APPELLATE CIVIL.

Before Sir M. R. Westropp, Knight, Chief Justice, and Mr. Justice West.

1881 *July* 28.

BA'LA'JI SITA'RA'M NA'IK SALGAVKAR (ORIGINAL PLAINTIFF), APPELLANT, *v.* BHIKA'JI SOYARE PRABHU KANOLEKAR (ORIGINAL DEFENDANT), RESPONDENT.*

Landlord and tenant—Lessor and lessee—Suit for rent—Notice of surrender of land by tenant—Splitting up of the cause of action—Son's liability on the father's contract of tenancy.

On the 22nd April, 1848, one Sabnis mortgaged certain land to the plaintiff. Soyare (the father of Bhikáji, the defendant), who was then tenant in possession of the land, attorned to the mortgagee (plaintiff) by a *kabulâyat* dated the 1st June, 1848. Soyare died in 1870 in possession as tenant. In 1877 the plaintiff sued the defendant Bhikáji as heir of Soyare for three years' rent from 1871-72 to 1873-74. The defendant answered that he had had no possession or occupation of the land since the death of his father in 1870. It was decided in that suit that the defendant had occupied the land up to 1874, and a decree was made against him for the rent claimed. In July, 1878, the plaintiff brought the present suit for rent for the subsequent three years, *viz.*, from 1875-76 to 1877-78. The defendant answered that he had given up the land in 1871-72. He did not assert, either in the former or in the present suit, that he had given notice to the plaintiff of his intention to terminate his tenancy by surrendering the land to the defendant, nor did he allege that the plaintiff had assented to a surrender of it by the defendant without such notice. The lower Courts found the *kabulâyat* proved, but threw out the plaintiff's claim on the ground that he failed to prove the defendant's occupation of the land during the three years for which rent was claimed. In the second appeal it was contended for the plaintiff that the tenancy continued until the mortgage was paid off.

Held that Soyare became a yearly tenant of the plaintiff under the *kabulâyat*, but that he was not bound to continue his tenancy until the mortgage was paid off.

Held, also, that neither the plaintiff nor Soyare as yearly tenant could, without the consent of the other, terminate the tenancy without six months' notice ending with the cultivating year (30th June).

Held further that the defendant as the son and heir of Soyare was responsible on his father's contract of yearly tenancy, so far as he (defendant) had assets of his father, and in order to free those assets from a continuing liability under that contract he was bound to give a six months' notice of surrender to the plaintiff. The mere denial by the defendant in the former and present suit, that he had ever occupied the land, could not operate as such notice, and his non-occupation or non-cultivation alone could not relieve him from his liability to pay the annual rent to the mortgagee (plaintiff), unless the latter assented to a surrender or abandonment of the land by the defendant.

Held, also, that the right of the plaintiff to the rent for the year 1875-76 depended upon whether he might have included it in the former suit.

* Second Appeal, No. 488 of 1880.

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BA'LA'JI SITA'RA'M NA'IK SALGAVKAR v. BHIKA'JI SOYARE PRABHU KANOLEKAR.

The High Court reversed the decrees of the Courts below, and made a decree for the plaintiff for the rent for 1876-77 and 1877-78.

Venkatesh Náráyan Pai v. *Krishnáji Arjun* (1) referred to and followed.

THIS was a second appeal from the decision of C. B. Izon, District Judge of Ratnágiri, affirming the decree of P. V. Joshi, Second Class Subordinate Judge of Vengárla.

This was a suit for rent. On the 22nd April, 1848, one Salunis mortgaged the land in question to the plaintiff. Soyare (the father of the defendant Bhikaji) was then tenant in possession of the land, and he attorned to the plaintiff by a *kabuláyat* dated 1st June, 1848. In 1870 Soyare died in possession as tenant. In 1877 the plaintiff sued the defendant Bhikáji as heir of Soyare for three years' rent of the said land, *i.e.* from 1871 to 1874. In his defence Bhikáji denied that he had had possession of the land during the said three years, or that he had ever taken possession since his father's death in 1870. The Court, however, held in that suit that Bhikáji had occupied the land up to 1874, and a decree was made for the rent sued for. The present suit was for the rent for the three years 1875 to 1878. The defendant answered that he had given up the land in 1871-72.

