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raised in either of the Courts below, and therefore I should dispose of Mr. Palekar's contention on that ground, *viz.*, that there is no evidence before the Court which could induce it to hold that the widow's possession was adverse.

Appeal dismissed.

G. B. R.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

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October 13.

SITARAM BHIMAJI DESHPANDE AND ANOTHER (ORIGINAL DEFENDANTS 3 AND 4), APPELLANTS, *v.* SADHU BIN AWAJI PARIT AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Suit based on title to recover possession—Presumption of right arising from possession applies as much to defendant as to plaintiff—Plaintiff to prove such possession as will give him better title—Suit in ejectment—Proof of such title as carries a present right to possession—Determination of annual tenancy—Notice to quit—Relinquishment of tenancy gives no right to present possession—Jus tertii.

In a suit based on title to recover possession, the presumption of right arising from possession applies as much to a defendant as to a plaintiff and the fact of possession within twelve years of suit will not avail the plaintiff unless it is shown to be such a possession as gives a better title to the land than the defendant can show.

To succeed in ejectment it is only necessary for the plaintiff to establish such title as carries a present right to possession.

Ordinarily, unless there is an express agreement for the expiry of a tenancy on a certain day, a tenancy from year to year is only determined by a notice to quit.

It is a reasonable inference that if the plaintiff had not asserted his right as yearly tenant for eight years, he must be taken to have abandoned the tenancy or to have relinquished such other occupancy right as he might have, and if so, he would have no right to present possession such as would entitle him to maintain a suit for ejectment.

The defendant in ejectment might set up and prove *jus tertii*.

* Second Appeal No. 811 of 1912.

The defendant is entitled to rely on the *jus tertii* appearing from the facts adduced by the plaintiff to defeat his claim.

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SECOND appeal against the decision of W. T. W. Baker, Acting District Judge of Satara, confirming the decree of R. B. Gogte, Subordinate Judge of Patan.

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The plaintiffs sued to recover possession of the land in dispute together with Rs. 149 on account of the mesne profits of the past three years. The plaint alleged that one Raghunath Ramchandra, father-in-law of defendant 1 and father of defendant 2, wrongfully deprived the plaintiffs of their possession in April 1899 and had been unlawfully enjoying the produce of the land and that defendants 3—7 were made parties because they had recently come into possession under defendants 1 and 2. The suit was filed in the year 1908.

Defendant 1 did not appear.

Defendant 2 put in no written statement.

Defendants 3 and 4 contended that the land originally belonged to Raghunath Ramchandra, that they purchased it along with other property from Raghunath's heir and daughter, defendant 2, under a registered deed in November 1907, that they had been cultivating the land through their tenants, defendants 5—7, that the plaintiffs cultivated the land for some years as tenants of Raghunath, that as the plaintiffs could not pay rent they gave up the land and so Raghunath and one Pandoba Salukha cultivated it, that plaintiffs had no right whatever to the land and that the land was not capable of yielding so much income as claimed by the plaintiffs.

Defendants 5—7 answered that they were tenants of defendant 3 to whom they gave half produce and that they had no knowledge of plaintiffs' rights.

The Subordinate Judge found that the plaintiffs were in possession of the land through the Swami of Chaphal

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before the same went into the possession of the defendants after the year 1899, that the plaintiffs had not voluntarily given up possession of the land as contended by the defendants, that the defendants were not entitled to retain possession as against the plaintiffs and that the plaintiffs were entitled to recover Rs. 149 for mesne profits from defendants 2—4. He, therefore, passed a decree awarding the claim.

On appeal by the defendants the Assistant Judge found that a tenant (plaintiffs) who could not prove a right of permanent occupancy, could not recover possession after eight years on the strength of his previous possession and that the plaintiffs were not entitled to recover possession. The Assistant Judge, therefore, allowed the appeal.

The plaintiffs having preferred a second appeal, No. 913 of 1910, it was heard by Russell and Chandavarkar, JJ., who delivered the following interlocutory judgment and remanded the case for disposal according to law on the merits on the 28th November 1911.

