1900.

H. H. THE GAIKWÁR SIRKÁR v. GHANDI.

JENKINS, C.J.:—The decree directs the payment of money and the completion of certain accommodation works. Defendants-appellants seek stay of execution.

As to the works, we grant the stay. As regards the money, we must apply the law as it is.

No order for execution has been made, so section 546 does not apply. We must act under section 545, *i. e.* we must be satisfied that substantial loss may result. We are not so satisfied on the affidavits which have been filed. This will not prevent any application under section 546 should an order for execution be obtained.

Costs to be costs in the appeal, as the applicants have succeeded in part and failed in part.

Order accordingly.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Batty.

1900.
August 30.

SHEIK GULAM JILANEE (PLAINTIFF) *v.* KASHINATH BAPUJI DANI (DEFENDANT).*

Dekkhan Agriculturists' Relief Act (*XVII of* 1879), *sec.* 3, *cl.* (*x*)—*Land revenue—Suit for land revenue not a suit for rent.*

A suit for land revenue does not fall under section 3 of the Dekkhan Agriculturists' Relief Act (XVII of 1879).

The liability for land revenue does not spring from a contractual engagement, and a claim in respect thereof is not one for rent or damages within the meaning of clause (*x*) of section 3 of the Act.

THIS was a reference by Khán Bahádur Navroji Dorabji, Special Judge under the Dekkhan Agriculturists' Relief Act (XVII of 1879).

The reference was in the following terms:—

"The plaintiff sued to recover from the defendant the sum of Rs. 48 for the assessment of certain jághír lands from 1894-95 to 1897-98.

* Civil Reference, No. 9 of 1900.

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"The defendant denied the plaintiff's claim.

"The Subordinate Judge awarded the claim.

"The defendant therefore applied for revision.

"The lower Court seems to have treated this suit as one falling under section 3, clause (*x*), of the Dekkhan Agriculturists' Relief Act, and a mark has accordingly been made in the plaint. The defendant therefore had to make a revision application to this Court. The plaintiff's pleader has raised a preliminary objection that this suit cannot be taken to fall under section 3 of the Dekkhan Agriculturists' Relief Act, and therefore a revisional application would not lie.

"It must first be seen what the plaintiff claims in his plaint. The minor plaintiff is the present jághírdár of Wái, and it has been alleged that Sheik Ajimudin, the previous jághírdár, having died on 18th September, 1891, his jághír was attached by Government, who, after setting aside all burdens created by the previous jághírdárs, made the plaintiff a grant of the property as if it were a new jághír on 9th October, 1894, from which date the plaintiff became complete owner of the said jághír; that the lands mentioned in the plaint are in the possession of the defendant as a tenant and the plaintiff has the right to recover the assessment thereof; that the defendant having failed to pay the assessment for 1894-95, an assistance suit was brought before the Mámlatdár of Wái, who, however, passed an order against the plaintiff; that the assessment for four years from 1894-95 to 1897-98 being Rs. 48, should be awarded therefore.

"The defendant contended that the land had been obtained by his father as inám and mirás from a previous jághírdár. That no assessment had been paid since then, and that the plaintiff had no right to obtain any assessment from him.

"It appears that since August, 1836, the defendant and his father have been making use of the land as pôt inámdár without payment of any assessment according to a sanad of the plaintiff's predecessor (Khan Mahomed II).

"The plaintiff's contention seems to be that his predecessor had no right to make any alienation of the land beyond his lifetime, that the land forms part of a saranjám jághír, and as a new grant was made by Government of the said jághír to plaintiff

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in 1894, the defendant cannot any longer hold the land free of assessment.

"The plaintiff's right to claim the assessment had been distinctly contested and denied by the defendant before the Mámlatdár, and the plaintiff was well aware all along that for more than sixty years past the defendant and his father had been in possession and enjoyment of the land without paying any rent or assessment to any one. If the grant by Government of the jághír in 1894 to the plaintiff has given him a right to have the sub-inám of the defendant set aside and to claim assessment from him, the plaintiff must, I think, distinctly sue according to section 42 of the Specific Relief Act to obtain a declaratory decree in his favour to that effect.

"The plaint in this case has been vaguely worded and the plaintiff has fought shy of clearly asking for a declaratory decree affirming his right to claim from the defendant the assessment of the land. The form given to the suit is that of a simple rent suit, as if there was no dispute regarding the plaintiff's right to claim the assessment, and that there had been only a temporary cessation of the payment of the same. It was owing to this defect in the plaint that the lower Court seems to have classed this suit as one for rent and falling under section 3, clause (*x*), of the Dekkhan Agriculturists' Relief Act.

