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FORSHAW v. FORSHAW.

attended to. We confirm the decree for the dissolution of the marriage of the petitioner with the respondent Eunice Geraldine Forshaw.

Decree made absolute.

1909. *May* 25.

APPELLATE CIVIL.

Before Mr. Justice Banerji and Mr. Justice Tudball.

PUSA MAL (PLAINTIFF) *v.* MAKDUM BAKHSH AND OTHERS (DEFENDANTS).*

Act No. XV of 1877 *(Indian Limitation Act), Schedule II, Article* 139—*Landlord and tenant—Adverse possession—Lease for a term of years—Tenant holding over after expiration of term—Tenant by sufferance.*

Where a tenant holds over after the expiry of the lease, *held* that time begins to run against the landlord on the expiry of the term of the lease under article 139, Schedule II, Limitation Act, *Adimulam* v. *Pir Revuthan* (1) dissented from, *Kantheppa* v. *Sheshappa* (2), *Chandri* v. *Daji Bhaw* (3), *Madan Mohan Goshain* v. *Kumar Rameshar Malia* (4) *and Khunni Lal* v. *Madan Mohan* (5) followed.

THE facts of this case are as follows :—

On April 17th, 1887, one Jhargar executed a *kirayanama* for one year in favour of Bhopal Das, in respect of a house. On February 18th, 1895, Bhopal Das sued Jhargar for rent of the house in the Court of Small Causes. Jhargar pleaded adverse possession in that suit and denied the plaintiff's title. The plaint was returned for presentation to the proper court, but that was not done. In 1897, the house in question along with other properties belonging to Bhopal Das was sold in execution of a decree and purchased by Ram Ratan, the decree-holder. On December 20th, 1901, Pusa Mal purchased the house. He demanded rent from the defendants who were heirs of Jhargar, but they refused to pay. Hence this suit for rent and for possession. The defendants denied the plaintiff's title and contended that the suit was barred by limitation. The courts below dismissed the suit as barred by time. The lower appellate court found that the *kirayanama* was proved, but that since the expiry of the term specified therein the defendants had never paid any rent to the

*Second Appeal No. 521 of 1908 from a decree of Khetter Mohan Ghose, Second Additional District Judge of Aligarh, dated the 6th of March 1908, confirming a decree of Keshab Deo, Munsif of Koil, dated the 24th of August 1907.

(1) (1885) I. L. R., 8 Mad., 424.
(2) (1897) I. L. R., 22 Bom., 893.
(3) (1900) I. L. R., 24 Bom., 504.
(4) (1907) 7 C. L. J., 615.
(5) (1909) 6 A. L. J. R., 239.

plaintiff and they continued in possession of the house without any fresh tenancy being created. The plaintiff appealed to the High Court.

Dr. *Satish Chandra Banerji* (for whom Babu *Sarat Chandra Chaudhri*) for the appellant: A tenant who takes the premises on lease for a fixed term and holds over without paying any rent after the expiry of that term, cannot acquire adverse title. The lease having been found to be genuine, mere non-payment of rent by a tenant cannot convert his possession into adverse possession. *Premsukh Das* v. *Bhupia* (1). There must be a denial of the landlord's title, and the denial here took place within 12 years of the suit. The tenancy of the defendants was tenancy by sufferance, that is to say a tenancy without the assent or dissent of the landlord. Article 139, Schedule II, Limitation Act, is the article which applies. No doubt the original tenancy has expired, but the tenancy which has come into existence by operation of law still subsists, and the suit is within time. A tenancy by sufferance is determined by the act of the landlord as by expressing his dissent to the tenants occupation or by taking steps to evict him or by the act of the tenant as by his transferring the property which he cannot do having no title to convey. *Adimulam* v. *Pir Ravuthan* (2). His possession is not adverse and he is not a trespasser. It is to prevent the consequences arising from such possession that the law has created this fiction of a tenancy. Foa, *Outline of the Law of Landlord and tenant*, p. 5.

The expression "or otherwise assents" in section 116 of the Transfer of Property Act connotes also an action on the part of the landlord. It is submitted that the position of a tenant by sufferance cannot be worse than that of a licensee. Permission in his case too is, it is submitted, implied. The observations in Mitra on Limitation, 4th edition, p. 1021, are also in support of the appellant, as also those in *Srinivasa* v. *Muthusami* (3).

The *cursus curiæ*, however, is opposed to this contention.

