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finding. Though the postscript found in B relating to the right of managing Nallacheruvu choultry and its endowment is not to be found in exhibit A, yet it may be that Srinivasa Rau changed his mind about it when he executed exhibit A in supersession of B. I must hold that, when two documents are executed by one and the same person and they create the same interest in the same property standing to each other in the relation of an operative and a superseded document, the value of the suit for the purposes of jurisdiction is the value of the interest intended to be created by the operative instrument. The only contention which remains to be noticed is that, in determining the value of the subject-matter when it is land, house or garden, the market value should be considered instead of the value prescribed by section 7, clause 5 of the Court Fees Act. I do not think that the value of a suit to have a document registered and thereby give it legal efficacy can be higher for purposes of jurisdiction than that of a suit to recover the property itself.

I am of opinion that this second appeal cannot be supported, and I would dismiss it with costs.

SHEPHARD, J.—I concur.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

1889.
July 10,
August 20.

APPA RAU (PLAINTIFF), APPELLANT,

v.

SUBBANNA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Transfer of Property Act—Act IV of 1882, ss. 106, 108—Landlord and tenant—Assignability of tenancy—Suit by zamindar to set aside a court-sale of his raiyat's interest—Burden of proof.

A zamindari raiyat mortgaged the land comprised in his holding, and the mortgagee, having sued and obtained a decree on his mortgage, attached the mortgagor's interest in the land and purchased it at the court-sale held in execution of his decree. The zamindar, who had intervened unsuccessfully in execution, now sued to set aside the sale and to eject the decree-holder and the judgment-debtor from the land. Neither party adduced evidence:

* Second Appeal No. 1086 of 1888.

Held, that as the burden of proof lay on the plaintiff, and had not been discharged, the suit must be dismissed.

SECOND APPEAL against the decree of G. T. Mackenzie, Acting District Judge of Kistna, in appeal suit No. 80 of 1886, affirming the decree of E. Subharayudu, District Munsif of Bezvada, in original suit No. 173 of 1885.

Suit by a zamindar to set aside the sale of the interest of defendant No. 2 in certain land held by him of the plaintiff, in execution of a decree obtained by defendant No. 1 against defendant No. 2, and to restrain the defendants from obstructing the plaintiff from taking possession of the land.

No evidence was adduced. The District Munsif and, on appeal, the District Judge held that the burden of proof lay on the plaintiff and decreed for the defendants.

The plaintiff preferred this second appeal.

Bhashyam Ayyangar for appellant.

Narayana Rau for respondents.

The further facts of the case and the arguments adduced on this second appeal appear sufficiently for the purpose of this report from the following judgment:—

MUTTUSAMI AYYAR, J.—The appellant is the owner of a portion of the Nuzvid estate in the district of Kistna. Respondent No. 2, a raiyat in the zamindari, mortgaged the land under his cultivation to respondent No. 1, who obtained a decree upon the mortgage and purchased the mortgagor's interest in the land at the court-sale held in execution. When the land was attached prior to the sale, the appellant objected that the tenant had no saleable interest, but his objection was disallowed on the ground that what was intended to be sold was such interest, if any, as the tenant had. The appellant then brought this suit to eject the respondents, alleging that respondent No. 2 had no saleable interest, but they contended that they had a permanent occupancy right. Neither party went into evidence. On appeal the Judge held that the appellant having failed to show how the tenancy was determined, the sale of such interest as the tenant actually had did not entitle him to eject the respondents. It is argued in second appeal that it lies on the tenant to prove that he had a saleable interest either from contract or usage as mentioned in s. 38 of Act VIII of 1865, and that in the absence of proof of such interest, the court-sale gave the appellant a right to re-enter.