[After referring to Bombay Act V of 1879, section 3, and to *Narayan* v. *Gangadhar* (1) and *Laxman* v. *Rampiarabai*,(2) the reference proceeded :—]

"In the present case although the suit is one for claiming assessment only, yet it has no reference to any written or unwritten engagement to pay the same, and the suit cannot, therefore, be taken to fall under clause (*w*) or (*x*) of the Dekkhan Agriculturists' Relief Act.

"The present suit has been brought by the plaintiff as a trial suit, and he intends to bring several other suits of this description against other holders of portions of the jághír lands.

"The plaint having been defectively framed, the lower Court seems to have been led into treating this suit as one under clause (*x*) for rent. As I am of a different opinion I think it proper

(1) (1888) P. J. 282. (2) (1897) P. J. 290.

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to refer, according to section 54 of the Dekkhan Agriculturists' Relief Act and section 617 of the Code of Civil Procedure, the following question for the decision of the Honourable High Court:—

"Whether a suit by an alleged superior holder to recover the assessment of land from the holder of the same, where there is no express or implied agreement to pay the assessment, could be held to be a suit for 'rent' under section 3, clause (*x*), of the Dekkhan Agriculturists' Relief Act.

"As stated above, my finding on the question is in the negative, and I am of opinion that the revision application should be returned to the defendant so that he may prefer an appeal to the District Court."

The reference was argued before a Division Bench (Jenkins, C.J., and Batty, J.)

Ratanlal Ranchhoddas for plaintiff.

G. S. Rao for defendant.

JENKINS, C.J.:—Had the Special Judge kept clearly before him the provisions of section 617 of the Civil Procedure Code, much time and toil would have been saved: for our chief difficulty has been to learn what the facts are found by him. We think, though not without doubt, the Judge intended to find that what was due from the defendant to the plaintiff was not rent but land revenue: if so, this was a matter that lent itself to a very brief and clear statement. Taking this to be the case, we have to determine whether a suit for land revenue falls within section 3 of the Dekkhan Agriculturists' Relief Act, 1879. In our opinion it does not. While fully recognizing the difficulties the draftsman of the Act has placed in the way of a logical construction of this section, we think that the last clause of sub-section (*w*) relates only to contractual engagements. We are led to this conclusion by the apparent scheme to be inferred from the provisions of the section and by the expression "contracts other than the above" to be found in sub-section (*x*). But it is, we think, clear that the liability for land revenue does not spring from a contractual engagement, nor is the claim in respect of it one for rent or

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damages within the meaning of sub-section (x). No other ground for inclusion in this section has been urged before us. Therefore we would answer the matter referred by stating the opinion that a suit for land revenue does not fall under section 3 of the Dekkhan Agriculturists' Relief Act, 1879.

Order accordingly.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Batty.

1900. *September* 18.

MOHANCHAND NEMCHAND GUJAR (ORIGINAL DEFENDANT), APPELLANT, v. ISAKBHAI TANAJI (ORIGINAL PLAINTIFF), RESPONDENT.*

Tenants-in-common, rights of against each other—Trespass—Exclusion from common property.

Laying a drain in land and the incidental temporary interference with the soil necessary for that purpose cannot be regarded as an ouster or destruction or an act of waste, and will not entitle a tenant-in-common of the land to maintain an action against another tenant-in-common.

SECOND appeal from the decision of H. F. Aston, District Judge of Poona, confirming the decrees of Ráo Sáheb V. V. Vagh, Subordinate Judge of Talegaon.

Suit for an injunction restraining the defendant from laying a drain pipe in land held in common by the plaintiff, the defendant and others.

The plaintiff Isakbhai and defendant Mohanchand respectively were owners of certain plots of land with houses thereon which abutted on the strip of land in question in this suit. This strip of land belonged to the several owners of the land abutting upon it as tenants-in-common, and was only used by them as a means of access to their respective lands.

The defendant commenced to lay a drain pipe under the land and along one side of it for the purpose of carrying off the drainage from his premises. The plaintiff now sued to restrain him from allowing the waste water from his house to pass through this land either through a drain or otherwise. The plaintiff alleged that the said waste water would be a nuisance to him.

* Second Appeals Nos. 261 and 262 of 1900.