

have discretion to make the order. The proceedings must be stayed until the petition to wind up the company is heard and disposed of on the defendants giving the usual undertaking as to damages.

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Order to stay proceedings.

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Attorney for the plaintiff : Mr. *Shamrao Pandurang.*

Attorneys for the defendants : Messrs. *Wadia and Gandhi.*

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Before Mr. Justice Bayley and Mr. Justice Starling.

YESHWADABAI AND GOPIKABAI, WIDOWS (*Original Plaintiffs*),
Appellants v. RAMCHANDRA TUKARAM (Original Defendant),
*Respondent.** [18th August and 2nd September, 1893.]

Practice—Procedure—Evidence—Landlord and tenant—Terms of tenancy proved orally although contained in a document—Compensation for buildings erected by tenant—Estoppel.

The plaintiffs alleged that in 1866 the defendant's father had let land to their predecessor-in-title in perpetuity on fazendari tenure for building purposes, subject to a certain rent. They complained that the defendant sought to eject them, and they prayed for a declaration that they were entitled to the land in perpetuity subject only to payment of the yearly rent. In the event of its being held that they were not perpetual tenants, they prayed that the defendant might be ordered to pay them Rs. 7,000, the value of the buildings on the land. The plaintiffs made out a *prima facie* case without showing, or its being shown, that there was any agreement or lease. Before the case had concluded, however, a document was [67] produced which was said to be a counterpart of the agreement of letting made in 1866. It was not registered, and was, therefore, inadmissible in evidence. It was not tendered, but it was shown to the defendant in cross-examination, and he denied that it was a genuine document.

Held, that the plaintiffs, having made out a *prima facie* case without betraying the existence of a written contract relating to the subject-matter of the suit, were not precluded from obtaining a decree even though it afterwards appeared that a written contract had been made. If the defendant intended to rely upon a written contract it was for him to produce it as part of his evidence. In the present case, as the document was not referred to in the plaint, written statement or issues and was not before the Court, the evidence should be looked at to ascertain the terms of the tenancy by which the plaintiffs and their predecessors in title held the property.

Where a landlord had not objected to buildings erected by his tenant for a period of twenty-five years, and during that time had received rent from the tenant.

Held, that even if the Court were not justified in holding that the land had originally been granted for building purposes, the landlord would be precluded from ejecting the tenant without compensation.

[F., 22 C. 820 (826); R., 20 B. 1 (4); 22 B. 1 (14); 27 M. 211 (222) = 14 M.L.J. 25; 3 C.W.N. 255 (259); (1900) P.L.R. 203 (205); D., 16 A. 328 (332); 27 C. 570 (586); 1 Bom.L.R. 191 (197); 3 N.L.R. 72 (78).]

SUIT for a declaration that the plaintiffs were entitled to hold certain land situate at Foras Road in Bombay in perpetuity subject only to a certain rent payable to the defendant, and for an injunction restraining the defendant from executing a decree for possession obtained by him in the Small Cause Court,

* Suit No. 34 of 1882.

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The plaint stated that in 1866 one Tukaram Moroji, the father of the defendant, let the land in question to one Thucker Tricum Sewji Lowana, in perpetuity, on fazendari tenure for building purposes at an uniform rate of Rs. 12 per kathi per annum; and that it was then agreed that, in the event of Government taking up the said land, the said Thucker Tricum Sewji and his successors or assigns should be entitled to receive the value of any buildings erected by him or them upon the land, and that the said Tukaram Moroji should only be entitled to receive the value of the land.

In pursuance of this agreement, Thucker Tricum Sewji built a house on the land and paid as rent Rs. 102 per annum to Tukaram Moroji.

Thucker Tricum Sewji afterwards became insolvent, and his right, title and interest in the house and land were sold in 1876 to Solomon Aroon Gandel, who continued to pay the said sum of Rs. 102 as rent.

In 1878 Solomon Aroon conveyed the said house and land to Gopal Yeshwant Pednekar, the husband of the plaintiffs, and he [68] continued to pay the said rent each year to the defendant as fazendar.

Gopal Yeshwant rebuilt the house and continued to pay the said rent to the defendant until 1885. He died intestate in February, 1887, and the plaintiffs, his widows, paid the defendant the rent for 1886. They also subsequently paid the rent for 1887, 1888, 1889 and 1890.

On the 30th September, 1891, the defendant gave notice to the plaintiffs requiring them to give up the land, which he alleged they held as monthly tenants. The plaintiffs declined to do so. The defendant then filed a suit in the Court of Small Causes in Bombay, and on the 5th December, 1891, obtained a decree for possession.

