APPELLATE CIVIL.

Before Mr. Justice Nánábhái Haridás and Mr. Justice Birdwood.

1884
April 29.

C. R. DESOUZA (ORIGINAL PLAINTIFF), APPELLANT, *v.* PESTANJI DHANJIBHAI (ORIGINAL DEFENDANT), RESPONDENT.*

Landlord and tenant—Lease—Sale by lessor—Custom—Evidence—Section 167, *Indian Evidence Act*, 1872 —*Sec.* 578, *Code of Civil Procedure, XIV of* 1882.

A Mahomedan residing at Zanzibar let a house situated there to the defendant, to be held by the latter as long as he pleased, under a lease in which he (the lessor) stipulated never to remove the lessee. The plaintiff, subsequently, with full knowledge of the lease, purchased the same house from the lessor, and as such purchaser sued to eject the defendant. The plaintiff tendered evidence to show that by the custom of Zanzibar the defendant's tenancy was determined upon the sale by the landlord. This evidence was refused.

Held that the alleged custom, even if proved, was invalid. It was unreasonable, as enabling a man, after having granted a lease, to deprive the lessee of the entire benefit of his lease.

The exclusion of evidence in the lower Court is not sufficient ground for reversing that Court's decree, unless the Appeal Court comes to the conclusion that the evidence refused, if it had been received, ought to have varied the decision.

THIS was an appeal from the decree of W. B. Cracknall, Judge of the Consular Court at Zanzibar.

The facts appear from the following judgment of the Consular Court:—

"In this case the plaintiff seeks possession of a house which the defendant occupied under a lease, dated 13th Rabi 1923, granted to him by the plaintiff's vendor. The plaintiff is a Goa shopkeeper and grocer, and the defendant is a Pársi, who resides within fifty yards of the plaintiff, and carries on very much the same business. The plaintiff wishes to evict the defendant, having without any doubt full notice of the defendant's lease; but this Court regarding the principle laid down in many cases, (*Le Neve* v. *Le Neve* [1]) cannot look at him as having greater rights than his vendor. It is also contended that the plaintiff, by the *lex rei sitæ* and the Arab law, has acquired the rights

* Regular Appeal, No. 8 of 1883.

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of an Arab purchaser. Whatever these may be, and assuming them to be as he contends, I again, regarding the principle laid down in *Penn* v. *Lord Baltimore* (1), will not permit him to avail himself of this law to do an injustice, and, therefore, dismiss the suit with costs.

"At the request of the plaintiff I note that he has tendered the evidence of *kázis* and Arab authorities as to the Arab law of Zanzibar".

The plaintiff appealed to the High Court.

Mánekshán Jehángirshah Taleyárkhán for the appellant.—The law which applies to the determination of this case is the Arabic law obtaining in Zanzibar, where both the lease and the sale were executed. According to the law of Zanzibar the lease was determined by the sale. According to English and Indian law the lease would, no doubt, be binding on the purchaser, but not according to the Arabic law, which is the law applicable to immoveable property situated at Zanzibar. According to the custom of Zanzibar the right of the lessee depended only on the ownership of his lessor continuing, and the lessee knew the custom. The plaintiff tendered evidence to show what the Zanzibar law was, but it was refused. According to it, a contract of lease is determinable—III Hedaya, 367 and 370. The cases cited by the Consular Court have no bearing on the case.

There was no appearance for the respondent.

The judgment of the Court was delivered by

NA'NA'BHA'I HARIDA'S, J.—There was no question as to the facts in this case, which are as follows:—One Hashil bin Khaluf, on the 13th Rabi 1293 (April or May, 1876), leased to the defendant a house at Zanzibar, to be held by the latter as long as he pleased, the rent reserved being dollars 50 a year. In the lease the lessor expressly agrees never to remove the lessee. The plaintiff, subsequently, with full knowledge of such lease, purchased the same house from the defendant's lessor, and, as such purchaser, sued to eject the defendant. This the Consular Court at Zanzibar held he was not entitled to do, his purchase being of such right only as his vendor had to give.

