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determine." And no such conditions being proved, their Lordships said :—"Hence the grant may be said to have been made *pro servitiis impensis et impendendis*—partly as a reward for past, partly as an inducement for future services." Whether the grant in this case was of this nature or of the other, it was a rent-free grant all the same; and in calling it "rent-free" I am only using the expression as employed by the Lords of the Privy Council in the case just referred to. And this being so, the incidents of the tenure as to resumption or assessment of rent would be governed by s. 30 of the Rent Act and ss. 79-84 of the Revenue Act, being matters which lie beyond the jurisdiction of the Civil Court. Whether the defendant Nasiba had, under those provisions, acquired a proprietary title under cl. (*d*) of s. 30 of the Rent Act, or under s. 82 of the Revenue Act, is a question which, for want of jurisdiction of the Civil Court, I am not called upon to determine in this case. For it is admitted that such rights as Nasiba had have been sold by him to Waris Ali, appellant, under the sale-deed of the 26th May, 1883, and the latter therefore stands in the shoes of the former, for purposes either of resumption or of assessment of rent. Nor do I, under this view, feel myself called upon to decide the question of *res judicata*, or to enter into the merits of the case, and the only ground upon which I base my judgment is the want of jurisdiction of the Civil Court. For these reasons, I regret I am unable to concur with my learned brother Oldfield in the conclusions at which he has arrived, and I would decree this appeal, and, setting aside the decrees of both the lower Courts, dismiss the suit with costs in all the Courts.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Tyrrell.

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GAYA (DEFENDANT) v. RAMJIAWAN RAM (PLAINTIFF).*

Lease—Istimrari patta—Hereditary title—Construction of patta.

In an instrument described as a perpetual lease (*patta istimrari*) the lessor covenanted as follows :—"So long as the rent is paid, I shall have no power to resume the land. The lessees shall have no power to sell the land in any way. I have therefore executed these few words by way of a perpetual lease, that it

* Second Appeal No. 1215 of 1885, from a decree of Pandit Kashi Nath, Additional Subordinate Judge of Gházipur, dated the 22nd May, 1885, reversing a decree of Maulvi Syed Muhammad Ashgar Ali, Munsif of Saidpur, dated the 17th January, 1885.

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may be used when needed." Upon the death of one of the lessees, his heir, who was in possession of the land which formed the subject of the lease, claimed to be the lessee of a moiety thereof on the ground that the lease was one creating a heritable interest. The claim was allowed by the settlement officer, and the lessor thereupon brought a suit to have it declared that he was entitled to eject the defendant, under s. 36 of the N.-W. P. Rent Act (XII. of 1881), as being a tenant-at-will, and to set aside the settlement officer's order.

Held that the mere use of the word *istimrari* in the instrument did not *ex vi termini* make that instrument such as to create an estate of inheritance in the lessee; that the words "so long as the rent is paid I shall have no power to resume the land" did not show any meaning or intention that the lease was to be in perpetuity; and that the defendant (even should he be the legal heir and representative of one of the lessees) could not resist the plaintiff's claim. *Tulshi Pershad Singh* v. *Ramnarain Singh* (1) followed. *Lakhu Kowar* v. *Harikrishna Singh* (2) dissented from.

THE plaintiff in this case, on the 24th July, 1873, gave two persons called Jag Lal and Har Prasad a lease of certain land, the terms of which were as follows :—

"I, Ramjiawan, * * * * do hereby declare as follows :—I have given a perpetual lease (*patta istimrari*) of 24 bighas of land, bearing numbers as given below, situated in mauza Raghunathpur, otherwise called Bilauripur, pargana Shadiabad, on a rent of Rs. 48 a year, at the rate of Rs. 2 per bigha, besides the acreage and the patwári's fee, to Jag Lal, *Jati*, and Har Prasad, *Jati*, residents of Raghunathpur, in equal shares, and do hereby stipulate and covenant in writing that they may get into possession and cultivate the land from 1281 fasli, and pay me its rent every year, and at due instalments, and obtain receipts bearing my signature. They should never make a default. In case of the rent falling in arrears, I shall have the power to oust them without the assistance of the Court. They shall not make an objection on the score of weather contingencies, or of any act of the Sovereign, and pay the rent without any objection. So long as the rent is paid, I shall have no power to resume the land. The lessees shall have no power to sell the lands in any way. I have, therefore, executed these few words by way of a perpetual lease, that it may be used when needed."

