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The result is that, in my opinion, the plaintiff has failed to show that the action of the Municipality of which he complains is illegal and *ultra vires*.

It was contended before me that, assuming the Municipality had power to issue the order complained of, the plaintiff had not acted contrary to that order, because the order was that he should build his house leaving five feet space from the wall of his eastern neighbour. Both the Courts below have held that the plaintiff has built contrary to the specific orders of the Municipality. No such contention as is now raised before me was clearly set up before them, nor can I say that the Courts below have misconstrued the order.

For these reasons, agreeing with Mr. Justice Aston in his view of the law, I confirm the decree appealed against with costs on the appellant.

Decree confirmed.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

1902. *December* 9.

BALAJI RAGHUNATH PHADKE (ORIGINAL PLAINTIFF), APPELLANT, *v.* RAMCHANDRA KASHI PATKAR (ORIGINAL DEFENDANT), RESPONDENT.*

Landlord and tenant—Lease—Tenant holding over—Assent of landlord—Liability for rent after expiry of term—Transfer of Property Act (IV of 1882), section 116.

The defendant held a share of a khoti village from the plaintiff under a kabuláyat dated 30th June, 1890, for a period of five years. This suit was filed to recover from him the rent due under it for the years 1898, 1899 and 1900. He pleaded that the kabuláyat had expired on 30th June, 1895, and that subsequently to that date he held possession not of the plaintiff's share as his tenant, but of the whole village as managing Khot, and that, therefore, the plaintiff was not entitled to rent from him, but was entitled merely to his (the plaintiff's) share of the profits of the village. It appeared, however, that though the kabuláyat had expired in June, 1895, the plaintiff in 1897 had sued the

* Second Appeal No. 421 of 1902.

defendant for the rent due under it for the four years 1893-1894 to 1896-1897 and had obtained a decree.

Held, that the decree in that suit was an adjudication that the defendant continued in possession after the date of the expiry of the kabuláyat as tenant from year to year and was liable to payment of rent for the years then sued for and that he would be liable to the rent now sued for unless he proved that after the decree in the suit of 1897 he gave such notice to the plaintiff as had in fact terminated the tenancy, and unless he put the plaintiff in the way, if he desired it, of acting on that notice by receiving from the defendant as managing Khot what the plaintiff would be entitled to receive if the tenancy by sufferance had continued.

SECOND appeal from the decision of T. Walker, District Judge of Ratnágiri, confirming the decree passed by Ráo Bahádur Mahadev Shridhar, First Class Subordinate Judge at Ratnágiri.

The plaintiff owned a one-tenth share in the khoti village of Mauje Shivrambere and leased to the defendant for a term of five years, the defendant executing a kabuláyat (rent-note) to him dated 30th June, 1890. After the expiration of the five years the defendant remained in possession, and in 1897 the plaintiff filed a suit against him and obtained a decree for rent for the years 1893, 1894, 1895, 1896 and 1897.

The plaintiff now sued him for rent for the three years 1898 to 1900.

The defendant denied his liability for rent. He contended that his tenancy had expired on the 30th June, 1895, and that he had subsequently been in possession not merely of the plaintiff's share, but of the whole village as managing Khot, and that plaintiff was now entitled not to the rent reserved by the kabuláyat, but merely to his share of the profits of the village.

The Subordinate Judge dismissed the plaintiff's suit. He held that the defendant's tenancy under the terms of the kabuláyat had terminated on the 30th June, 1895. In his judgment he said:

The plaintiff has produced certified copies of the decree and judgment in Suit No. 208 of 1897, which prove that plaintiff has recovered on the strength of the kabuláyat *svámitva* (1) for the four years 1893-1894 to 1896-1897. It is

(1) That is, the share out of the products of a farm due to him, who holds directly from the State, from the person who manages it. (Molesworth and Candy's Maráthi and English Dictionary, page 889.)

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contended that this decree is evidence that the tenancy continued after the expiry of the term of the kabuláyat. I do not think the decree can have that effect. The Court cannot make a contract between the parties. I am of opinion that after the determination of a lease it is only voluntary payment by the tenant and acceptance by the landlord of the rent, that can be evidence of an intention to continue the relationship of landlord and tenant. The decree and judgment do not show that the Court held that the contract of lease as embodied in the kabuláyat continued binding after the expiry of the term. The Court simply awarded the rent for 1895-1896 and 1896-1897 probably because defendant had held the management for those years and that the kabuláyat afforded the best evidence to determine his liability for the profits.

This decree was confirmed on appeal by the District Judge.

Plaintiff appealed to the High Court.