PER CURIAM :—We cannot accept the findings of the Assistant Judge because he has not paid due regard to the pleadings, and his own findings are not in accordance with law and vague. He finds that the plaintiff was in possession till about eleven years ago as a tenant from year to year. He finds that the defendants have come into possession since then. There is no doubt that he has also held upon his view of the facts that the dispossession of the plaintiff by the defendants was not forcible, and to use a new word invented by the Judge 'wrongous'.

Now if the dispossession was not forcible, and if the plaintiff was ousted by the defendants in a lawful manner, because the defendants had a right to the possession, then we should have expected to find that the defendant had some title, and the Judge's finding

about the defendants not having dispossessed wrongfully to be based upon *some* title found by him in favour of the defendants. But at the same time the Assistant Judge says that it is unnecessary for the defendants to prove their title, and that because, in his opinion, the plaintiffs must first prove that the defendants' possession is wrongful; and he holds that the plaintiffs have not done this.

Now, where the plaintiff has been held to have been in possession till about eleven years ago as a tenant from year to year; where again it is found that the defendant has come into possession since then, by dispossessing him, the inevitable inference in law from these proved facts must be that the defendant has wrongfully dispossessed the plaintiff, unless the defendant is able to show that he has a better title to hold the land. This is in accordance with the rule of law which says that of two persons one of whom has been dispossessed by the other, the person dispossessed is entitled to be restored to possession, because if the dispossessor has proved no title and no right to possession, peaceable possession is some proof of title, where the question of title and the question of possession is doubtful. To this rule of law the learned Assistant Judge has paid no due regard. And further we should say that his mode of dealing with a case like this, which was disposed of on the merits fully by the Subordinate Judge, is a most unsatisfactory way of dealing with litigation. Here are parties who come into Court with disputes and ask the Court to decide between their conflicting titles. In effect Mr. Ferrers' language is that: I do not know if the plaintiffs have any title, but they were in possession till about 11 years ago when they were dispossessed by the defendants. I do not care what the defendants' title is, but all I can say is that the defendants have dispossessed, but the dispossession is not forcible, and

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defendants are in peaceful possession, and, therefore, defendants must be retained in possession. In other words, both parties are told, it does not matter what their titles are, plaintiffs must fail.

Therefore, the decision appealed from must be reversed and the lower appellate Court must be directed to rehear this appeal, after raising proper issues, and dispose of it according to law on the merits.

Costs costs in the appeal.

On the remand the Acting District Judge framed the following issues :—

- (1) Who has got the occupancy rights to the land ?
- (2) Has defendant a better title ?
- (3) What is the nature of plaintiffs' possession ?
- (4) Whether defendants have wrongfully dispossessed plaintiffs ?

Having framed the said issues the Acting District Judge found that "the defendants do not show a better title and therefore the plaintiffs are entitled to be restored to possession. The dispossession appears to be wrongful. This disposes of issues 2 and 4." With respect to issues 1 and 3 the Judge remarked :—

As regards the 1 and 3 issues the learned counsel for respondents says that plaintiffs do not prove their title and it is not necessary.

As their Kaul is not proved, there would be some difficulty in doing so. They may be taken to be tenants of the Svami of Chaphal, still they are entitled to possession as against defendants.

The decree of the first Court was therefore confirmed and the appeal was dismissed.

Defendants 3 and 4 preferred a second appeal.

Strangman (Advocate-General) with *S. R. Bakhle* for the appellants (defendants 3 and 4).

Binning with *K. H. Kelkar* for the respondents (plaintiffs).

SCOTT, C. J. :—The plaintiffs brought this suit in 1908 to recover possession of land alleging that in 1899 they had been wrongfully deprived of their possession by Raghunath Ramchandra who and the defendants, who derive title under him, have been in wrongful possession ever since. The defendants pleaded that Raghunath was the owner and that the plaintiffs had been his tenants until they relinquished the property as they could not pay the rent.

