1893 SEP. 26. APPELLATE CIVIL. 18 B. 597.

Applying this view of the law to the present case, we have the defendant setting up two defences to the plaintiff's claim to have the house declared to be the property of his judgment-debtor Bai Jamna; 1st, that the house did not belong to Bai Jamna; 2nd, that it had been already sold to him by Bai Jamna and her son Mulji prior to the plaintiff's decree against Bai Jamna. The Court found that it was not Bai Jamna's property, but belonged to Mulji, and decided the suit on that finding; but it also recorded a finding on the 2nd issue, that the alleged sale to defendant was fraudulent and collusive. This finding was, therefore, not material in the sense of not being necessary for the determination of the suit, or, in other words, it was not covered by the general terms of the decree dismissing the plaintiff's suit.

We must, therefore, reverse the decree of the Court below and send back the case for a fresh decision having regard to the above remarks. Costs to abide the result.

Decree reversed.

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18 B. 603.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

NARAYAN DASAPPA (*Original Defendant No.* 3), *Appellant v.* ALI SAIBA AND OTHERS (*Original Plaintiff and Defendants Nos.* 1 *and* 2), *Respondents.** [2nd October, 1893.]

Landlord and tenant—Mulgeni *lease—Alienation by mulgenidar—Alienation contrary to the terms of the lease—Absence of any clause as to re-entry—Valid alienation—Suit by mulgar for possession.*

In the absence of any clause of re-entry in the event of alienation by the mulgenidar (permanent tenant) contrary to the terms of the lease, the mulgar (landlord) cannot treat the alienation as void and recover possession from the alienee.

[F., 21 B. 195 (197); Cons., 26 M. 157 (161)=12 M.L.J. 189.]

SECOND appeal from the decision of Arthur H. Unwin, District Judge of Kanara.

[604] The plaintiff sued the defendant to recover possession of certain lands and arrears of rent. The plaintiff alleged that he had let the lands on *mulgeni* tenure to one Narna Kamti, who on the 12th June, 1873, passed a *kabulayat* to him agreeing to pay rent every year and undertaking not to alienate the lands and to surrender them to the plaintiff if he himself did not require them. The plaintiff stated that after Narna Kamti's death, defendants Nos. 1 and 2, who were his (Narna's) grandnephews and heirs, sold the lands to defendant No. 3 on the 3rd September, 1889, in violation of the terms of the *kabulayat*. He contended that the sale was void as against him, and had put an end to the *mulgeni* tenancy.

The first defendant pleaded that the stipulation in the *kabulayat* was penal and that plaintiff was not entitled to possession; that the *mulgeni* tenant right had been sold for a family debt to defendant No. 3, who was in possession of the lands and was liable to pay the arrears of rent.

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* Second Appeal No. 394 of 1892.

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The second defendant, a minor represented by his guardian, pleaded that the sale by the first defendant was not binding on him; that the plaintiff was not entitled to possession, and that the first defendant, who had possession, was the person liable to pay the arrears of rent.

The third defendant alleged that the sale to him was made for the family debts of defendants Nos. 1 and 2, and was, therefore, binding on both these defendants; that the conditions in the *kabulayat* were penal and could not be enforced; that the restraint on alienation affected only the first lessee and not his heirs, and that, therefore, the plaintiff was not entitled to eject him, and that he was liable to pay one year's rent, of which due notice was given to plaintiff, who had refused to accept it.

The Subordinate Judge held, following the decision in *Tamaya* v. *Timapa* (1), that the forfeiture clause in the lease could be relieved against, as it simply prohibited alienation by the lessee, but did not stipulate that the lease should terminate if any such alienation was made, nor did it give the lessor any right to eject [605] the lessee. He, therefore, passed a decree for arrears of rent only against all the defendants.

On appeal by the plaintiff the Judge found that the lease contained a clause of forfeiture or re-entry enforceable by plaintiff, provided he accepted "the position of the lessee's vendee." He, therefore, amended the decree in the following terms:—

"I, therefore, amend the lower Court's decree by awarding plaintiff's claim for possession also, provided that within six months from date he tendered to defendant No. 3 the amount which the latter has paid to defendant No. 1 for the *mulgeni* right in his property, and which defendant No. 3 must accept. On plaintiff's failure to tender this amount within six months, this part of the decree ceases to be enforceable, and therewith also plaintiff's claim to recover possession. Costs on defendants."