The plaintiffs now sued praying for an injunction restraining the defendant from executing the decree of the Small Cause Court, and for a declaration that they were entitled to hold the land in perpetuity, subject only to the payment of the aforesaid yearly rent, and that the defendant was not entitled to eject them so long as the said rent was paid. They prayed that, in the event of its being held that they were not perpetual tenants, the defendant might be ordered to pay them Rs. 7,000, the value of the building standing on the land, &c.

The defendant denied that the plaintiffs were perpetual tenants, and alleged that the rent was payable monthly, but had been often in arrear.

At the hearing a document was produced which was said to be a counterpart of the agreement under which the land was let in 1866 by the defendant's father to the plaintiffs' predecessor (Tricum Sewji). This document, however, was not registered, and was, therefore, inadmissible in evidence. It was not tendered, but in cross-examination it was shown to the defendant, who denied that the mark affixed to it was his father's mark. The document was not made an exhibit in the case.

The lower Court (Parsons, J.) held that there was no evidence of the perpetual lease alleged by the plaintiffs, and that the defendant had a right to eject the plaintiffs. The plaintiffs had alleged a special agreement. Although there was no evidence of its terms (the document being inadmissible) the fact that this agreement was made [69] precluded the plaintiffs from claiming compensation under the custom of the country. As to this the Court said:—"Had the plaintiffs been let in on the land without an agreement, or had the land been let to them according to the custom of the country, it might be argued, according to some decided cases, that plaintiffs would be entitled to remove the materials or to compensation, but here there was a special agreement, and we cannot go

beyond it. It might have been one for a term of years. Certainly it is not proved that under that agreement plaintiffs have the right to remove the materials; and, therefore, I cannot award them or their value. The value of them is very little. It is not proved that the plaintiffs' husband rebuilt, or that they spent Rs. 1,500 in repairs." The suit was dismissed with costs.

The plaintiffs appealed.

Macpherson and Lowndes, for the appellants (plaintiffs).—They cited *Beni Madhab Banerjee v. Jai Krishna* (1); *Sufdur Ali v. Jeo Narain* (2); *Lalla Gopee Chand v. Liakut Hossein* (3); *Furzund Ali Khan v. Aka Ali Mahomed* (4); *Prosunno Coomar Chattarjee v. Jagun Nath Bysack* (5); *Gungadhur Shikdar v. Ayimuddin Shah Biswas* (6); *Irangowda v. Leshapa* (7); *Ramsden v. Dyson* (8).

Inverarity and Anderson, for respondent (defendant).—They cited *Juggut Mohinee Dossee v. Dwarka Nath Bysack* (9); *Beni Madhab Banerjee v. Jai Krishna* (1); *Prosunno Coomar Chatterjee v. Jagun Nath Bysack* (5); *Plimmer v. Mayor, &c., of Wellington* (10).

Cur. adv. vult.

JUDGMENT.

September 2. BAYLEY, J.—The plaint in this suit states that in or about the year 1866 Tukaram Moroji, defendant's father, let to Thucker Tricum Sewji, in perpetuity, on fazendari tenure a piece of land situate at Foras Road, called Arthur Road, leading from Parel to Tardeo, 85 feet in length and 30 in breadth and measuring $8\frac{1}{2}$ kathis, at an uniform rate of Rs. 12 per kathi per annum, and it was agreed that, in the event of Government taking up the land, [70] Tricum Sewji and his successors or assigns should be entitled to receive the value of any house or other buildings erected by him or them thereon, and that Tukaram Moroji should only be entitled to receive the value of the land; that Tricum Sewji, in pursuance of the said agreement, built a house on the land and paid as rent Rs. 102 per year to Tukaram Moroji; that Tricum Sewji having subsequently filed his petition and schedule in the Insolvency Court, the Official Assignee in 1876 sold the insolvent's right, title and interest in the house and ground to one Solomon Aroon Gandel, who thereafter continued to pay annually the said sum of Rs. 102 as the rent for the said ground; that by indenture dated 2nd July, 1878, Solomon Aroon Gandel conveyed the property to Gopal Yeshwant, the husband of the plaintiffs, who thereafter paid the aforesaid rent every year to the fazendar, the defendant; that Gopal Yeshwant rebuilt the house and continued to pay the annual rent of Rs. 102 to defendant until 1885; that Gopal Yeshwant died intestate on the 17th February, 1887, leaving him surviving the plaintiffs his widows, and that the plaintiffs paid the rent for 1886 to defendant; that in 1887 the defendant demanded payment of the rent from plaintiffs every six months, who accordingly paid it every six months, and in 1888 at defendant's request they paid it to him every two months until the 31st August, 1888, after which date defendant sent his rent bills sometimes every month and sometimes every two months until 31st December, 1889. In 1890 defendant returned to the former practice and sent a bill for the

