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clause 4, in connection with the Dekkhan Agriculturists' Relief Act, XVII of 1879. The words used in section 47 of that Act are:—"No application shall be entertained unless the plaintiff produce the certificate." But in the Succession Certificate Act, section 4, the words are:—"No Court shall proceed upon an application . . . . to execute . . . a decree . . except on the production, &c."

On consideration of the difference of language used, "entertain" meaning something different to "proceed," we are of opinion that the last cited decision does not conflict with those passed at Calcutta and Allahabad referred to above. We follow them as being in accordance with the tendency of the decisions on article 179, clause 4.

The Court, therefore, reverses the decrees of the Courts below, and directs the original Court to proceed with the execution as not barred by limitation; the respondent-defendant to pay the costs incurred in the two lower Courts.

Order reversed.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Fulton.

1894.
November 8.

SONSHET ANTUSHET TELI (ORIGINAL DEFENDANT), APPELLANT, *v.* VISHNU BA'BA'JI JOHA'RI (ORIGINAL PLAINTIFF), RESPONDENT.*

Khoti Settlement Act (Bom. Act I of 1880)*—Landlord and tenant—Tenancy—Presumption as to nature of tenancy in absence of evidence—Payment of rent—Mortgage by tenant—Sale of tenant's interest—Rights of purchaser—Heirs of tenant cannot surrender tenancy, or affect purchaser's title—Transfer of tenancy in khoti village—Ordinary tenancy—Occupancy tenancy.*

One A'tmárám, who held certain land as tenant, mortgaged it to Hirshet and shortly afterwards died. There was no evidence to show the term of A'tmárám's tenancy. After his death the plaintiff Vishnu, who was his brother, became tenant of the land and paid rent to the khots. Some years subsequently Hirshet (the mortgagee) sued to enforce his mortgage and made the plaintiff Vishnu and his two sisters parties. He obtained a decree and sold the mortgaged land in execution. Sonshet bought it and now claimed possession. Vishnu contended that A'tmárám's interest terminated at his death, and that Sonshet was, therefore, not entitled to possession.

* Second Appeals Nos. 787 and 788 of 1892.

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Held, that Sonshet was entitled to possession. The fact that A'tmárám had paid rent to the khots showed that he was their tenant. In the absence of all evidence on the subject, the presumption was that the tenancy was an ordinary tenancy from year to year continuable until legally terminated. There was nothing to show that the khots had ever terminated it. A'tmárám's heir could not surrender it to the prejudice of the mortgagee. Sonshet, therefore, had purchased a tenancy which had never been legally put an end to, and was entitled to possession.

Under the Khoti Settlement Act (Bom. Act I of 1880) occupancy tenancies are not transferable except under certain circumstances, but there is no prohibition to the transfer of an ordinary tenancy.

SECOND appeal from the decision of T. Walker, Assistant Judge of Ratnágiri.

Suit for possession of land.

The land in question was originally held by one A'tmárám, a khátedár, who mortgaged it to one Hirshet. A'tmárám died in 1882; and after his death the plaintiff Vishnu, who was his brother, paid the rent for that year and got the khots to enter his name as khátedár.

In 1886 the mortgagee Hirshet brought a suit on his mortgage to which he made A'tmárám's brother Vishnu (the plaintiff) and also his sisters Bhimábái and Jánkibái parties. He obtained a decree, and in execution the land was sold in 1890 and bought by Sonshet. Subsequently Vishnu sued the mortgagee (Hirshet) and others in the Mámlatdár's Court to recover possession, but his suit was dismissed. He thereupon brought a suit in the Court of the Subordinate Judge of Devgad (No. 158 of 1890) for a declaration of his title to the land and for ejectment of defendants. The purchaser Sonshet was afterwards made a party to that suit.

Vishnu obtained a decree and proceeded to take possession, but was obstructed by Bápu Dhond, who claimed as tenant under the purchaser Sonshet. Plaintiff applied to the Court under section 328 of the Civil Procedure Code (Act XIV of 1882), and the application was registered as a suit (No. 254 of 1891) between Vishnu as plaintiff and Bápu and Sonshet as defendants.