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I am unable to accede to this contention. In the absence of a covenant not to assign, a tenancy is presumably a saleable interest, and it lies on the plaintiff in ejectment to show what was the nature of the tenancy, how it ceased by virtue of the court-sale, and how his right to present possession accrued. It is no doubt for the tenant to prove a permanent occupancy right when the plaintiff makes out a *primâ facie* case for his eviction, but it does not follow from his failure to prove such right that such other interest as he really had was not saleable. As to s. 38 of Act VIII of 1865, on which reliance is placed for the appellant, it only specifies the sources from which a saleable interest is derived, but it was not intended to deal with presumptions on which the onus of proof rests in suits for ejectment. According to ss. 106 and 108 of the Transfer of Property Act, which only declare the law as previously administered in this presidency, the presumption as to the duration of an agricultural tenancy is that it is a tenancy from year to year, and that it is an assignable interest in the absence of an agreement or local usage to the contrary.

In *Venkataramanier* v. *Ananda Chetty*(1), decided by this Court in 1869, it was held that the tenancy of an ordinary pattadar (raiyat) in a mitta was assignable. This Court then observed: "We apprehend the established general rule of law in this presidency to be that such a tenancy, when properly created, entitles the tenant to the right of occupancy for the purpose of cultivation until default in the payment of the stipulated rent at the time it becomes due, and that it may be determined upon such default under s. 41 of Madras Act VIII of 1865, or at any time by the landlord's acceptance of a surrender by the tenant which is required to be in writing by section 12 of the same Act." This shows that even in cases in which a permanent right of occupancy may not be shown to exist, there may be a right to continue in possession so long as rent is punctually paid.

In *Chockalinga Pillai* v. *Vythealinga Pundara Sunnady*(2), the landlord sued to eject the tenant under a muchalka. The Court then held that neither the Rent Recovery Act nor the Regulations operated to extend a tenancy beyond the period of its duration secured by the express or implied terms of the contract creating

(1) 5 M.H.C.R., 120. (2) 6 M.H.C.R., 164.

it. Holloway, J., observed there was nothing in any existing written law to render a tenancy once created only modifiable by a revision of rent, but not terminable at the will of the lessor exercised in accordance with his obligations. It was also observed that the decision in *Venkataramanier* v. *Ananda Chetty*(1) went too far in laying down the rule as to a pattadar's right of occupation in the broad terms that it did. This decision is an authority for the position that when there is a contract, express or implied, the duration of the tenancy and the right to evict the tenant are governed by it and that to that extent the rule laid down in *Venkataramanier* v. *Ananda Chetty*(1) is inapplicable. Again, in *Krishnasami* v. *Varadaraja*(2), which was a Full Bench decision, this Court observed that the case of *Chockalinga Pillai* v. *Vythealinga Pundara Sunnady*(3) did not derogate from any customary right. The Court discusses the nature of custom on the subject and observes that "where there is so much evidence to show that by the custom of the country and of the district in which the lands are situated permanent cultivators are entitled to permanent occupancy, we do not see how this privilege can be refused to the defendants whose ancestors have cultivated the lands they now cultivate for at least 70 years. This case shows that the general custom of the country and of the district in which the land in suit is situated may materially add to the value of the tenants' length of enjoyment or of other circumstances as *primâ facie* evidence of a right of permanent occupancy. In *Venkan* v. *Kesavalu*(4), in which the plaintiffs failed to prove the letting alleged, and the defendants who admitted that the land belonged to the plaintiffs failed also to establish the occupancy right set up by them, this Court held that the plaintiffs were not entitled to a decree in ejectment. This negatives the view that there is a presumption in favor of a tenancy at will. According to the course of decisions, therefore, in this presidency, the landlord may determine the tenancy if there is a contract, express or implied, by exercising his will in accordance with his obligations; that there is no presumption in favor of a tenancy at will; that an occupancy right may exist by custom; that a pattadar or raiyat in a mitta is entitled to continue in possession so long as he regularly pays rent and has a saleable interest, and that by reason of special

(1) 5 M.H.C.R., 120.
(2) I.L.R., 5 Mad., 345.
(3) 6 M.H.C.R., 164.
(4) S.A. 1078 of 1887 unreported.