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In this appeal he complains of the lower Court having decided the case without admitting the evidence offered by him to prove that, according to Mahomedan law and custom of Zanzibar, the defendant's tenancy determined upon the sale by the landlord, the lease containing no stipulation that he was not to sell; and it appears, from a note made by the lower Court at the plaintiff's request, that such evidence was excluded by it. Therefore, assuming, as contended. that the respective rights of the parties, neither of whom is a Mahomedan, are governed by the Mahomedan law because they are derived from a Mahomedan, and also because the house in dispute is situated in the territory of a Mahomedan sovereign, we called upon the appellant's pleader, Mr. Mánekshâh, to show us any authority in that law in support of his proposition that a sale necessarily terminates all tenancies previously created by the vendor. But the only authorities he has referred us to, are certain passages in the Hedaya, Vol. III, pages 367 and 370. Those passages, however, do not support his contention at all, and do not seem to us to have any application to the case before us. They show that a contract of hire is, in some cases, dissolved by the death of one of the parties to it, or may by a decree of the *kázi* be dissolved in other cases in the event of the lessor's poverty. Here, however, the lessor and lessee are both alive, and no case of poverty or dissolution by the *kázi* is set up.

Upon the question of the exclusion of evidence as to the alleged custom of Zanzibar, it appears to us that that alone is not a sufficient ground for reversing the lower Court's decree, unless we come to the conclusion that such evidence, if it had been received, ought to have varied the decision—see Act I of 1872, sec. 167, and Act XIV of 1882, sec. 578. Assuming, then, that the custom alleged exists, is it such a custom as we ought to recognize as valid? We are of opinion that it is not. It seems to us most unreasonable, as enabling a man, after having granted a lease, at his mere pleasure, by simply resorting to a dodge, to deprive the lessee of the entire benefit of his lease, and that, not only in the absence of any such power reserved, but in the face of an express stipulation not to remove the tenant, and irrespective of the stipulated duration of the lease, and also without the least compensation to

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the lessee. A custom so unreasonable, even if proved, cannot be regarded as having the force of law; and we do not think that the rights of the lessee under his lease in this case could be in the least affected by such a custom, or by the subsequent transaction between the lessor and the plaintiff. We must, accordingly, confirm the decree of the Court below.

Decree confirmed.

APPELLATE CIVIL.

Before Mr. Justice Nánábhái Haridás and Mr. Justice Birdwood.

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DURGA'RA'M MA'NIRA'M (ORIGINAL PLAINTIFF), APPELLANT, *v.* SHRIPATI AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Dekkhan Agriculturists' Relief Act XVII of 1879, *Secs.* 3, 39, 46, 47 *and* 48—*Conciliator's certificate when necessary—Limitation—Act XV of* 1877, *Sch. II, Art.* 11—*Time intervening between application to conciliator and grant of certificate.*

The necessity to procure the conciliator's certificate before the entertainment of a suit to which an agriculturist residing within any local area for which a conciliator has been appointed is a party, is not limited to suits specified in section 3 of the Dekkhan Agriculturists' Relief Act, 1879, but extends to all matters within the cognizance of a Civil Court.

Held that such certificate was necessary before bringing a suit against an agriculturist to obtain a declaration that certain property was liable to be sold in execution.

In computing the period of limitation for such a suit the time intervening between the application to the conciliator and the grant of a certificate by him must be excluded.

THIS was a second appeal from the decision of R. F. Mactier, Judge of Sátára, confirming the decree of the Subordinate Judge of Sátára rejecting the claim.

Hon. *K. T. Telang* (with *Ganesh Rámchandra Kirloskar*) for the appellant.

Branson (with *Ghanashám Nilkant Nádkarni*) for the respondents.

The facts appear from the judgment delivered by

NA'NA'BHA'I HARIDA'S, J.—In this suit the plaintiff seeks to obtain a declaration that certain lands mentioned in his plaint

*Second Appeal, No. 5 of 1883.