The following is an extract from the Judge's judgment:—

"There is an express stipulation both in the lease, of which Ex. A is a certified copy produced from the District Registrar's office, as well as in the *kabulayat*, Ex. 13, that if the lessee does not want the *mulgeni* holding, he must *surrender* (*wappisa*) it to the lessor, and then immediately follow words binding the lessee not to sell, mortgage, or alienate, &c., to any one but the lessor. This seems to distinguish the lease from that sued on in the case relied on by the Subordinate Judge. If defendants Nos. 1 and 2 desired to sell, they were clearly bound to treat with plaintiff only.

"Now in these days, when assessment payable by mulgars is liable to be enhanced to an amount exceeding the fixed rents payable to them by their mulgenidars, and when the struggles of mulgars to rid themselves of the *damnosa hereditas* which these permanent leases have entailed upon them form so large an item of the litigation of these Courts, the present plaintiff could never have expected that this *mulgeni* holding would be surrendered to him except for valuable consideration; he had secured not merely pre-emption, but *sole* emption, and was, I take it, bound by a correlative obligation to offer the lessee at any rate market value for this holding."

[606] The third defendant preferred a second appeal.

Narayan G. Chandavarkar, for the appellant (defendant No. 3).

Shamrav Vithal, for respondent (plaintiff).

(1) 7 B. 262.

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JUDGMENT.

SARGENT, C.J.—The decision in *Tamaya* v. *Timapa Ganpaya* (1) with respect to the private sale by defendant No. 2 to defendant No. 5 in that case shows that in the absence of any clause of re-entry in the event of alienation by the mulgenidar contrary to the terms of the lease, the mulgar cannot treat the alienation as void and recover possession from the alienee. See also *Nil Madhab Sikdar* v. *Narattam Sikdar* (2). We must, therefore, reverse the decree of the Court below and restore that of the Subordinate Judge, with costs on plaintiff here and in the Court below.

Decree reversed.

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18 B. 606.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

JAGANNATH BRAKHBHAU (*Original Defendant*), *Applicant v.* J. E. SASSOON AND OTHERS (*Original Plaintiffs*), *Opponents.**
[3rd October, 1893.]

Practice—Procedure—Service of summons—Service by post—Return through the post of packet containing the summons endorsed "refused"—Evidence—Civil Procedure Code (Act XIV of 1882), ss. 82 and 622—Material irregularity.

A Small Cause Court having forwarded the summons to the defendant in a registered packet through the Post Office, the packet was returned endorsed 'refused,' the Small Cause Court held the service of the summons to be good service and passed an *ex parte* decree against the defendant.

Held, that the delivery of the summons by the post to a person who was not shown to be the defendant, was not good service.

[R., 29 M. 324; D., 21 B. 412 (418); 35 B. 213=13 Bom. L. R. 323=11 Ind. Cas. 351.]

APPLICATION under the extraordinary jurisdiction against the decision of Khan Bahadur C. M. Cursetji, one of the Judges of the Court of Small Causes at Bombay.

E. D. Sassoon and Company brought a suit (No. 23362 of 1892), in the Bombay Court of Small Causes against the applicant Jagannath Brakhbhau, residing at Kampti and Nagpur in British territory and trading at those places under the name of [607] Brakhbhau Jagannath, to recover the balance of an account. The summons in the suit was sent through the post office in a registered packet, but the packet was returned to the Court by the Post Office endorsed 'refused.'

On the day of hearing, the applicant failed to appear, and an *ex parte* decree was passed against him. Subsequently the applicant applied for restoration of the suit to the file, but the Court rejected the application, holding that under s. 82 of the Civil Procedure Code (Act XIV of 1882) the service through the post was sufficient.

The applicant thereupon applied under the extraordinary jurisdiction, and obtained a *rule nisi* calling upon the opponent to show cause why the *ex parte* decree should not be set aside.

Macpherson, with *Payne*, *Gilbert and Sayani*, appeared for the opponent to show cause.—The summons was originally served upon a

*Application No. 65 of 1893 under extraordinary jurisdiction.

(1) 7 B. 262. (2) 17 C. 826 (828).