(1) 7 B.L.R. 152 (158). (2) 16 W.R. C. R. 161. (3) 25 W.R. C. R. 211.
 (4) 3 C.L.R. 194. (5) 10 C.L.R. 25 (30). (6) 11 C.L.R. 281=8 C. 960.
 (7) P.J. 1892, p. 382. (8) L.R. 1 H.L. 129, (140). (9) 8 C. 582.
 (10) 9 App. Cas. 699.

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year's rent, *viz.*, Rs. 102, which plaintiffs paid; that on the 30th September, 1891, defendant by his solicitor sent a notice to plaintiffs calling on them to give up possession of the land on the 1st November, 1891, and threatening, in default of compliance with such requisition, that a suit in ejectment would be brought against them, and that in reply thereto the plaintiffs by a letter dated the 29th October, 1891, denied that they were monthly tenants, and declined to give up possession of the land.

The plaint then stated that the defendant filed a suit (No. 25011 of 1891) in the Bombay Court of Small Causes against the plaintiffs for possession of the land, and obtained a decree against them on the 5th December, 1891, whereby the plaintiffs were ordered to deliver up possession to the defendant within two months from the date of the decree.

[71] The plaintiffs prayed that it might be declared that they are entitled to hold the land in perpetuity, subject only to the payment of the annual rent of Rs. 102; that defendant might be restrained by injunction from executing the decree of the Court of Small Causes in suit No. 25011 of 1891 until the final determination of this suit; that, in the event of the Court's holding that the plaintiffs are not the permanent tenants of the defendant, he might be decreed to pay to them Rs. 7,000, the present value of the building now standing on the ground, and a further sum of Rs. 3,000 for damages for the defendant's unlawful acts and proceedings taken by him against the plaintiffs, by which the property has deteriorated in value; that the plaintiffs' costs may be provided for, with a prayer for such further or other relief as the circumstances of the case may require.

The defendant by his written statement denied the statements contained in the 1st and 2nd paragraphs of the plaint and the statement as to payment of rent in paragraphs 4 and 5 thereof, and required the plaintiffs to prove the same. He alleged that the rent was always, as a matter of fact, payable monthly, but that the plaintiffs, being the defendant's monthly tenants, frequently got into arrears, and consequently when they did pay, they paid rent for more than one month. He denied that the plaintiffs were entitled to the remedies claimed, and submitted that the suit should be dismissed with costs.

The case came on for hearing before Mr. Justice Parsons on the 1st August, 1892, when after reading the plaint and written statement the following issues were framed:—

1. Whether plaintiffs are entitled to hold the land in suit in perpetuity, subject only to the payment of Rs. 102 annually?
2. Whether after the decision of the Small Cause Court in suit No. 25011 of 1891 the plaintiffs can maintain this suit?
3. Whether the defendant has a right to eject the plaintiffs?
4. Whether the plaintiffs are entitled to claim Rs. 7,000 or any and what sum for the value of the buildings now on the land?

The claim for damages (*i.e.*, of Rs. 3,000) being abandoned, no issue was raised on it.

5. The general issue.

[72] The judgment and findings were thus recorded by the learned Judge:—

"I find issue 1 in the negative. No evidence of perpetual lease or of right to hold subject to payment of fixed rent; 2 affirmative. 3 affirmative. Plaintiffs being tenants can be ejected, no right to the contrary being proved. 4. Had the plaintiffs been let in on the land without an agreement, or had the land been let to them according to the custom of the country, it might be argued, according to some decided

cases, that plaintiffs would be entitled to remove the materials or to compensation; but here there was a special agreement, and we cannot go beyond it. It might have been here one for a term of years. Certainly it is not proved that under that agreement plaintiffs have the right to remove the materials, and, therefore, I cannot award them or their value. The value of them is very little. It is not proved plaintiffs' husband rebuilt, or that they spent Rs. 1,500 in repairs. The suit is dismissed with costs."