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circumstances in evidence the onus of proof may be shifted, even in regard to a permanent occupancy right, from the tenant to the landlord.

The appellant's pleader draws our attention to the case of *Kripamoyi Dabia* v. *Durga Govind Sirkar*(1), and to the decisions cited in it. In that case the land formed part of a *patni* belonging to the plaintiffs and the Court held that the onus lay upon the tenant to show that his holding under the plaintiffs was of a transferable character. The holding was on a *patni* tenure, and it may well be that, as a customary incident of that tenure, the landlord may be entitled to *khas* possession unless the tenant made out the special right set up by him. But in *Doya Chand Shaha* v. *Anund Chunder Sen Mozumdar*(2), another Divisional Bench of the Calcutta High Court held that there was no presumption that any tenure on which land was held was not transferable. In the Privy Council case of *Perhlad Sein* v. *Doorgapershad Tewarree*(3), which was relied on in *Kripamoyi Dabia* v. *Durga Govind Sirkar*(1), the defendant set up an intermediate tenure, a mokurrari tenure, which derogated from the *primâ facie* right of the zamindar (plaintiff) to the gross collections from the mauzas within his zamindari. Adverting to this *primâ facie* right of the zamindar, their Lordships of the Privy Council held that the onus lay on the defendant of proving the intermediate tenure. In *Sumbhoolall Girdhurlall* v. *Collector of Surat*(4), the question was whether the right to levy a *huk* called "*tara garas*" was alienable. The Privy Council observe, apart from any evidence in that case, that the onus lay upon the Government to prove that there was something in the nature of the payment which made it incapable of alienation.

It seems to me that the foregoing cases show that unless the landlord has a *primâ facie* right to evict the tenant, he must start his case and show how such right accrued. It may be that the tenant is bound to prove a permanent occupancy right by custom or contract and fails to do so. I do not see, however, how this failure gives the landlord a right to evict the tenant from the land, and shows that the tenant has no other interest in the land which, though not a permanent occupancy right, may be alienable. Such a right of eviction could only arise either because there is a

(1) I.L.R., 15 Cal., 89.
(2) I.L.R., 14 Cal., 382.
(3) 12 M.I.A., 322.
(4) 8 M.I.A., 39.

presumption that every zamindari raiyat is a tenant at will, unless and until he shows the contrary, or because the liability to eviction must, unless the special case set up by the tenant is proved, be taken to be admitted upon the pleadings or by the mode in which the parties conducted their case. It would be monstrous to hold that every tenant in a zamindari is presumably a tenant at will. Such a presumption is at variance with section 106 of the Transfer of Property Act and with the course of decisions in this presidency. Nor is there a presumption that a tenancy is not a saleable interest. Such presumption is contrary to section 108 and to the previous course of decisions. In the case before us there was no admission that defendant No. 2 was a tenant at will or that he had no saleable interest. I am therefore of opinion that the plaintiff is not entitled to a decree until he starts his case and shows by evidence how the tenancy of defendant No. 2 ceased by the court-sale. The decision of the Judge is right, and I would dismiss this second appeal with costs.

WILKINSON, J.—I think the Lower Courts were right in holding that the burden of proof lay upon the plaintiff. He seeks to set aside a sale of his tenants' right and to obtain possession of the land. It is evident that if neither side gave any evidence, plaintiff could not recover, for, admittedly defendant No. 2 was at the time of the sale a tenant of the plaintiff, and it has not been shown that the tenancy has terminated or that by law or custom a tenant is prohibited from assigning his tenant right. In execution of the decree obtained by defendant No. 1, the second defendant's rights in the land were sold and purchased by defendant No. 1. He then stepped into the shoes of defendant No. 2 as a tenant of plaintiff, and, before ejecting him, plaintiff must show that he has put an end to the tenancy. This he has failed to do, and the Lower Courts have rightly dismissed his suit. This second appeal fails and is dismissed with costs.