APPELLATE CIVIL.

Before Mullick and Jwala Prasad, J.J.

TEKAIT HARNARAYAN SINGH

v.

DARSHAN DEO.*

1919.

April, 8.

Specific Relief Act, 1877 (*I of* 1877), *section* 42—*Limitation Act* (*Act IX of* 1908), *Schedule I, Article* 139, *whether a bar—Tenant holding over.*

Where the plaintiff brought a suit for a declaration that the land in dispute did not constitute the permanent *thika* right of the defendants and that it was in possession of the defendants in temporary *thika* to be resumed year after year and after service of due notice, without asking for any consequential relief by way of ejectment.

Held, that section 42 of the Specific Relief Act was not a bar. The plaintiff's case being that the defendants were his tenants from year to year and it not being open to him at the point of time when the plaint was filed to ask for possession, the suit was perfectly competent.

Held, also (*i*) that Article 139, Limitation Act, Schedule I, only applies where the tenancy has been determined (*Per* Mullick, J.); (*ii*) that since the defendants were holding over as tenants under section 116, Transfer of Property Act, and were not trespassers, Article 139 was not applicable.

Chandri v. *Daji Bhau* (1), distinguished by Mullick, J.

Appeal by the plaintiff.

On the 19th of April, 1913, a record-of-rights in respect of the village in suit was published under the provisions of the Chota Nagpur Tenancy Act. The entry, material to this case, was to the effect that the defendants were holding the village in suit under the plaintiff as permanent *thikadars* who were not liable to ejectment.

*First Appeal No. 148 of 1916.

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On the 23rd of August, 1915, the plaintiff filed the present suit for the following reliefs:

1. That it may be declared that *mauza* Madanpur does not constitute permanent *thika* right of the defendants and that it is held in *miadi thika* and fit to be resumed.

2. That it may be further declared that the said *mauza* is in the possession of the defendants in temporary *thika* to be resumed year after year and after service of due notice.

The Subordinate Judge found that the defendants had a permanent tenure in the village but were liable to enhancement of rent from time to time.

Sultan Ahmed (with him *Jamini Mohan Mukherji* and *Sakti Kanta Bhattacharjee*), for the appellant.

P. K. Sen (with him *Ganesh Dutt Singh*), for the respondents.

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

There is very little dispute about the facts. It is admitted that the origin of the tenure is unknown. The defendants set up an oral contract creating a permanent tenure; and there is evidence which has been accepted and which has not been substantially impeached that the predecessor of the defendants entered into possession in or about 1863 and they have continued to pay rent first of all to the Political Department managing the estate of the plaintiff, then to the mother of the plaintiff and finally to the plaintiff himself who attained majority in or about 1904.

In 1293, *F.S.*, which corresponds to 1885, the plaintiff's mother gave a *patta* to defendant No. 1, Darshan Deo, for a term of six years and a *kabuliyat* was executed by way of counterpart to the *patta* upon the same terms.

At the trial in the Court below the main contest between the parties was as to the construction to be placed upon these two documents. Now, the *patta* itself recites that after the expiry of the term the lessor will be competent to make a fresh settlement on an

increased or a reduced rental and there is at the end of the document a further sentence to the following effect:

"The settlement will be made with this *thikadar* on either an increased or a reduced rental."

It is argued by the learned counsel on behalf of the defendants that this covenant is a covenant for perpetual renewal. In my opinion the document does not warrant this inference. The period of renewal is left uncertain and in the ordinary course in the absence of any other indication of the intention of the parties the period would be the period of the lease itself, namely, six years and the covenant would be exhausted by the first renewal. The *kabuliyat* on the other hand has provisions with regard to the trees and fruits which certainly do warrant the inference that it was not the intention of the parties to create a permanent interest in the lessee. There is no reason why if the lease was to be permanent in duration the lessee should have been restricted as to his mode of enjoying the fruit and the timber. In my opinion, taking the *patta* and the *kabuliyat* together, there cannot be any doubt that the intention of the parties was to create a lease for a term of years and not a lease in perpetuity. In this view of the case extraneous evidence of the conduct of the parties would not be admissible but assuming that the learned Subordinate Judge is right in saying that the documents themselves are ambiguous, then let us see whether the inference drawn by him from the admitted acts of the parties is correct. The learned Judge relies first of all upon the fact that between 1863 and the present day the defendants or their predecessors have erected four reservoirs and dug up two tanks upon the land for the purpose of irrigation, also that they had planted two orchards. The evidence shows that previous to 1863 another lessee had constructed a reservoir for irrigation and there is evidence that it is customary for temporary lessees to construct these works for their own benefit. Why should then the inference be drawn from the construction of these works