The plaintiffs have appealed on the ground, amongst others, that the Judge was in error in finding that there was no evidence of a perpetual lease of the premises in question or of a right in the plaintiffs to hold the same subject to the payment of a fixed rent; that, in any event, he should have held that the plaintiffs were entitled either to remove the building erected on the land in question or to compensation therefor; that the decree was contrary to law and equity and to the weight of evidence in the case, and should be reversed with costs, and a decree passed for the plaintiffs for the relief claimed by them.

On the argument of the appeal before us Mr. Macpherson, on behalf of the appellants, contended that the original grant in 1866 not being before the Court, the Court could only collect what were the terms of it from perusing the evidence given at the hearing; that the respondent could not eject the appellants, because they had an absolute title so long as they paid the rent; and that, if he could, they were entitled to compensation, or to have a reasonable time to remove their buildings, and that the case must be dealt with as if the origin of the tenancy was not known. Mr. Anderson, on the other hand, argued that the foundation of the claim was a written document of which by a Judge's order the respondent had been allowed inspection [73] that on the authority of *Juggut Mohinee Dossee v. Dwarka Nath Bysack*, a case reported in I.L.R., 8 Calc., 582, it was clear that the English law applied, the property in dispute being situated in a Presidency town and not in the Mofussil, and that the decision of the learned Judge was correct, and ought not to be disturbed. The Judge in the Court below found that there was a special agreement, and that he could not go beyond it.

The plaint, however, made no reference whatever to any written agreement, nor did the written statement, and there was no allusion to any such document in the issues. There was nothing said in the evidence, oral or documentary, given on behalf of the appellants as to any written contract or lease having been executed by respondent's father Tukaram Moroji to Tricum Sewji, and the appellants made out a *prima facie* case without showing, or its being shown, that there was any written agreement or lease. When the respondent was afterwards examined in support of his case he said, in cross-examination, that he had no writing of the lease to Tricum, no counterpart; that his father could not write or sign his name, but used to make a mark—the mark of a plough; that he had no paper with him that bears his mark; that the paper then shown to him was not his mark.

There is, however, some document in existence which was alleged to be a counterpart of a Marathi agreement said to be dated 19th November, 1866, made between Tukaram Moroji and Tricum Sewji. The respondent had applied and, under a Judge's order, was allowed inspection of it before he filed his written statement, and such document was probably the one shown to him during his cross-examination, the mark on which he said was not his father's mark. Had he admitted that the document was a genuine one, and had he tendered it, it could not

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have been received in evidence, because, as stated by counsel during argument before us, it had not been registered as required by the Registration Act then in force, the first of which Acts (XVI of 1864) came into force in the Bombay Presidency on the 1st January, 1865. We are of opinion that the Judge could not see judicially that such document was in existence, unless it was produced properly registered. In point of fact, no such document was produced, or even tendered in evidence, during the hearing.

[74] Now it has been long settled in England that, if a plaintiff can establish a *prima facie* case without betraying the existence of a written contract relating to the subject-matter of the action, he cannot be precluded from recovering by defendant subsequently giving evidence that the agreement was reduced into writing; but the defendant, if he means to rely on a written contract, must produce it as part of his evidence, and, in the event of its turning out to be unstamped or insufficiently stamped, he must pay the duty and penalty. In a case decided by the Court of King's Bench in 1827—*Read v. Deere* (1)—Mr. Justice Littledale said (p. 266): "If, indeed, a plaintiff gets through his case, without giving the defendant any opportunity of mentioning the written agreement, the latter must produce it, and he cannot avail himself of it unless it be duly stamped." In *Stevens v. Pinney* (2) decided by the Court of Common Pleas in 1818, in an action on the common counts for work and labour, it was held that the plaintiff having established his case by other evidence was not precluded from recovering by the defendant's proving the existence of an unstamped and unsigned agreement which fixed the price and which the defendant did not give notice to the plaintiff to produce. In *Fielder v. Ray* (3), after the plaintiff had proved by witnesses a case of implied or oral contract, it was held that he could not be non-suited by the defendant's producing an unstamped written instrument purporting to contain the terms of the contract. Tindal, C.J., said: "It was incumbent on the defendant in that stage of the cause to prove the existence of the agreement, by producing it in a form in which it could be received, that is, properly stamped. . . We cannot see judicially that the instrument is in existence unless it is produced properly stamped," and Mr. Justice Burrough said: "When the plaintiff's case has been closed, the defendant is not to get rid of it by suggesting the existence of a writing which he is unable legally to produce, and on the subject of which he might have cross-examined the plaintiff's witnesses."