The Subordinate Judge held the *kabuláyat* proved, but threw out the plaintiff's claim, on the ground that it was not binding on the defendant, and that the plaintiff failed to prove the land to have been occupied by the defendant during the years for which rent was claimed.

In appeal the District Judge confirmed the decree of the first Court. He observed: "This Court in a previous case held that the defendant occupied up to 1874. But it does not follow that he continued to occupy after that year. * * There is no evidence that defendant did cultivate the land, and it is impossible to go on presuming that he did so, because his father held the land as tenant."

The plaintiff appealed to the High Court.

G. N. Nádkarni for the appellant.—The District Judge did not give proper effect to the *kabuláyat*, which created a tenancy

(1) See *supra*, p. 160.

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in favour of the plaintiff as long as the mortgage existed. The defendant, after the death of his father, continued to occupy the land on the terms contained in that document. He was bound to give notice to the plaintiff of his relinquishing the tenancy, if he ever relinquished it at all. There is neither allegation nor evidence in the case that the defendant ever gave such notice to the plaintiff. He is estopped by the decree in the former suit from disputing the plaintiff's right to claim rent.

Mánekshâh Jahângirshâh for the respondent.

WESTROPP, C.J.—The plaintiff is mortgagee under date 22nd April, 1848, from a person surnamed Sabnis, of the lands mentioned in the plaint. Soyare, the father of the defendant, as tenant in possession of the land at the time of the mortgage attorned, by a *kabuláyat* of the 1st June, 1848, to the mortgagee the plaintiff. We do not think that Soyare became more than tenant from year to year of the plaintiff under the *kabuláyat*. He was not bound to continue his tenancy until the mortgage was paid off, although the contrary has been here contended. As tenant from year to year, however, neither the plaintiff nor Soyare could, without the consent of the other, terminate such tenancy without six months' notice ending with the cultivating year. Soyare died in possession as tenant in 1870. The defendant Bhikáji, as his son and heir, would, so far as Bhikáji had assets of his father, be responsible on his father's contract of yearly tenancy, and, in order to free those assets from a continuing liability under that contract, would be bound to give a six months' notice of surrender to the plaintiff—*Venkatesh Náráyan Pai* v. *Krishnáji Arjun*[1]—a Ratnágiri case. Further, it appears that in a suit brought early in 1877 by the present plaintiff against Bhikáji, as heir of Soyare, for rent for 1871-72, 1872-73 and 1873-74, the latter defended himself on the ground that he had not possession or occupation of the lands during those years, and that he never did take possession thereof since his father's death in 1870; but it was decided in that suit that Bhikáji did occupy the lands up to 1874, and a decree against him for the rent then sued for was made, and that decree stands in full force

(1) Printed Judgments for 1875, p. 361.

and unreversed. It has not been asserted at any time on behalf of Bhikáji that he has given notice to the plaintiff of his (Bhikáji's) *intention* to terminate his yearly tenancy by surrendering the lands to the plaintiff. The mere denial by Bhikáji in the former and in the present suit, that he has ever occupied the lands, cannot operate as such notice; and although it may be true (as found by the District Judge) that Bhikáji has not occupied or cultivated the lands since 1874, such non-occupation or non-cultivation cannot alone relieve him from his liability to pay the annual rent to the mortgagee, his lessor, the plaintiff, unless the latter assented to a surrender or abandonment of the land by Bhikáji. There is not any allegation of such an assent by the plaintiff.