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that it was the intention of the lessor to give a permanent lease of the property. There was in this case long possession but there is no erection of permanent structures such as ordinarily warrants the inference of a title in perpetuity. In my opinion the inference drawn by the learned Subordinate Judge does not necessarily follow.

Then the learned Subordinate Judge relies upon the fact that Darshan in his evidence states that when the *patta* was being executed he set up a permanent title and that thereupon by way of compromise the covenant as to renewal was inserted. On referring to the evidence of Darshan I do not find it expressly stated that he did set up a permanent title. All that he says is that he objected upon the ground that he had been in possession for generations. In the absence of any express indication that the assertion of a permanent title was made I think it would be wrong to infer that the lessor by inserting the clause as to renewal admitted by implication the permanency which is now pleaded.

Finally, the learned Subordinate Judge relies upon the fact that the lessee had carried out reclamation works. That is an ordinary incidence of temporary leases and no inference as to permanency arises from it. Having regard to the terms of the *patta* and the *kabuliyat* it seems to me that the onus lay very heavily upon the defendants to prove that the intention was to create a permanent tenure and in my opinion the defendants have failed to discharge that onus.

The learned Counsel for the respondents then contends that the suit itself is not maintainable by reason of section 42 of the Specific Relief Act. He objects that it was open to the plaintiff to ask for consequential relief by way of ejectment and a mere declaration ought not therefore to be given. The suit is essentially one for a declaration that a record-of-rights is incorrect. Such a form of suit is well known in respect of entries in records-of-right prepared under the Bengal Tenancy Act and is recognized by

section 111 of that Act. In the Chota Nagpur Tenancy Act there does not seem to be any express provision of law corresponding to that section but there is no reason for supposing that the legislature contemplated that the jurisdiction of the Civil Court was to be ousted. I see no reason why if no other consequential reliefs were open to the plaintiff he should not be permitted to obtain a declaration such as he seeks in this present suit. Whether or not consequential relief by way of recovery of possession was open to him is a question of fact and upon the evidence in the case I can find nothing which supports the view that at the moment when the suit was brought it was open to the plaintiff to ask for recovery of possession. The plaintiff's case is that the defendants are his tenants from year to year and if it was not open to him at the point of time when the plaint was filed to ask for possession, I think, the suit was perfectly competent.

Then the other point taken by the learned Counsel is that the suit is barred by limitation. It is contended that under Article 139, Schedule I of the Limitation Act, the plaintiff cannot recover possession more than twelve years after the period of the *patta* of 1293 expired. The answer to this in the first place is that this is not a suit for recovery of possession. In the second place Article 139 only applies where the tenancy has been determined. In this case it is the plaintiffs allegation that the tenancy from year to year still continues while if the defendant's case is accepted the tenancy is permanent and is also continuing. So that I fail to see how the principle applied in *Chandri* v. *Daji Bhau* (1) can be applied to this case. In the case before their Lordships of the Bombay Court there had been a determination of the tenancy and there was no holding over and the finding was that the landlord had neither received rent nor assented to the continuation of the defendant as a tenant. It was held, therefore, that he was at best a tenant on sufferance and that time

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began to run against the landlord from the determination of the term of the lease. That is not the case before us and it is admitted on both sides that the defendants are still paying rent to the plaintiff on the footing that they are his tenants.

MULLICK, J.

This disposes of all the points argued before us and the result is that the appeal is decreed with costs.

JWALA PRASAD, J.—I would only add that the defendant Darshan Deo himself did not understand that he was given a permanent tenure under the *patta* or the *kabuliyat* in question. In his evidence before the Revenue-Officer, Mr. S. K. Gupta, on the 1st of February, 1915, he distinctly stated as follows:

"That patta was *miadi* which I received."