The same rule has been applied in cases where the question was, as here, as to the terms on which landed property was let [75] to a tenant. In *The King v. The Inhabitants of Padstow* (4), the respondents having proved by parol a taking of the premises by the pauper's husband, who occupied and paid the rent agreed on for two years, a witness for the appellant parish was called, who stated that he was present when the pauper's husband took the fields in question of his master, and that the conditions of taking were reduced into writing and signed by the parties on unstamped paper. Lord Denman, C.J., said that the rule undoubtedly is, that where a party has made out a *prima facie* case, and the opposite party attempts to cut it down by a written instrument, he must prove it; and Parke, J., said that, if a party makes out a *prima facie* case without showing that there was any written contract, the other party, if he relies on that written

(1) 7 B. & C. 261.

(2) 8 Taunt 327.

(3) 6 Bing. 332.

(4) 4 B. & Ad. 208.

contract, must produce it. And in *Martson v. Dean* (1), tried at the sittings at Westminster in 1835 before Mr. Justice Coleridge, an action by a landlord for use and occupation, it was held, and the learned Judge stated that he recollected several instances in point, that when the existence of a written agreement was not proved till the defendant had gone into his case, the plaintiff was not bound to put it in. See, also, to the same effect *Magnay v. Knight* (2), where the above mentioned decisions were referred to and acted on by the Court of Common Pleas.

None of the above authorities appear to have been brought to the notice of the learned Judge in the Court below, nor indeed were any of them cited to us on the argument of the appeal. We consider, however, that they are applicable to the case now before us. The respondent in the Court below did not rely on or tender in evidence any document executed when Tricum Sewji's occupation of the land in dispute commenced in 1866. The reason he did not was doubtless because his legal advisers knew it was inadmissible for want of registration, and, therefore, made no mention of it in the defendant's written statement; and, as was said by Tindal, C. J., in *Fielder v. Ray* (3), the Court could not see judicially that any such instrument was in existence, unless it was produced in proper form, *i.e.*, as regards the present case unless it had been duly registered according to the [76] law then in force in British India. The argument, therefore, addressed to us on behalf of the respondent, that the foundation of the appellant's claim is a written document, falls to the ground, as no such document was tendered in evidence, nor was, nor is, legally in existence.

The original grant, if there was one, not being before the Court, the evidence must be looked at to see what were the terms of the tenancy by which the appellants and their predecessors-in-title hold and held the property. The respondent in cross-examination stated that Tricum Sewji built the house, and he did not know whether his father let the land to him, but there was no house on it before Tricum built it; that there were other pieces of land in the same plot which were given to people to build on. He stated he went over the house with Mr. Campbell, the Architect and Civil Engineer, and Mr. Campbell in his report dated the 16th March, 1892, (Ex. No. 12) said that he was informed that the chawl on the land in dispute was built about 26 years ago, *i.e.*, about 1866. He also said in that report that he estimated the cost of the chawl when new at Rs. 3,000, which shows that at the time of the original building a very substantial sum was laid out.

Mr. Cursetji F. Chapkar, a licentiate of civil engineering of the Bombay University, who surveyed the house for the appellants in January, 1892, stated in his report (Ex. 9) that the property is situated at Arthur Road, a greater portion of its frontage commanding DeLisle Road, and that such situation is very desirable on account of its being at the junction of two main roads, *viz.*, DeLisle Road and Arthur Road, and being only about three minutes' walk from the railway station, *i.e.*, the Chinchpokli Station on the G. I. P. Railway. Arthur Road is a road running diagonally across the Flats in a north-north-easterly direction from Tardeo to near the road leading to Government House, Parel. The land in dispute with the chawl on it occupies $8\frac{1}{2}$ kathis and is 85 feet in length and 30 feet in breadth, facing, as it does, Arthur Road.

The evidence shows that from the first down to 1885 the rent had always been paid at the annual rate of Rs. 102 for the [77] ground.

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(1) 7 C. & P. 13.

(2) 1 Man. & Gr. 944.

(3) 6 Bing. 332.

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In the receipts for the rent put in by the appellants and the respondent, the rent is uniformly described as "the rent of ground of $8\frac{1}{2}$ kathis (85 feet in length and 30 feet in breadth) used and occupied at the rate of one rupee per kathi each per month." In more recent years the rent has, no doubt, been paid at irregular intervals, after six or two months or after one month. Tricum Sewji, the original grantee, became insolvent. Sometimes the respondent had to sue for it in the Court of Small Causes. It was stated, however, before us by the learned counsel for the respondent, and we think correctly, that whether the payments were yearly or monthly did not affect the question.