Under these circumstances we must reverse the decrees of the Courts below, and make a decree for the plaintiff for the annual rent for the years 1876-77 and 1877-78. The right of the plaintiff to the rent for the year 1875-76 will depend upon whether the plaintiff might have included the rent for that year in his former plaint. The suit in which that plaint was filed, is numbered 19 of 1877, but the plaint may possibly have been presented before 1877 and at a date earlier than the termination of the cultivating year 1875-76, in which case the rent for 1875-76 could not have been properly included in it, and may be recovered in this suit. If, however, as *primâ facie* would seem to be the case, the plaint was not presented until the year 1877, the rent for 1875-76 ought to have been included in the former suit, and cannot be recovered in the present suit. Our doubt, as to the time at which the plaint in the suit of 1877 was presented, arises from the fact that suits have recently been transferred from one Court to another in the Ratnágiri District, and, consequently, the number of the suit is not always a safe guide to the time of the presentation of the plaint. The District Judge should, in conformity with what has been said above, determine whether or not the plaintiff is entitled to a decree for the rent for the year 1875-76. The defendant must pay the costs of the suit and of both appeals.

Decree reversed.

APPELLATE CIVIL.

Before Sir M. R. Westropp, Knight, Chief Justice, and Mr. Justice Kemball.

1881
August 22.

RA'DHA'BA'I (ORIGINAL DEFENDANT), APPELLANT, *v.* SHA'MRA'V VINA'YAK (ORIGINAL PLAINTIFF), RESPONDENT.*

Mortgage—Priority—Equity of redemption—Registration—Notice—Possession—Parties to suit brought by a first mortgagee—Practice—Amendment of plaint.

A., the owner of certain land, mortgaged it to S. for ten years for Rs. 1,500 by a deed dated the 27th November, 1867. The deed was registered, but S. was not put into possession of the mortgaged land. On the 17th January, 1868, A. mortgaged the same land to the defendant Rádhábái for Rs. 250. The mortgage deed was registered in May, 1868, and recited that the mortgagee (defendant) was put in possession. The lower Courts found, as a fact, that the defendant had obtained possession of the mortgaged property. S. sued A. on her mortgage, and obtained a decree against him dated the 8th December, 1869, directing satisfaction of the mortgage debt by the sale of the mortgaged property. The defendant was not a party to that suit. On the 10th March, 1870, the land was sold in execution of that decree, and purchased by the plaintiff for Rs. 99-12, with notice of the defendant's mortgage. On the 28th April, 1870, the defendant Rádhábái instituted a suit in ejectment against N., (the mother of A.,) who was in occupation of the land as tenant and had failed to pay the rent. On the 7th July, 1870, the plaintiff, as purchaser at the above-mentioned sale, was put into possession, but on the 24th August, 1870, the defendant obtained a decree in ejectment against N., (the mother of A.,) as her tenant. In execution of that decree the defendant recovered possession of the land, dispossessing the plaintiff, though he had not been a party to the ejectment suit. The plaintiff thereupon brought the present suit to recover the land under section 230 of Act VIII of 1859. His claim was rejected by the Subordinate Judge, but allowed by the Joint Judge in appeal.

On special appeal to the High Court.

Held that the claim of S. against the land was prior to that of the defendant, inasmuch as her mortgage was prior in date to the defendant's mortgage, and was registered. S. had a right to maintain a suit for the sale of the land to satisfy her mortgage, but she ought to have made the defendant (as subsequent mortgagee) a party to it, inasmuch as the equity of redemption was vested in the defendant to the extent of her (defendant's) mortgage, and she (defendant) would have been entitled to redeem the land by payment of the amount which might have been found due to S. in her suit. The defendant being in possession of the land at the time of the institution of the suit of S., and her (defendant's) mortgage being registered, S. must be regarded as having had notice of the defendant's claim, and was bound to make defendant a party to that suit in order to give a good title to a purchaser under such decree as might be made in that suit. S. by her omission

* Special Appeal, No. 518 of 1874.

