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Maksudpur Ogawan and Ogawan Nisf, sold last of all the properties mentioned in the mortgage bond. Accordingly we vary the decree made by the learned Subordinate Judge and order that the decree be modified by inserting therein an express direction that the properties be sold in the order indicated above.

JWALA PRASAD, J.

In the circumstances of the case we think that defendant No. 14 is entitled to only half the costs incurred by him in this Court as well as in the Court below.

KULWANT SAHAY, J.—I agree.

Decree varied.

APPELLATE CIVIL.

1924.

Feb., 28.

Before Das and Ross, J.J.

HARI GIR

v.

KUMAR KAMAKHYA NARAYAN SINGH.*

Landlord and Tenant—tenant holding over after expiry of lease—suit for ejectment—Limitation Act, 1908 (*Act IX of* 1908), *Schedule* 1, *Article* 139.

The possession of a tenant holding over on the expiry of the term of his lease is wrongful, and, in the absence of evidence from which a fresh tenancy can be inferred, time begins to run against the landlord from the expiry of the lease.

Krishnaji v. Anthaja(1), not followed.

Chandri v. Daji Bhau (2), followed.

Hellier v. Silcox(3), referred to.

*Appeal from Original Decree No. 48 of 1921, from a decision of Babu Paramatha Nath Bhattacharji, Additional Subordinate Judge of Hazaribagh, dated the 28th of August, 1920.

(1) (1894) I. L. R. 18 Bom. 256. (2) (1900) I. L. R. 24 Bom. 504.

(3) (1850) 19 L. J. (Q. B.) 295.

Appeal by the defendants.

On the 21st of June, 1865, an *istemrari mukarrari* lease was granted by the then proprietor of the Ramgarh Raj to Kanhai Gir and Jainath Gir. It appeared that between 1864 and 1866 the Ramgarh Raj executed a considerable number of *istemrari mukarrari* leases and that there had been a considerable controversy between the *raj* and the grantees as to the meaning of the term "*istemrari mukarrari*". It was the case of the grantees that by the term "*istemrari mukarrari*" a permanent heritable and transferable grant was intended; whereas, the rival case was that all that was intended to be granted was a lease for life. Certain test cases were instituted by the *raj* and the controversy was set at rest by the decision of the Calcutta High Court in the case of *Ram Narain Singh* v. *Chota Nagpur Banking Association* (1). That decision was pronounced on the 25th of August, 1915; and it was conceded in the present appeal that the lease in favour of Kanhai Gir and Jainath Gir was a lease for their life. The survivor of the grantees died sometime in 1890; and it was found by the Judge in the Court below that defendants Nos. 1 to 5, who were the heirs of the grantees, had been un-interruptedly in possession of the demised land without payment of any rent to the landlord. On the 16th of November, 1911, defendants Nos. 1 to 5 gave an underground lease of 200 *bighas* of coal lands to defendants Nos. 6 and 7; and defendants Nos. 6 and 7 had assigned their interest under the lease of the 16th of November, 1911, to defendants Nos. 8 and 9. On the 27th of September, 1915, the plaintiff, who was the then proprietor of the Ramgarh Raj, served a notice to quit upon the defendants calling upon them to deliver up quiet possession of the demised land at the end of the *Sambat* year 1972. On the 18th of September, 1917, the plaintiff served a fresh notice upon the defendants asking them to quit at the end of the *Sambat* year 1974, corresponding to the 11th of April,

(1) (1916) I. L. R. 43 Cal. 332.

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1918. On the 14th of December, 1918, the suit out of which this appeal arose was instituted by the plaintiff for ejectment of the defendants and for recovery of Rs. 10,000 as damages for the unauthorized removal of coal from the demised land. The Subordinate Judge gave the plaintiff a decree substantially as claimed by him.