The lessees being dead, the defendant, who was in possession of the land, claimed, as heir to Har Prasad, to be the lessee of a

(1) I. L. R., 12 Calc. 117. (2) 3 B. L. R. 226.

moiety of the land under the lease, asserting that the lease was one creating a heritable interest. This claim was allowed by the settlement officer, and the plaintiff accordingly brought this suit to have it declared that he was entitled to issue a notice of ejectment to the defendant, under the provisions of s. 36 of the N.-W. P. Rent Act (XII. of 1881), as being a tenant-at-will, and to set aside the settlement officer's order.

The Court of first instance dismissed the suit for reasons which it is not necessary to mention. On appeal by the plaintiff the lower appellate Court held, on the construction of the lease, that it did not create a heritable interest, but a life interest only, and decreed the claim. The defendant appealed to the High Court.

Mr. *Amir-ud-din* and Lala *Lalta Prasad*, for the appellant.

Mr. *Howell* and Munshi *Sukh Ram*, for the respondent.

STRAIGHT, Offg. C. J.— I think this appeal fails. The Subordinate Judge, having regard to the language of the lease of the 24th July, 1873, was of opinion that its proper interpretation was that it was not, as alleged by the defendant-appellant, a lease in perpetuity, or one that created any heritable interest. Now no doubt the word "*istimrari*" is used in several places in this document, and it was contended by the learned counsel for the appellant that the use of this word was sufficient of itself to show that what the parties intended was, that the lease should continue binding, not only so long as the fixed rent was paid, and that the interest granted by the plaintiff was not a mere life but a heritable interest. He supported this contention by referring us to the case of *Lakhu Kowar* v. *Harikrishna Singh* (1), and no doubt if that authority is correct in law, it favours his view. But our attention has been called by the learned pleader for the plaintiff-respondent to a ruling of their Lordships of the Privy Council in the case of *Tulshi Pershad Singh* v. *Ramnarain Singh* (2), which appears to be directly apposite to the present case. Their Lordships here remark that "the words *istimrari* and *muqarrari* in a patta do not, *per se*, convey an estate of inheritance, but they do not accept the decisions as establishing that such an estate cannot be created without the addition of the other words that are mentioned ("*bafazandan*"

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or "*naslan bad naslan*"), as the Judges do not seem to have had in their minds that the other terms of the instrument, the circumstances under which it was made, or the subsequent conduct of the parties might show the intention with sufficient certainty to enable the Courts to pronounce that the grant was perpetual." Now as I understand these observations of their Lordships, the mere use of the word *istimrari* in the instrument with which we are dealing, does not *ex vi termini* make that instrument such as to create an estate of inheritance in the lessee. Their Lordships, as I understand them, also say that the words "from generation to generation," "*naslan bad naslan*," must not necessarily be inserted in an instrument of lease in order to constitute a grant in perpetuity, and that the word *istimrari*, accompanied by other words and illustrated by the subsequent conduct of the parties, and in acting upon the instrument, may show that an estate of inheritance was intended. The learned counsel urges that the words used in the lease before us, namely, "so long as the rent is paid I shall have no power to resume the land," are sufficient to show that the lease was one in perpetuity; but I confess that those words do not convey to my mind any such meaning or intention. Had the lease been clearly expressed as one for the life of the lessee, or for the joint lives of two lessees, or have been a lease for five or ten years, those words might equally as well have been used.

I cannot, therefore, hold that the construction put upon the lease by the lower appellate Court is erroneous. Its decision that the defendant-appellant (even should he be, as he claims to be, the legal heir and representative of one of the lessees) is not a person who can resist the plaintiff's claim, is correct, and its finding appears to me to be quite in accord with the terms of the document and the facts of the case as evidencing the intention of the parties. The appeal therefore fails, and must be dismissed with costs.

TYRRELL, J.—I am entirely of the same opinion.

Appeal dismissed.