The learned Subordinate Judge raised four issues : 1st, whether before 1899 the plaintiffs held the property under the Swami of Chaphal or under Raghunath Ramchandra ; 2nd, whether the plaintiffs gave up possession voluntarily ; 3rd, whether the defendants were entitled to retain possession against the plaintiffs ; and 4th as to the mesne profits recoverable by the plaintiffs. His findings were that the plaintiffs held under the Swami of Chaphal and not under Raghunath ; that the plaintiffs did not give up the possession voluntarily and that the defendants were not entitled to retain possession against the plaintiffs.

The Assistant Judge, Mr. Ferrers, in appeal reversed the decision of the Subordinate Judge holding that a tenant who could not prove a right of permanent occupancy, which was the plaintiffs' position, could not after eight years recover on the strength of his previous possession. He held that as the plaintiffs had failed to prove title as *mirasi* tenants they must be presumed to have been tenants from year to year, and that their title being to an annual tenancy had long since expired, for they had withdrawn from the land for eight years. He accordingly allowed the appeal.

His decree was set aside by the High Court and the case remanded for trial to the appellate Court on the ground that if the plaintiffs had been in possession as tenants from year to year and the defendants thereafter

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came into possession by dispossessing them, the defendants could only retain possession by showing a better title and that the defendants' evidence as to title must be investigated.

The appeal was reheard on remand by the District Judge, Mr. Baker, who raised four issues as follows:—

1. Who has got the occupancy rights to the land?
2. Have defendants a better title?
3. What is the nature of plaintiffs' possession?
4. Whether the defendants have wrongfully dispossessed plaintiffs?

He held, quoting from the remand judgment, that the dispossession by the defendants appeared to be wrongful as they had not shown a better title than the plaintiffs saying that that disposed of issues 2 and 4 and that "as regards issues 1 and 3" the learned counsel for respondents says "plaintiffs do not prove their title and it is not necessary. As their Kaul is not proved there would be some difficulty in doing so. They may be taken to be tenants of the Swami of Chaphal, still they are entitled to possession as against defendants." He therefore dismissed the appeal with costs.

The case now comes up for the second time in second appeal.

This is a suit based upon title. It is not a possessory suit brought within six months of a wrongful dispossession but a suit against defendants who had been in possession for eight years. The presumption of right arising from possession applies as much to a defendant as to a plaintiff (see *Jowala Buksh v. Dharum Singh*⁽¹⁾), and the fact of possession within twelve years of suit will not avail the plaintiff unless it is shown to be such a possession as gives a better title to the land than the defendants can show. See *Dharani Kanta v. Gabar Ali*⁽²⁾. To succeed in ejectment it is only necessary for

(1) (1866) 10 Moo. I. A. 511 at p. 528. (2) (1912) 15 Bom. L. R. 445 at p. 451.

the plaintiff to establish such title as carries a present right to possession. The Assistant Judge, Mr. Ferrers, having found the plaintiffs on failure to prove their title as permanent tenants to be only tenants from year to year, thought that so far as their previous possession was equivalent to title it was a title which was annual only and which for want of renewal had long ceased to be, but he failed to recollect that ordinarily unless there is an express agreement for the expiry of a tenancy on a certain day a tenancy from year to year is only determined by a notice to quit. He found, it is true, that the plaintiffs had withdrawn from the land but that finding for some reason, which does not appear on the remand judgment, was not accepted by the High Court. The District Judge, Mr. Baker, said that the alleged relinquishment of the land by the plaintiffs was to be received with great suspicion but only held that there had been a wrongful dispossession as a legal inference arising from the pronouncement in the remand judgment. It seems to us that upon the admitted facts it would be a reasonable inference that as the plaintiffs had not asserted their right as yearly tenants for eight years they must be taken to have abandoned the tenancy or to have relinquished such other occupancy rights as they might have and if so they would have no present right to possession such as would entitle them to maintain a suit for ejectment. The only cases cited to us as establishing the plaintiffs' right as yearly tenants to maintain ejectment were *Doe dem. Hughes v. Dyeball*⁽¹⁾ and *Krishnarav Yashvant v. Vasudev Apaji Ghotikar*⁽²⁾ in which there was no delay by the tenant in suing the trespasser and therefore no possibility of such an inference as seems to arise in the present case.

Counsel for the appellants contends that on the facts found by the District Judge the plaintiffs have no title.