His claim rested entirely before the Settlement Officer as well as in the written statement in this case, on long possession of over 50 years. He admitted in his evidence in this case that his ancestors had no written lease whereby he came into possession of the village. He has not been able to prove that there was any oral agreement that his ancestor would be permanently in possession of the property as lessee. Mere possession of a property for a long time would not confer permanent tenure upon the lessee. The present is not a case where the origin of the tenancy is not known and that the lessee was in possession for an indefinite term of years. There can therefore be no presumption in favour of the lease being permanent. It has been definitely stated in the statement and has been found by the Court below that the defendant's ancestors came into possession of the property about the year 1271 corresponding to 1864. On behalf of the plaintiff it was definitely stated that he was in possession from year to year. No presumption therefore from long possession can be made in favour of the defendant in this case as holding the property under a permanent lease. No inference from the conduct of the parties can also lead to the conclusion that the lease

was a permanent one. On the other hand it is obvious that the defendant No. 1 in whose favour the lease now is, wanted to create during survey proceedings in 1912 in favour of his brother defendant No. 2 a tenancy right in about 144 acres, the bulk of the property of the village This shows not only that it was fraudulent on the part of the lessee to set up a tenancy right in the village against the interests of the lessor, but it also shows that Darshan Deo, defendant No. 1, was conscious of his position that he was holding a temporary lease of the village and that there was a possibility of his lease being terminated and his being ejected from the village.

The lease in the present case cannot be said to be at all ambiguous in its terms and does not at all appear to have conferred a right other than that of a temporary lease of six years limited by it. I agree entirely with the view taken by my learned brother that the conduct of the parties relied upon by the learned Subordinate Judge would not be admissible.

It appears from the record-of-rights that the village which at the time of the lease was full of jungles had at the time of the survey operations a large quantity of culturable land yielding a very large income to the lessee. The lease was granted for a very small rent of Rs. 84. In order to reap the full benefit of a concessional lease of this kind the lessee had no doubt to excavate tanks and *ahars* for his own purposes. It has not been shown that the tanks or *ahars* were excavated solely for the purposes of the landlord. In the absence of such evidence it is impossible to infer that the defendant excavated the tanks and *ahars* under the belief that he had a permanent right in the village.

This disposes of the finding of fact arrived at by the Court below. Thus upon the evidence in the case and upon the true consideration of the lease the defendant have failed to prove that they have a permanent lease of the village.

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I also agree that the plaintiff's suit is not barred by limitation inasmuch as the plaintiff and his predecessor took rent from the defendant and accepted him as a tenant of the land after the expiry of the lease. The defendants were therefore holding over as tenants under section 116 of the Transfer of Property Act. They were not trespassers but were recognized as tenants from year to year.

Article 139 of the Limitation Act has, therefore, no application to the present case. Nor is the suit barred by the proviso to section 42 of the Specific Relief Act for the relief No 2 claimed in this case expressly mentions that the plaintiff wants a declaration that the lease in question is temporary and resumable and that after the service of a due notice the plaintiff is entitled to evict the defendants. This relief implies that no notice to evict the defendants had been given by the plaintiff and that the defendants were at the time when the suit was filed treated as tenants from year to year. The lease had not been terminated and the right of re-entry therefore did not accrue to the plaintiffs. The proviso to section 42 will not, therefore, bar the present suit.

For all these reasons I agree with the view taken by my learned brother that the appeal should be decreed with costs.

S. A. K.

Appeal decreed.

APPELLATE CRIMINAL.

Before Adami and Bucknill, J. J.

1924.

January, 14.

SHAMBHU KHATRI

v.

KING-EMPEROR.*

Penal Code, 1860 (*Act XLV of* 1860), *section* 304—*Rape of a girl under* 12—*rupture of vagina—death due to shock.*

* Criminal Appeal No. 187 of 1923, against the order of conviction and sentence passed by C. C. Chattarji, Esq., Magistrate exercising special power under section 30, Criminal Procedure Code, Hazaribagh, dated the 7th August, 1923.