Tricum Sewji and his successors-in-title appear undoubtedly to have considered that they had an absolute interest in the property, subject to the payment of an annual rent of Rs. 102 to Tukaram Moroji and his son the defendant. In the conveyance dated the 20th June, 1876 (Ex. 13), by Mulchand Lilladhar and Moti Lilladhar and Mr. Gamble, Official Assignee of the insolvent Tricum Sewji, to Solomon Aroon Gandel, after reciting an indenture of mortgage dated the 23rd September, 1871, by Tricum Sewji to Mulchand Lilladhar and Moti Lilladhar to secure Rs. 351-4-0, by which the premises were mortgaged unto and to the use of Mulchand and Moti Lilladhar, their heirs and assigns, and the sale by such mortgagees by public auction, with the consent of Mr. Gamble, to Solomon Aroon Gandel, for the sum of Rs. 550 the premises which are described as a piece or parcel of fazendari land or ground with the messuages, tenement or dwelling-house standing thereon were granted, released and confirmed to Solomon Aroon Gandel, his heirs, executors, administrators and assigns unto and to the use of Solomon Aroon Gandel, his heirs, executors, administrators and assigns for ever subject to the payment of the fazendari rent and all rates, taxes and assessments. That conveyance is in English and was attested by Mr. Rabimtolah Mahomed Sayani, solicitor of Bombay, an experienced and careful lawyer, and in whose office the conveyance was probably prepared, and who would doubtless take care that the recitals and other statements in it were accurately set forth.

[78] The conveyance dated the 2nd July, 1878, (Ex. A) by Solomon Aroon Gandel to Gopal Yeshwant, the husband of the appellants, was also in English, but was not attested; and judging from its language was not drawn by any duly qualified legal practitioner. It was a conveyance in consideration of Rs. 500 to Gopal Yeshwant, his heirs, executors and assigns, subject to the payment of the fazendari rent and all taxes, rates and dues, and by it Solomon Aroon Gandel, his heirs, executors, administrators and assigns bound themselves to make the said messuage, tenement or dwelling-house and premises free and clear from all disputes and embarrassment whatever arising by way of mortgage or inheritance by their own costs and expenses, and that they should and would warrant and for ever defend,—a covenant he would not have been likely to enter into unless he considered that he had an absolute interest in the property, and he too, as he described himself in the document, a Jew inhabitant of Bombay, and thus one of a race generally considered to be cautious and circumspect in regard to business and money matters.

The respondent's contention is that from 1866 Tricum Sewji and his successors-in-title were mere monthly tenants, liable to be turned out at a month's notice, although Tricum Sewji had built the house, there being admittedly no house on the ground before. Assuming for argument's sake that such was the position of Tricum Sewji when he took the land, what

would be the rights of the appellants when they filed the present suit on the 25th of January, 1892?

In a case decided by the House of Lords in 1866—*Ramsden v. Dyson* (1)—the Lord Chancellor (Lord Cranworth) stated what were the principles of equity on the subject. He said (p. 140): "If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of Equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he [79] had fallen, it was my duty to be active and to state my adverse title, and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented." Lord Kingsdown said (p. 170): "If a man under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord or without objection by him, lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision in *Gregory v. Mighell* (2), and, as I conceive, is open to no doubt." Then, after stating that there has been a difference of opinion among great Judges as to the nature of the relief to be granted, he says: "But I do not understand any doubt to have been entertained by any of them that, either in the form of a specific interest in the land, or in the shape of compensation for the expenditure, a Court of Equity would give relief, and protect in the meantime the possession of the tenant."

In a case that came before the Judicial Committee of the Privy Council in 1884, on appeal from the Court of appeal, New Zealand, *Plimmer v. Mayor, &c. of Wellington* (3), the passage just cited from Lord Kingsdown's judgment was quoted as being the law relating to such cases; and the Privy Council, when considering the question as to the extent of interest which Plimmer acquired by his expenditure in 1856 for the extension of his jetty and for the erection of a warehouse at Wellington harbour, say: (p. 713) "Referring again to the passage quoted from Lord Kingsdown's judgment, there is good authority for saying what appears to their Lordships to be quite sound in principle, that the equity arising from expenditure on land need not fail merely on the ground that the interest to be secured has not been expressly indicated. In such a case as *Ramsden v. Dyson* (1) the evidence (according to Lord Kingsdown's view) showed that the tenant [80] expected a particular kind of lease, which Vice-Chancellor Stuart decreed to him, though it does not appear what form of relief Lord Kingsdown himself would have given. In such a case as *Duke of Beaufort v. Patrick* (4) nothing but perpetual retention of the land would satisfy the equity raised in favour of those who spent money on it, and it was secured to them at a valuation. In such a case as *Dillwyn v. Llewelyn* (5), nothing but a grant of fee simple would satisfy the equity which Lord Chancellor (Lord Westbury) held to have been raised by the son's expenditure on his father's land. In fact, the Court must

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(1) L. R. 1 H. L. 129.
(4) 17 Beav. 60.