⁽¹⁾ (1829) 1 Moody & Malk. 346.

⁽²⁾ (1884) 8 Bom. 371.

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It is not disputed that the Inámdár of the land was the Swami of Chaphal and the plaintiffs attempted to prove a permanent lease by the Swami in their favour. The proof failed as the lease was held to be a forgery. The payments made by the plaintiffs for the land while their possession continued are held to have been made either to Ramchandra, the Khátedár, or to the village officers as assessment and not as rent. These facts, it is contended, show no tenancy by the plaintiffs and prove that the title is and was actually in the Swami. The defendants are entitled to rely on the *jus tertii* appearing from the facts adduced by the plaintiff to defeat his claim, see *Doe dem. Carter v. Barnard*⁽¹⁾. Defendants' counsel also relies upon *Nagle v. Shea*⁽²⁾ in which it was held that the defendant in ejectment might set up and prove *jus tertii*. Sir Frederick Pollock, in *Pollock and Wright on Possession*, p. 97, thinks this case conflicts with *Davison v. Gent*⁽³⁾. The passage in Bramwell B's judgment in that case is not clear owing to the equivocal use of the pronoun "he" but here at all events the plaintiffs' own case discloses the *jus tertii* and brings the case within *Doe dem. Carter v. Barnard*⁽¹⁾. In this connection we may observe that *Jeffries v. Great Western Railway Company*⁽⁴⁾, relied upon by the Court in *Ali v. Pachubibi*⁽⁵⁾ to show that a *jus tertii* cannot be set up in a suit for possession, was an action in trover for chattels.

In our opinion the plaintiffs have failed to prove title, that is, a present right to possession of the land in suit.

There are, moreover, facts found which show that Raghunath Ramchandra was the plaintiffs' 'superior holder' as that term is defined by the Land Revenue Code, and in that capacity Raghunath Ramchandra got decrees in assistance suits against the plaintiffs in 1899

(1) (1849) 13 Q. B. 945.

(3) (1857) 26 L. J. Ex. 122.

(2) (1874) 8 Ir. R. C. L. 224.

(4) (1856) 5 E. & B. 802.

(5) (1903) 5 Bom L. R. 264.

and 1900 under section 86 of that Code. It is no answer to say, as does the District Judge, that the decisions were *ex parte* and the plaintiffs did not appear. These proceedings together with the fact that Raghunath Ramchandra and since him the defendants have been the Khátedárs of the lands in suit are evidence of a title in the defendants which must prevail against the failure of the plaintiffs to prove any title.

We reverse the decree and dismiss the suit with costs throughout:

Decree reversed and suit dismissed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

HARIBHAI HANSJI (ORIGINAL PLAINTIFF), APPELLANT, v. NATHUBHAI RATNAJI AND ANOTHER (ORIGINAL DEFENDANTS NOS. 1 AND 2), RESPONDENTS.^o

1913.

October 14.

Indian Contract Act (IX of 1872), section 65—Agreement discovered to be void—Compensation, payment of—Bhagdari Act (Bombay Act V of 1862)—Alienation of unrecognised sub-division of a bhag—Valatdana patta.

In 1902, the plaintiff executed a *valatdana patta* of lands forming an unrecognised sub-division of a *bhag*, in favour of defendants who were put in possession. The deed contained a personal covenant whereby the plaintiff bound himself to give compensation to the defendants in case their possession was obstructed. In 1910, the plaintiff sued to recover possession of the property by redeeming the *valatdana patta* which he alleged was a mortgage. The lower Courts held that the alienation was void under the provisions of the Bhagdari Act (Bombay Act V of 1862); and following the decision of *Jijibhai v. Nagji*⁽¹⁾ ordered that the plaintiff could recover possession on payment of moneys he had received from the defendants. The plaintiff having appealed:—

Held, that the order of compensation against the plaintiff was justified, inasmuch as the agreement was discovered to be void within the meaning of section 65 of the Indian Contract Act (IX of 1872) long after the transaction, and as there was a personal covenant in the agreement.

^oSecond Appeals Nos. 42 and 43 of 1913.

⁽¹⁾ (1909) 11 Bom. L. R. 693.