P. K. Sen (with him *A. Sen*, *Abani Bhushan Mukerji* and *Bankim Chandra De*), for the appellants.

Sultan Ahmed (with him *Susil Madhab Mullick*, *S. K. Mitra* and *Lachmi Narain Sinha*), for the respondents.

DAS, J. (after stating the facts, as set out above, proceeded as follows) :—

The critical question in this case is whether, having regard to the lapse of time, the plaintiff is entitled to eject defendants Nos. 1 to 5 from the demised land. The lease came to an end in 1890; and it is not disputed by the defendants that the plaintiff was entitled to recover possession of the demised land if he had instituted appropriate proceedings within twelve years from 1890. But the suit was not instituted till the 14th of December, 1918. It is contended on behalf of the defendants that the tenancy having come to an end in 1890, the suit is barred under the provisions of Article 139 of the Limitation Act. The case of the plaintiff is that notwithstanding the determination of the tenancy on the death of the original grantees, defendants Nos. 1 to 5 as the heirs of the grantees continued in possession with the assent of the landlord as tenants from year to year, and that the tenancy from year to year came to an end on the 11th of April, 1918. Some attempt was made in the evidence to show that the defendants paid rent to the plaintiff, but the learned Subordinate Judge has not accepted that part of the plaintiff's case and no attempt has been made before us by the learned Counsel appearing on behalf of the plaintiff to establish that there was any payment of rent at any time by

defendants Nos. 1 to 5 to the plaintiff. The view of the learned Subordinate Judge, however, is that there was an assent on the part of the landlord to the defendants continuing in possession of the demised land sufficient to convert the tenancy by sufferance into a tenancy from year to year. In this view he has come to the conclusion that the tenancy came to an end on the 11th of April, 1918, and that the plaintiff's suit is well within time.

It is necessary to scrutinize the evidence with some care to see whether the finding of the learned Subordinate Judge on this point can be supported I have referred to the fact that there was considerable controversy between the parties as to the meaning of the term '*istemrari mukarrari* lease'. The controversy was set at rest on the 25th of August, 1915, by an authoritative decision of the Calcutta High Court; and it is an undoubted fact that many suits which were held back pending the decision of the Calcutta High Court were instituted subsequent to that decision. It is necessary to remember these facts in dealing with the evidence whether there was an assent on the part of the landlord to the defendants continuing in possession of the demised land. The first witness examined on behalf of the plaintiff is Sibsahay Lal. He makes a perfectly general statement in his examination-in-chief that the heirs of the original grantees were allowed to remain in possession of the disputed *mauza* as year-to-year tenants; but he admits in his cross-examination that his knowledge was derived from the terms of the notices served upon the defendants, and that he had no knowledge of the real facts independently of those notices. He also admits that there are no papers to show that the defendants were yearly tenants and that settlement with the defendants was not made in his presence. Lastly he admits that only those tenants who pay rent are recognized as yearly tenants and that there are no papers in the *raj* to show that the defendants were in possession with the consent of the Ramgarh Raj.

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The next witness on this point is Mahta Tilakdhari Prasad. In his examination-in-chief he says that the heirs of the original grantees were allowed to remain in possession of the demised land, but in his cross-examination he makes it perfectly clear that he has no personal knowledge of the actual facts and that "there is no written note anywhere of the fact that the heirs of other deceased *mukarraridars* were allowed to remain in possession".

The last witness on this point is Harihar Sahay. He speaks in his examination-in-chief as to a practice in the *raj* to make demand for rent upon the heirs of *mukarraridars* and to treat such heirs at tenants-at-will. In his cross-examination he says as follows:

"I dot not recollect if demands for rent were made on defendants 1 to 5 but such demands must have been made. No steps were taken against them for non-payment of rent."

Upon this evidence it is impossible to hold that there was an assent on the part of the landlord to the defendants continuing in possession of the demised land as tenants.

