice to quit. There is no allegation that the notice was insufficient.

Ganesh Ramchandra Kirloskar, for the respondent.—In construing a document, its language as well as the surrounding circumstances and the intention of the parties must be taken into consideration—*Robert Watson & Co. v. Mohesh Narain Roy* (4); *Tulsi Pershad Singh v. Rajaram Narayan Singh* (5); *Sreemutty Anundo Mohey v. John Doe* (6); *Bapu Dhanput Singh v. Gooman Singh* (7); *Nobo Doorga Dossia v. Dwarka Nath Roy* (8); *Rajah Suttosurum Ghosal v. Moheshchunder Mitter* (9). These authorities show that words of inheritance are not necessary in a lease to create perpetual tenancy, and that in determining the nature of a transaction the intention of the parties and the surrounding circumstances must be looked to. The defendant's father became a tenant of the land in the year 1833. He remained in possession as tenant for 30 years, and

(1) Grain which cultivators present to Patil, &c. (2) P.J. for 1883, p. 310.
(3) P.J. for 1889, p. 321. (4) 24 W.R. C. R. 176. (5) 12 I.A. 205.
(6) 8 M.I.A. 43. (7) 11 M.I.A. 433. (8) 24 W.R. C. R. 301.
(9) 12 M.I.A. 263.

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since his death his son, the present defendant, has had the land. During all this time, the rent has been uniform, *viz.*, Rs. 60 a year. The lease itself indicates that the tenant is to have peaceable enjoyment of the land on payment of rent from year to year. There is nothing in the [707] document to show that an annual tenancy or even a tenancy for a particular period was meant to be created. The tenant was to remain in possession of the land so long as he paid rent from year to year, and did not allow the assessment to fall in arrears. The parties clearly meant to create a permanent tenancy.

Both the lower Courts have come to the conclusion that the document creates a permanent tenancy. The High Court will not, in second appeal, interfere with the concurrent findings of the lower Courts on the point—*Dyami Naik v. Lingapa* (1).

JUDGMENT.

JARDINE, J.—The ruling in *Gangabai v. Kalapa* (2), followed in *Gangadhar v. Mahadu* (3), is, in our opinion, applicable to this case. The terms of the lease, on which the defendants hold the lands claimed, do not appear to us to create a perpetual tenancy. There are also no circumstances in the evidence from which the Court ought to infer that the intention was to create a perpetual tenancy. The plaintiff is, therefore, entitled to the lands claimed and to rent at the rate of Rs. 60 per annum from 1st April, 1886, till delivery of possession, unless this rent, or any part thereof, has been already paid him. His counsel has waived the part of the claim relating to rent in excess of Rs. 60 and the value of trees.

We must now reverse the decrees of the Courts below and decree to plaintiff the possession of the lands claimed and rent at Rs. 60 per annum. Defendants to pay costs in all Courts.

Decree reversed.

(1) P.J. for 1889, p. 37.

(2) 9 B. 419.

(3) P.J. for 1889, p. 321.