G. S. Rao for the appellant.

M. R. Bodas for the respondent.

CHANDAVARKAR, J.:—The plaintiff brought this suit on a kabuláyat dated 30th June, 1890, to recover rent from the defendant as his tenant for the years 1897-98, 1898-99, and 1899-1900, in respect of his (the plaintiff's) one-tenth share in a khoti *takshim*. The kabuláyat sued on was for five years.

The defendant pleaded in answer that the period of the kabuláyat having expired on the 30th of June, 1895, the relation of landlord and tenant between the plaintiff and himself ceased after that date. That would be so, no doubt, according to the decisions in *Kantheppa Raddi* v. *Sheshappa*[1] and *Chandri* v. *Daji Bhau*,[2] where it was held that where a tenancy for a fixed period expires, and the tenant continues in possession on such expiry, his possession is only by sufferance, and no relation of landlord and tenant can after that subsist in the absence of anything from which a new tenancy can be inferred.

Section 116 of the Transfer of Property Act provides that where a lessee of property remains in possession thereof after the determination of the lease granted to the lessee and the lessor or his legal representative accepts rent from the lessee, or otherwise assents to his continuing in possession, the lease is, in the absence of an agreement to the contrary, renewed from year to year,

(1) (1897) 22 Bom. 893. (2) (1900) 24 Bom. 504.

&c. In the present case, then, though the kabuláyat expired on the 30th of June, 1895, the relation of landlord and tenant would continue after that date if the plaintiff assented to the defendant's continuance in possession.

But it is contended for the defendant that there was no such assent and that, as a matter of fact, the defendant's possession commenced from that date in the character of managing Khot. We are asked to infer from that that the defendant's tenancy which existed in respect of the plaintiff's share in the khoti merged in or was extinguished by the defendant's possession as the managing Khot. We cannot, however, draw any such inference, having regard to certain admitted facts. Those facts are that though the kabuláyat had expired on the 30th June, 1895, the plaintiff sued the defendant in 1897 for rent under it for the years 1892-93 to 1896-97 and a decree was passed against the defendant. That was an adjudication that the defendant continued in possession after the date of the expiry of the kabuláyat as a tenant from year to year and was liable to payment. Having that decree against him, which stands unreversed, the defendant cannot in the present suit fall back on the 30th June, 1895, or any period covered by the decree and say that he is not the plaintiff's tenant, unless he shows that he determined the tenancy, after the decree, "by some intimation conveyed to the lessor and put him in the way, if he desired it, of acting on that intimation by a re-entry on the premises" (*per* West, J., in *Venkatesh Narayen Pai* v. *Krishnaji Arjun*[1]). Mr. Bodas has argued that the defendant's written statement in the suit of 1897 was such intimation, but it cannot be treated as such, because that would be going behind the decree in that suit. In *Balaji Sitaram* v. *Bhikaji Soyare*[2] a similar objection was overruled by Westropp, C.J., who held that the mere denial in a previous suit cannot operate as such notice.

The defendant, then, would be liable to pay rent to the plaintiff unless he proves that after the decree in the suit of 1897 he gave such notice to the plaintiff as would in fact terminate the tenancy and unless he put the plaintiff in the way, if he

(1) (1875) 8 Bom. 160. (2) (1881) 8 Bom. 164.

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desired it, of acting on that notice by receiving from the defendant as managing Khot what the plaintiff would be entitled to receive if the tenancy by sufferance had continued.

Neither of the Courts below has approached the case from this point of view. The lower Appellate Court has rejected the plaintiff's claim on the ground that the tenancy ceased on the expiry of the kabuláyat. That, for the reasons above set forth, is erroneous. We must, therefore, reverse the decree and remand the case for disposal with reference to the above remarks. Costs to abide the result.

Decree reversed. Case remanded.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

1902. *December* 16.

BYRAMJI JAMSETJI (ORIGINAL DEFENDANT), APPELLANT, *v.* CHUNILAL LALCHAND AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Lis pendens—Court-sale—Auction-purchaser—Applicability of the rule of lis pendens to a purchaser at an execution sale.

The rule of *lis pendens* applies to purchasers at execution sales.

SECOND appeal from the decision of E. M. Pratt, District Judge of Ahmednagar, confirming the decree passed by Ráo Sáheb Kashidas Narayendas Dalal, Joint Subordinate Judge of Ahmednagar.

Suit by a purchaser at a Court-sale for possession of the property purchased.

The property in question originally belonged to one Sitabai. She mortgaged it to the plaintiffs on the 22nd April, 1891.

In 1897 the plaintiffs sued Sitabai on the mortgage (Suit No. 612 of 1897) and on the 31st May, 1898, obtained a decree for sale. In execution of this decree the property was sold; and the plaintiffs (the mortgagees) purchased it with the leave of the Court.

Meantime, however; and while the above suit was pending, a creditor obtained a money decree against Sitabai and in

* Second Appeal No. 400 of 1902.