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to do so did not afford to the defendant the opportunity of redeeming to which the defendant was entitled. The plaintiff, notwithstanding notice of the defendant's claim, became the purchaser, although the defendant was not a party to the suit of S. and, therefore, not bound by the decree in it. The plaintiff, accordingly, was fully aware of the infirmity of the title which he was acquiring. No doubt, the decree in the suit of S. bound the mortgagor A., who was a party to it, so far as his right to redeem was concerned. The plaintiff, therefore, had a good title to the interest of A., and was entitled to redeem the land from the defendant's mortgage. The utmost relief which the Court could afford to the plaintiff under the above circumstances was to permit him to amend his plaint by praying a redemption of the land from the defendant's mortgage, and to treat his suit, which was in the nature of an ejectment suit, as one for redemption.

The High Court, accordingly, reversed the decree of the Joint Judge, and made a decree for an account on the defendant's mortgage, allowing the plaintiff to redeem within a certain time on payment of the balance that might be found due to the defendant, or, in default, ordering the plaintiff to be for ever foreclosed from recovering the land.

Itchárám Dayárám v. *Raiji Jaga*(1) and *S. B. Shringarpure* v. *S. B. Pethe*(2) referred to and followed.

THIS was a special appeal from the decision of G. Ayerst, Acting Joint Judge of Thána, varying the decree of the Second Class Subordinate Judge of Alíbág.

One Anandráv Bápuji, who resided in Bombay, was possessed of certain land and a house situated in the district of Thána. His mother, Narmadábái, cultivated the land as his tenant.

On the 27th November, 1867, Anandráv mortgaged the house and land to Sitábái (his mother's sister) for ten years for Rs. 1,500. Sitábái registered the deed on the 13th December, 1867, but did not obtain possession of the property.

On the 17th January, 1868, Anandráv mortgaged the same lands (but not the house) to Rádhábái for Rs. 250. That mortgage deed was registered in May, 1868, and contained a statement that Rádhábái was put into possession. The lower Courts found, as a fact, that she had obtained possession of the property.

On 8th December, 1869, Sitábái obtained a decree on her mortgage against Anandráv, which directed a sale of the mortgaged property. Rádhábái was not a party to that suit. On

(1) 11 Bom. H. C. Rep., 41. (2) I. L. R., 2 Bom., 662.

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the 10th March, 1870, the mortgaged premises were sold under the said decree. The plaintiff became the purchaser for Rs. 99-12. At the sale Rádhábái gave notice of her mortgage.

On the 28th April, 1870, Rádhábái instituted a suit in ejectment against Narmadábái as her tenant, she having failed to pay the rent. On the 7th July, 1870, the plaintiff, as purchaser at the above mentioned sale, obtained possession of the land, but on the 24th August, 1870, Rádhábái obtained a decree in her aforesaid ejectment suit against Narmadábái, and under that decree recovered possession of the house and land, and the plaintiff (though not a party to that suit) was dispossessed. He thereupon brought the present suit under section 230 of the Civil Procedure Code (Act VIII of 1859) to recover the house and land. The Subordinate Judge was of opinion that Sitábái's mortgage of 1867 was collusive, and made a decree in favour of Rádhábái (the defendant). On appeal by the plaintiff the District Court made a decree in favour of the plaintiff. The defendant Rádhábái thereupon appealed to the High Court.

Bhairavnáth Mangesh for the appellant.—The plaintiff is only a purchaser at a court sale of the right, title and interest of the mortgagor, Anandráv Bápuji. The defendant is a mortgagee in possession, and his deed is duly registered. The Joint Judge, therefore, was wrong in holding that his title was superior, and that he could recover possession without paying the amount of the defendant's mortgage claim. The decision is contrary to the rulings of this High Court.

G. N. Nádkarni for the respondent.

WESTROPP, C. J.—Anandráv Bápuji, the owner of certain land and a house situated in the táluka of Alíbág and district of Thána, by exhibit No. 34, dated the 27th of November, 1867, mortgaged them for ten years to Sitábái for Rs. 1,500 (whereof Rs. 900 were said to be due in respect of a former debt and Rs. 600 were said to be a fresh advance) at 12 annas per cent. *per mensem* payable annually. That mortgage was registered on the 13th December, 1867, but Sitábái was not put into possession of the mortgaged premises.