(2) 18 Ves. 328.
(5) 4 DeG. F. & J. 517.

(3) 9 App. Ca. 699.

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look at the circumstances in each case to decide in what way the equity can be satisfied."

In the case now before us the receipts for rent put in evidence at the hearing are printed, and are headed Chinchpokli, in which district, according to Colonel Laughton's survey map of 1872, the property in dispute is situated, and each of them is signed by the respondent. We entertain little doubt that the plot of ground so granted was, as stated in the two indentures already referred to, fazendari land, the tenure of which description of property is well known and is very common in this island, under which the fazendar or landlord of the district or the oart in which the land is situated is entitled to a fixed yearly rent, and as long as that is paid, the fazendar tenant, who had undoubtedly an assignable and transferable interest, cannot, nor can his assignees or transferees be ejected by the fazendar landlord.

It would be a breach of contract, and little short of a direct fraud on the part of this respondent, if he were to be allowed to treat the appellants as mere monthly tenants, and, by giving them a month's notice to quit, to claim the property, and, as he has done, to eject them, and that, too, without any compensation whatever.

The learned counsel for the respondent argued, and we think correctly, that the present case ought to be decided according to English law. Act No. XI of 1855 of the Governor General in Council, s. 4, which applies only to cases under English law, secures to *bona fide* holders under defective titles the value [81] of buildings erected or improvements made by them in the belief that they had an estate in fee simple or other absolute estate. That Act has, by Act XV of 1874, s. 3, been declared to be in force in the whole of British India, except the scheduled districts. The appellants, however, wish to retain possession of the property in dispute, in preference to being paid the value of the buildings erected on the land. In the case of *Beni Madhab Banerjee v. Jai Krishna* (1), which came before Sir Barnes Peacock, C.J., and two other Judges in 1869, the first appellate Court (Kemp, J., and Glovey, J.) being divided in opinion, Sir Barnes Peacock, who agreed with Mr. Justice Kemp, said that that learned Judge thought that, in equity, the plaintiff was not entitled to turn the defendant out of the lands, because he stood by and saw them erecting *pucka* buildings on the land without any objection whatever. Sir Barnes Peacock then said that, if the plaintiff allowed the defendants to erect *pucka* buildings upon the land without objecting, it appeared to him that he was bound in the same way, in equity, as if he had granted them a *potta* with the privilege of building *pucka* houses on the land, and he thought that Mr. Justice Kemp was right in holding that the plaintiff was precluded by his conduct from turning the defendants out of possession. He then said: "Independently of this, speaking for myself, I should say that if one man grants a tenure for another for the purpose of living on the land, that tenure, in the absence of any evidence to the contrary, would be assignable. I know of no law which prohibits a man who gets land for the purpose of building from assigning his interest in it to another. By assigning his interest he does not necessarily get rid of his liability to pay the rent reserved." The two other Judges concurring, Mr. Justice Kemp's decision was affirmed. That decision was approved of and followed in *Lalla Gopi Chand v. Liakut Hossein* (2).

(1) 7 B.L.R. 152.

(2) 25 W.R. 211.

In *Gungadhur Shikdar v. Ayimuddin Shah Biswas* (1), decided in 1882 by Garth, C. J., and Mitter, J., where it was conceded that the land in dispute was not let for agricultural purposes, [82] and it was found that after the grant (whatever it was) buildings of a substantial character were erected some sixty years ago by the defendant's ancestors, and that they and their ancestors had lived there ever since, the Court held that under these circumstances they thought that the Courts below were at liberty to presume, if they thought fit, that the land was granted for building purposes, and that the grant itself was of a permanent character. The Court added that this had been explained in several recent cases, and, amongst others, in the case of *Prosunno Coomar Chatterjee v. Jagun Nath Bysack* (2).