Mr. *Sultan Ahmed* on behalf of the plaintiff strongly relies upon an alleged admission made by Meghlal Gir, one of the defendants. The passage in the evidence of Meghlal Gir upon which reliance is placed is as follows:

"*Raj tahsildars* used to demand rent for Tarai from us but we said that we should pay rent if receipts are granted in our names, but they said that would grant *marfatdari* receipts."

Marfatdari receipts, it may be pointed out, are receipts granted in the name of the original tenants through the persons actually paying the rent. The argument of Mr. *Sultan Ahmed* on this evidence is as follows: The defendants were actually in possession of the demised land. Their possession operated as an offer by them to accept a tenancy. The offer by the *raj* to grant receipts to them operated as an offer to recognize them as tenants. There was therefore an assent on the part of the landlord to the defendants continuing in possession of the demised land as tenants. With all

respect I am unable to agree with the argument. The defendants were no doubt willing to be treated as tenants on their own term and on recognition of their status as tenants. The refusal on the part of the landlord to grant any receipts other than *marfatdari* receipts to the defendants shows that although he was willing to accept rent from them he was not willing to recognize their status as tenants. And when the history of the litigation between the landlord and the different tenants under different *istemrari mukarrari* leases is remembered it will be realized that neither party was willing to make any concession until the controversy was settled by an authoritative decision of the High Court. This, in my view, explains why the landlord was unwilling to give direct rent receipts to the defendants. The evidence of Meghlal Gir upon which reliance is placed establishes that the landlord was unwilling to recognize the defendants as tenants. It is quite true that he suffered them to remain in possession; but a tenant by sufferance is in by laches of the landlord and is entitled to the benefit of the law of limitation.

The learned Subordinate Judge has strongly relied upon the case of *Krishnaji* v. *Anthaji* (1). That case no doubt supports the conclusion at which the learned Subordinate Judge has arrived. With all respect I am unable to agree with the view taken in that case. The learned Judges in that case followed *Hellier* v. *Sillcox* (2). But in my opinion *Hellier* v. *Sillcox* (2) is an authority for the proposition that an action for use and occupation would lie against a person who is in possession of the demised land after the death of the tenant with the permission of the landlord; it is not an authority for the proposition that the person in possession could not appeal to lapse of time if an action for ejectment was brought against him after the expiry of the period of limitation. The case of *Krishnaji* v. *Anthaji* (1) has, in my opinion, been virtually overruled by the decision of the Bombay High

(1) (1894) I. L. R. 18 Bom. 256. (2) (1850) 19 L. J. (Q. B.) 295.

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Court in *Chandri* v. *Daji Bhua* (1). It was held in that case that the possession of a tenant holding over is wrongful, and if there is no evidence from which a fresh tenancy can be inferred in the strict sense of the term, time begins to run against the landlord when the period of the fixed lease expires. In that case there was a lease for a year. At the end of the year the premises were not given up, nor was any rent paid. The suit was brought more than twelve years after the expiry of the lease. The defendant contended that the plaintiff's claim to recover possession was barred and the High Court gave effect to that contention and dismissed the suit.

In my opinion the decision of the learned Subordinate Judge on this point cannot be supported and the plaintiff's claim for possession must be dismissed.

The next question is whether the plaintiff is entitled to a declaration that the underground leases granted in this case are void and inoperative. He is clearly entitled to that declaration and the defendants have not challenged the accuracy of the finding of the learned Subordinate Judge on this point before us.

[The remainder of the judgment is not material to this report.]

Ross, J.—I agree.

Appeal decreed in part.

APPELLATE CIVIL.

Before Das and Ross, J.J.

1924.

Feb., 29.

GAYANI DAS

v.

DWARKA MANDAR.*

Bengal Tenancy Act, 1885, (*Act VIII of* 1885), *Schedule III, Article* 3—*land settled by tenant with others—tenant*

*Appeal from Original Decree No. 105 of 1921, from a decision of M. E. A. Khan, Subordinate Judge of Bhagalpur, dated the 24th February, 1921.

(1) (1900) I. L. R. 24 Bom. 504.