On the 17th of January, 1868 (*i. e.* in less than two months after the execution of the mortgage to Sitábái), Anandráv Bápuji mortgaged the same lands to the defendant Rádhábái or Rs. 250. That mortgage was registered in May, 1868, and contained a statement that, contemporaneously with its date already mentioned, Rádhábái was put into possession of the lands. A rent-note, dated the 17th of May, 1869, executed to Rádhábái by Narmadábái (mother of Anandráv Bápuji and sister of Sitábái), as tenant of the lands was, by both of the Courts below, held to be proved. Under these circumstances the Subordinate Judge found that Rádhábái was put into possession under her mortgage, and we understand the Joint Judge as having concurred in that finding. We observe that the Subordinate Judge noticed the fact that while Anandráv Bápuji ordinarily resided in Bombay, Narmadábái cultivated the lands. The house was not included in the mortgage to Rádhábái.

Sitábái having brought a suit (No. 1036 of 1869) against Anandráv Bápuji (to which suit she did not make Rádhábái a party) obtained against him, on the 8th of December, 1869, a decree (founded on her mortgage of the 27th November, 1867), for sale of the lands and house mentioned in that mortgage in default of payment of Rs. 1,637 (due thereon for principal and interest) and costs. Anandráv Bápuji not appearing, the decree was *ex parte*. Neither it, nor a copy of it, was forthcoming during the argument of this appeal; and, for Rádhábái, it was suggested that the decree might be one for money only, but a copy of it having been procured a few days afterwards, the decree turned out to be as we have above described it. A memorandum of it was duly sent by the Subordinate Judge to the Registrar of the locality of the property, pursuant to section 42 of Act XX of 1866.

The sale of the mortgaged premises under that decree took place on the 10th of March, 1870. In her deposition in the present suit Rádhábái said that she attended at the sale and gave notice of her mortgage on the lands, which statement was not contradicted. The present plaintiff, Shamráv Vináyak, purchased the mortgaged premises at that sale for Rs. 99-12,—a price so small as to corroborate Rádhábái's state-

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ment that at the sale she gave notice of her mortgage. The plaintiff in due time obtained a certificate of sale, which he omitted to register. That circumstance, however, is immaterial. The certificate, being in respect of a consideration less than Rs. 100, was optionally, not compulsorily, registrable. He was put into possession on the 7th of July, 1870. Rádhábái, however, had instituted a suit in ejectment on the 28th April, 1870, against Narmadábái as her tenant, she having failed to pay rent due in respect of the lands, and having refused to vacate them. Rádhábái on the 24th August, 1870, obtained a decree against Narmadábái, and under that decree recovered possession of the lands, and the present plaintiff, Shamráv Vináyak (though not a party to that suit), was dispossessed. Thereupon he brought the present suit, under section 230 of Act VIII of 1859, to recover the house and lands. It appeared on the trial that he had not been dispossessed of the house, and was in possession of it. As to the lands, the Subordinate Judge made a decree in favour of Rádhábái, being of opinion that Sitábái's mortgage of 1867 was collusive, and that Rádhábái's mortgage of 1868 was with possession, whereas Sitábái's mortgage of 1867 was not accompanied by possession. The plaintiff having appealed to the District Court,—the Joint Judge, being of opinion that Sitábái should be preferred as mortgagee to Rádhábái, and that the circumstances on which the latter relied as showing that Sitábái's mortgage was fraudulent, were not sufficient for that purpose (which latter finding is binding on this Court), varied the decree of the Subordinate Judge by directing that the plaintiff should recover all of the mortgaged premises and costs.

Against that decree of the Joint Judge the defendant, Rádhábái, has brought the present special appeal.