The following are the several cases decided since *Adimulam's case*.

(1) (1879) I. L. R., 2 All., 517. (2) (1885) I. L. R., 8 Mad., 424.
(3) (1900) I. L. R., 24 Mad., 246, 251.

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Kantheppa v. *Sheshappa*, (1); *Chandri* v. *Duji Bhau* (2); *Lachman* v. *Gulzari Lal* (3); *Khunni Lal* v. *Madanmohan Lal* (4); *Vadapalli* v. *Dronamraju* (5) and *Madanmohan Gossain* v. *Kumar Rameswar Malia* (6).

Munshi *Girdhari Lal Agarwala*, for the respondents, was not called upon.

The following judgments were delivered:—

TUDBALL, J.—This appeal arises out of a suit to recover possession of a house and Rs. 47-4-0 arrears of rent thereof for the period commencing from 17th October 1904 and ending 17th January 1907.

The facts are as follows:—On April 17th, 1887, the plaintiff's father Bhopal Das leased this house to one Jhargarh, brother of defendants 1 and 2, and father of defendant No. 3 for a fixed period of one year at a monthly rental of Rs. 1-12. After the expiry of the term of this lease the lessee continued to hold over without the express assent or dissent of the lessor. He paid no rent. On the 18th February 1895, the plaintiff brought a suit for rent against Jhargarh in the Small Cause Court for a period commencing from September 1892, up to the date of suit. Jhargarh contested the suit on the ground that he had held adverse possession of the house for over 30 years and denied having executed the so-called *kirayanamah* and having paid any rent. The plaint was returned by the Small Cause Court for presentation to a proper court on the ground that a question of a proprietary title was involved. The plaintiff however did not prosecute the suit for reasons it is unnecessary to detail. The proprietary title passed from him by auction sale to others but was finally reacquired by him.

The present suit was instituted on 15th February 1907. The lower court has held that Jhargarh executed the *kirayanama* of 17th April 1887, for a period of one year. That after the expiry of that term Jhargarh (and after him the present defendants) paid no rent. That there was no assent or dissent express or implied on the part of the lessor and that the lessees therefore became a tenant by sufferance. That a period of more than 12 years having

(1) (1897) I. L. R., 22 Bom., 893.
(2) (1900) I. L. R., 24 Bom., 504.
(3) (1904) 1 A. L. J. R., 201.
(4) (1909) 6 A. L. J. R., 239.
(5) (1907) I. L. R., 31 Mad., 163.
(6) (1907) 7 C. L. J., 515.

expired since the expiry of the lease, the suit was time barred under Article 139, Schedule II, of the Indian Limitation Act of 1877. The plaintiff comes here in second appeal and it is urged on his behalf that the lower court has taken a wrong view of the legal position of the parties. That the possession of a tenant by sufferance is not that of a trespasser nor, as such wrongful in law. That where a landlord remains silent when his tenant holds over on the expiry of his lease, his silence must be presumed to be tantamount to consent and that a new tenancy commences and limitation does not begin to run until this new tenancy comes to an end either by the substitution therefor of a fresh tenancy or by the tenant setting up an adverse title.

It is also urged that mere non-payment of rent does not constitute adverse possession and that it was not until after 18th February 1895, that Jhargarh set up an adverse title and the present suit is within 12 years of that date. The learned vakil for the appellant who has argued the case most ably and fairly and has placed before us all the rulings of the various High Courts in India, relies on the ruling in *Adimulam* v. *Pir Revuthan* (1), wherein it was held that if a tenant for years holds over in British India time does not begin to run against the landlord until the tenancy on sufferance has been determined.

The principle adopted in the ruling above mentioned appears to be that directly the tenancy for the term expired a new tenancy arose, *viz.* a tenancy on sufferance and that the limitation set forth in Article 139, Schedule II, of the Limitation Act would not begin to run until this second tenancy came to an end.

We are unable to agree with the view that a tenancy on sufferance is such a tenancy as is contemplated by Article 139. In the case of such tenancy there is no privity between the parties. The so-called tenant on sufferance is one who wrongfully continues in possession after the expiration of a lawful title. He is not entitled to any notice. There is very little difference between him and a trespasser. The same ruling was considered by the same High Court in *Vada Palli Narasimham* v. *Dronamraju Seetharamamurthy* (2), and it was held that that decision could no longer be treated as good law following the view expressed in

(1) (1885) I. L. R., 8 Mad., 424. (2) (1908) I. L. R., 31 Mad., 168.