We are of opinion that there is in the present case evidence from which the Court can reasonably presume that the land was granted in or about 1866 to Tricum Sewji for building purposes. It was a small plot of ground facing the Arthur Road, which, though doubtless marked out, and its direction well known, was not, as, in answer to a question put by us to the Municipal Commissioner for the City of Bombay, we have been courteously informed by him, actually made until 1868. The position of the ground, and the rent reserved, preclude any idea that it was let for agricultural purposes. In that locality and on the other portions of the Flats in and near the centre of that part of the island, which, as is well known, until the erection of the Hornby Vellard during the time of Mr. William Hornby (who was Governor of Bombay from 1776 to 1784), which closed the main breach of the sea from Mahalaxmi to Love Grove, and rescued the Flats from being flooded each tide with salt water, only rice crops could be grown. The soil is bad, and unless a layer of earth be placed over it, little else than rice can be cultivated.

Tukaram Moroji must have seen, and knowing what he had granted, of course made no objection to Tricum erecting the building on the ground. Even if the Court were not justified in holding that the grant was originally for building purposes, the fact that the building which Tricum Sewji placed upon the ground was not objected to by Tukaram, who, according to his son's evidence, lived until 1874, or since then by his son, and [83] that he and his son received the rent, at first yearly, but afterwards at shorter intervals until nearly twenty-five years afterwards, by his attorney's letter of the 30th September, 1891, (Ex. XI) the respondent treated the appellants as his monthly tenants and required them to vacate on the 1st November, 1891, shows that the position which he then took up was a mistaken one, and that, by his father's and his own conduct, he was, and is, precluded from recovering the land and premises from the appellants in the manner he seeks.

The decree, therefore, dismissing the suit with costs must be reversed, and in lieu thereof this Court passes a decree in favour of the appellants in terms of paragraph (a) of the prayer of the plaint. (His Lordship read the paragraph and continued.) The respondent must deliver forthwith to the appellants possession of the land and premises, of which on or about the 13th August, 1892, he was put in possession under the decree in suit No. 25011 of 1891 passed by the Bombay Court of Small Causes. And in the event of parties not agreeing, there must be a reference to the Commissioner of this Court to take an account of the rents and profits received by the respondent since he was so put in possession, which, after making all

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just allowances, he is already ordered to pay to the appellants. The respondent to pay to the appellants their costs in the lower Court including costs below and of this appeal, and to bear his own costs throughout, and repay to the appellants any costs which under the decree of the Court below they may have paid to him, and also repay to the appellants any costs paid by them to him under the decree in suit No. 25011 of 1891 in the Court of Small Causes dated the 5th December, 1891. If there be a reference to the Commissioner, further directions and further costs will be reserved with leave to apply as advised.

Decree reversed.

Attorneys for the appellants :—Messrs. *Chalk, Walker and Smetham.*
Attorneys for the respondent :—Messrs. *Balkrishna and Pherozsha.*

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[84] APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

PUNDLIK (*Original Plaintiff*), *Appellant v. ACHUT*
(*Original Defendant*), *Respondent.** [10th January, 1893.]

Limitation—Limitation Act (XV of 1877), s. 5—Review of judgment—Application for review—Sufficient cause for delay in filing an appeal.

Though under certain circumstances the presentation of an application for review may be considered as sufficient cause for delay in filing an appeal, the appellant is bound to satisfy the Court that such circumstances did exist in his case, and that he had sufficient cause for not presenting the appeal within the prescribed period.

The plaintiff obtained a decree for possession of certain land in the Court of first instance. This decree was reversed by the appellate Court on 28th October, 1890. The plaintiff applied for a review of judgment of the appellate Court on 27th January, 1891. The petition of review was rejected on 18th March, 1891. Thereupon the plaintiff preferred a second appeal to the High Court on 13th April, 1891.

Held, that the second appeal was time-barred. The time taken in prosecuting the application for review could not be deducted in calculating the period of limitation, as the plaintiff had not shown that he had reasonable grounds for asking for a review.

[F., 33 C. 1323=3 C. L. J. 545 (546)=10 C. W. N. 986; 1 L. B. R. 313 (314).]

THIS was a second appeal from the decision of Arthur H. Unwin, District Judge of Kanara, in appeals Nos. 169 and 192 of 1890 of the district file.

The plaintiff sued to eject the defendant from the lands in dispute, alleging that defendant was a trespasser in wrongful possession.

The Court of first instance passed a decree awarding possession to the plaintiff as prayed for.

This decree was reversed, and plaintiff's claim was rejected, on appeal, on 28th October, 1890.

On 27th January, 1891, the plaintiff applied for a review of the judgment of the appellate Court. The petition of review was rejected on 18th March, 1891.

* Second Appeal, No. 511 of 1891.