The mortgage of Sitábái being prior in date to that of Rádhábái and being registered, which registration is, under the rulings of this Court, equivalent to possession, as amounting to notice to subsequent incumbrancers or purchasers[1], Sitábái's claim against the land was prior to that of Rádhábái, and Sitábái had a right to maintain a suit for sale of the land to

(1) 11 Bom. H. C. Rep., 41; I. L. R., 2 Bom., 332, 662, but see I. L. R., 7 Bom. at pp. 132-3 *per* Sargent, C. J.

satisfy her mortgage; but she ought to have made Rádhábái a party to her (Sitábái's) suit for that purpose, inasmuch as the equity of redemption was, to the extent of Rádhábái's mortgage, vested in Rádhábái, and she would have been entitled to redeem the land by payment of the amount which might be found due in Sitábái's suit to Sitábái. Rádhábái being in possession of the land at the time of the institution of Sitábái's suit, and her (Rádhábái's) mortgage being registered, Sitábái must be regarded as having had notice of Rádhábái's claim and, therefore, of the necessity of making her a party to that suit in order to give a good title to a purchaser under such decree as might be made in it. Nevertheless Sitábái abstained from making Rádhábái a party to that suit, and thus did not afford to her the opportunity of redeeming to which she was entitled. The plaintiff, notwithstanding notice of Rádhábái's claim given to him at the sale, became the purchaser, although Rádhábái was not a party to Sitábái's suit, and therefore not bound by the decree in it. He, accordingly, must have been fully aware of the infirmity of the title which he was acquiring. No doubt the decree in Sitábái's suit bound the mortgagor, Anandráv Bápuji, (who was a party to Sitábái's suit), so far as his right to redeem is concerned, and, therefore, the plaintiff has a good title to the interest of Anandráv Bápuji, and is, accordingly, entitled to redeem the lands from Rádhábái's mortgage. The utmost relief which, under the above circumstances, we can afford to him, is to permit him to amend his plaint by praying a redemption of the lands from Rádhábái's mortgage, and to treat this suit, which at present is in the nature of an ejectment suit, as one for redemption.

The decree, therefore, of the Joint Judge must be reversed, and, in lieu of it, a decree made that an account should be taken of what sum, if any, is due to Rádhábái on her mortgage of the 17th January, 1868, of the lands in the plaint mentioned for principal and interest,—Rádhábái to be charged in that account with such sums or produce as she may have received from the said lands during her possession thereof, and to be allowed the expenses (if any) in respect of Government assessment or otherwise which she may have legitimately and necessarily incurred in relation to the said lands. And on payment, by the plaintiff, of

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the balance (if any) found due to Rádhábái on such account within six calendar months from such day as the amount of such balance is notified by the Subordinate Judge to the plaintiff, let the said lands be made over to the plaintiff. And in the event of the plaintiff not paying such balance within the said period of six calendar months, let the plaintiff be for ever barred and foreclosed from recovering the said lands from the said Rádhábái, her heirs and representatives.

As Rádhábái did not make the plaintiff a party to her suit against Narmadábái, and thereby caused him to be ousted from the lands without giving him an opportunity of putting forward such defence as he may have had, this Court directs that the parties to the present suit do, respectively, bear their own costs thereof, and of the appeals therein.

The plaintiff being in possession of the house in the plaint mentioned, and the same not being included in Rádhábái's mortgage, any order in respect of that house is unnecessary in this decree.

Decree reversed.

APPELLATE CIVIL.

FULL BENCH.

Before Mr. Justice Melvill, Mr. Justice West, and Mr. Justice Pinhey.

1882
March 9.

GIRDHAR MANORDA'S AND OTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* DA'YA'BHA'I KA'LA'BHA'I AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Res judicata—First suit of ejectment based on alleged lease—Second suit to eject tenant as trespasser founded on right of ownership.

The present plaintiffs in 1869 sued the present defendants to eject the latter from a certain piece of land, alleging that the defendants held it under certain leases dated July, 1864. The genuineness of the alleged leases was put in issue in that suit and was decided by the Subordinate Judge in favour of the plaintiffs, who accordingly obtained a decree. In appeal the District Judge reversed that decree, being of opinion that the alleged leases were not proved.

* Second Appeal, No. 22 of 1880.