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Seshamma Shettai v. *Chickaya Hegade* (1), that in a suit by a landlord to recover possession from a tenant for a term of years time begins to run under Article 139 from the expiry of the term which must be held to be the time when the tenancy is determined within the meaning of the article. The same point was considered by the Bombay High Court in *Chandri* v. *Daji Bhaw* (2). Following a former ruling in *Kantheppa* v. *Sheshappa* (3), it was therein held that a tenant holding over after the expiration of the term mentioned in his rent note is a tenant on sufferance and there is no such relationship between landlord and tenant as is contemplated by Article 139, Schedule II of Act XV of 1877. The opinion expressed by a Bench of the Calcutta High Court in *Madan Mohan Goshain* v. *Kumar Rameshar Malia* (4) is to the same effect, *viz.* that time begins to run against the lessor under article 139 from the date of the expiry of the lease.

Coming to the decisions of our own Court the case of *Premsukh Das* v. *Bhupia* (5) which has been cited, does not touch the point. There was no lease for a term in that case.

In *Lachman* v. *Gulzari Lal* (6), a Bench of this Court held under circumstances similar to those of the present case that the suit for possession was barred by 12 years' limitation, the relation of landlord and tenant having been determined at the end of the year 1839 since which time no rent had been paid. Article 139 is not specifically mentioned and the court appears to have held that the defendant tenant's possession had been adverse on the ground that no rent had been paid and no assent proved on the part of landlord.

The point again arose in the case of *Khunni Lal* v. *Madan Mohan* (7). The case of *Premsukh* v. *Bhupia* (5) was considered and distinguished. In that case (as in the present one) there was no payment of rent to the lessor and nothing to suggest the lessor's assent to the lessee holding over beyond the bare fact that the defendants remained in possession. The lease determined in 1884 and the suit was brought in 1904. Article 139 was applied and it was held that the suit for possession was barred by time. From what has been noted above it is clear that the rulings

(1) (1902) I. L. R., 25 Mad., 507.
(2) (1900) I. L. R., 24 Bom., 504.
(3) (1897) I. L. R., 22 Bom., 893.
(4) (1907) 7 C. L. J., 615.
(5) (1879) I. L. R., 2 All. 517.
(6) (1904) 1 A. L. J. R., 201.
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are all against the appellant's contention except that in *Adimulam* v. *Pir Revuthan* (1), from which the Madras High Court has itself expressly dissented in a subsequent ruling. The weight of authority is against the appellant.

Limitation clearly began to run on the expiry of the term fixed by the rent note against the appellant's predecessor in title on 17th April 1888, under Article 139 and the suit is barred by time. In this view of the case we dismiss the appeal with costs.

BANERJI, J.—I entirely agree.

Appeal dismissed.

1909
May 26.

Before Mr. Justice Banerji and Mr. Justice Tudball.

BALDEO (PLAINTIFF) *v.* BADRI NATH AND ANOTHER (DEFENDANTS.)*

Muhammadan Law—Pre-emption—Shafi Khalit—Easement.

In a suit for pre-emption it was found that the house of the pre-emptor discharged water on the property sold, and this latter and the house of the vendee discharged water on a lane intervening between the houses and the property sold. *Held* that both the pre-emptor and the vendee were sharers in the immunities and appendages (*Shafi Khalit*) and therefore one had no preferential right over the other.

Held also, that the Muhammadan Law does not prescribe any period which would give a person the right to enjoy an immunity such as that of discharging water or a right of way.

THE facts of this case are as follows :—

A certain stable situated in Muhalla Bagh Sundar Das, in the city of Benares was sold by one Bhagwan Das to one Badri Nath. The plaintiff alleging himself to be a *shafi khalit* sued for pre-emption. The defence was that he had no preferential right to claim the property. The plaintiff's house stood immediately next to the property in dispute and it was alleged that he had a right to discharge water of the house on a portion of it. The vendee's house was separated from the stable by a lane which was not a thoroughfare. Into the lane the water from both the house of the vendee and the stable was discharged. The Additional Subordinate Judge decreed the suit holding that the right of the

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* Second Appeal No. 838 of 1908 from a decree of G. A. Paterson, District Judge of Benares, dated the 29th of May 1908, reversing a decree of Bankey Behari Lal, Additional Subordinate Judge of Benares, dated the 23rd of November 1907.

(1) (1885) I. L. R., 8 Mad., 424.