The Subordinate Judge held that Sonshet by his purchase had become owner of the land, and he dismissed the plaintiff's

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(Vishnu's) suit, and issued a perpetual injunction against the execution of the decree in Suit No. 158 of 1890.

Vishnu appealed against this decision (No. 254 of 1891), and the defendants in Suit No. 158 of 1890 appealed against the decision in that suit. The appeals in both suits were heard by the District Judge of Ratnágiri. He reversed the decision in Suit No. 254 of 1891 and confirmed the decree in Suit No. 158 of 1890, and awarded possession of the lands to Vishnu, the plaintiff in the latter suit. He held that, as Sonshet had not shown what title he had purchased at the sale in 1890, he could not succeed in his claim against the plaintiff Vishnu, who had had possession.

The following is an extract of the judgment of the District Judge in appeal in Suit No. 158 of 1890:—

"Suit No. 158 of 1890 was a simple ejectment suit against certain defendants, ten in number, and Sonshet was afterwards added as defendant No. 11. A decree for possession was awarded against all but Sonshet (see Exhibit 18), who had declared to have been unnecessarily joined. Plaintiff, on going to take possession, was resisted by Sonshet's tenant, and he, therefore, now sues Sonshet, who was then not in possession but has since taken possession and claims on his title. The papers in the former case are now before me in appeal, and that appeal and this have been heard on consecutive days. It is proved that plaintiff had possession for six or eight years prior to his dispossession by the defendants in the former suit. As Sonshet and his tenant have subsequently taken possession, plaintiff is entitled to oust them, unless Sonshet can prove that he is the real owner of the land. From Exhibit 16 it is clear that he purchased A'tmárám Mahádevbhat's right, title and interest in the land in dispute on the 11th January, 1890. With the papers in both cases before me, I am unable to say with certainty what right, title and interest A'tmárám had. From Exhibit 31 it appears that he paid various sums of money to Sundrábái kom Govind Rámchandra and other people calling themselves khots. Perhaps these are the khots of the village. Granting that they are, I do not know whether A'tmárám's rights, if he be a tenant at all, were those of a dhárekári or *quasi*-dhárekari, occupancy tenant or ordinary tenant, transferable or non-transferable. The khots are the persons principally interested, and they are not called as witnesses, nor are they made parties to the suit. I am of opinion that Sonshet has failed to prove his case."

Sonshet preferred a second appeal.

Máneksháh J. Taleyárkhán for the appellant:—We claim as purchaser at a Court-sale held in execution of the decree against A'tmárám. We have bought A'tmárám's rights. The plaintiff is A'tmárám's heir. Whatever equities bound A'tmárám, bind the plaintiff.

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Dáji A'báji Khare with *Vásudev G. Bhandárkar* for the respondent (plaintiff) :—A'tmárám's tenancy terminated at his death, and Sonshet, who purchased A'tmárám's interest, has not shown any title to hold the land after that time. He has not proved the nature of A'tmárám's tenancy.

[FULTON, J. :—If so, A'tmárám must be presumed to have been a tenant from year to year.]

An annual tenant in a khoti village cannot mortgage his tenant right. Section 9 of the Khoti Act (Bom. Act I of 1880) enacts that even an occupancy tenant cannot mortgage his land, much less can a tenant from year to year—Bombay Gazetteer, Vol. X, p. 211; *Nárayan Balvantráo* v. *Bálu Vithu*(1). Moreover, a landlord is not bound to continue a tenancy from year to year after the death of his tenant—*Govind Raghunáth* v. *Náráyan Dikshit*(2). The khot could put an end to A'tmárám's tenancy after his death by giving the land to another. Accordingly Vishnu became the khot's tenant in his own right. A'tmárám's tenancy having come to an end at his death, neither his mortgagee, nor the purchaser in execution of the decree on the mortgage, can now claim any title to the land.

FULTON, J. :—Both these appeals have been heard together, the parties and the land in dispute being the same. It appears that the land originally stood in the name of A'tmárám, who mortgaged it without possession to one Hirshet. A'tmárám was the natural brother of the plaintiff Vishnu, and was adopted by his maternal grandafther Mahádevbhat, who was originally holder of the land. He died about 1882., and after his death the plaintiff paid the rent due for the year and got the khots to enter his name as kháteddr. Some years after A'tmárám's death Hirshet sued to enforce his mortgage, and made A'tmárám's sisters Bhimábái and Jánkibái and the plaintiff parties. He obtained a decree, and on bringing the mortgage land to sale, it was bought by the defendant Sonshet. The question now before us is, whether Sonshet by that purchase obtained a right to possession.

(1) P. J., 1879, p. 243. (2) P. J., 1877, p. 182.

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The learned Assistant Judge has correctly pointed out in his judgment in Appeal No. 556 of 1891 that by this transaction Sonshet purchased the right, title and interest of A'tmárám, but when stating that he could not say for certain what right, title and interest A'tmárám had, he failed to draw the usual presumption from the fact of A'tmárám's paying rent to the khots that he held the land as their tenant. For what term the tenancy was to continue, is not proved; but in the absence of all evidence on the subject, the Court should have presumed that it was an ordinary tenancy from year to year continuable until legally terminated—*Govind* v. *Náráyan*(1).

Mr. Vásudev Gopál contended that the entry of the plaintiff's name by the khots as tenant instead of the name of the sister or sisters of the deceased, who were the real heirs, would terminate the tenancy; but although on the assumption that the tenancy was an annual one, the khots were entitled to determine it by giving the proper notice, there is nothing to show that they have ever done so. The heirs themselves could not surrender it to the prejudice of the mortgagees' rights—*Sukru* v. *Tafazzul*(2), and their acquiescence, if they did acquiesce, in the entry of the plaintiff's name as tenant would not have the effect of terminating it.

Under these circumstances, Sonshet being purchaser of a tenancy which has never been legally put an end to, is entitled to be put into possession. No question of limitation arises, as twelve years have not elapsed since A'tmárám's death.

Mr. Vásudev Gopál contended that under the Khoti Act the tenancy could not be transferred; but on reference to the Act we find that while occupancy tenancies are not transferable except under certain circumstances, there is no prohibition to the transfer of an ordinary tenancy such as in the absence of evidence on the subject we must presume A'tmárám's tenancy to have been. The reason for this distinction is apparent. In case of an ordinary tenancy the khot can at any time get rid of the tenant by giving him notice; whereas, if a transfer of an occupancy tenancy could be carried out against his wishes, he might be provided with a tenant whom he did not like and could not eject.

(1) P. J. for 1877, p. 182. (2) I. L. R., 16 All., p. 399.

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We must point out that as Sonshet was made a party to Suit No. 158 of 1890 the Court should have decided as to his title. The suit was not brought within six months of the alleged dispossession, and, therefore, the plaintiff was not entitled to a decree until after adjudication on Sonshet's plea that he was not the owner. If the plaintiff was not the owner, he could not be awarded possession from defendants Nos. 1 to 10; and there was no authority for refusing to determine the issue of the title raised by defendant No. 11, and thus rendering necessary a second suit.

We now reverse the decrees of the Assistant Judge in both appeals and that of the Subordinate Judge in Suit No. 158 of 1890, and we restore that of the Subordinate Judge in Suit No. 254 of 1891, and direct that plaintiff do pay all Sonshet's costs in both suits throughout.

Decrees reversed.

CRIMINAL REFERENCE.

Before Mr. Justice Jardine and Mr. Justice Rânade.

IN *RE* GULA'BDA'S BHA'IDA'S.*

1894.
November 14.

District Municipal Act (Bombay Act VI of 1873), Sec. 54—"Offensive liquid"—Does not include mere waste or dirty water.

A person does not render himself liable to a penalty under section 54 of Bombay Act VI of 1873 for allowing mere waste or dirty water to run from his premises on to a public street, unless the water is "offensive."

REFERENCE by T. S. Hamilton, Sessions Judge at Surat, under section 438 of the Code of Criminal Procedure (Act X of 1882).

The reference was in the following terms:—

"Under the provisions of section 438 of the Code of Criminal Procedure, I have the honour to forward, for the consideration of their Lordships, the papers and proceedings in a criminal case, wherein Gulábdás Bháidás was convicted on the 8th August last by A. Wood, Magistrate, First Class, of this district, of an

* Criminal Reference, No. 121 of 1894.