1883

MOOLJI LILLA v. GOKULDA'S VULLA.

a partner. A considerable contract was shown to have been made and entered into in his name, and one or two small sums were advanced to him, whilst a series of entries show that some small transactions were carried on for two years in the name of his brother. But these transactions were of very trifling importance compared to the whole business of the firm, and certainly do not suffice to prove partnership in the presence of the fact that their names were not entered as partners in the books and they did not participate in the profits. As further proof of the joint business, it was shown that Lilla and his sons were fed and housed by Dársi, and that the business was charged with large marriage expenses in their favour. This is the plaintiffs' only strong point, but I do not think it is a proof of a joint concern, sufficient to set aside the very stong evidence afforded by the books. If the family is joint, it is the duty of the rich brothers to pay the marriage expenses of the family (see Colebrook's Dig., Vol. III, p. 99). Even if the family is separate, the generosity of Dársi does not invest his nephews with any legal right to share his separate estate. He only fulfilled a duty towards his poor relations such as is enjoined by his moral law.

My judgment is for the defendants, and the suit is dismissed with costs.

Judgment for defendants.

Attorneys for plaintiffs.—Messrs. *Macfarlane and Edgelow.*

Attorneys for the defendants.—Messrs. *Jefferson, Bhaishankar and Dinsha.*

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nánábhái Haridás.

1875
December 21.

VENKATESH NA'RÁYAN PA'I (ORIGINAL PLAINTIFF), APPELLANT, *v.* KRISHNA'JI ARJUN (ORIGINAL DEFENDANT), RESPONDENT.*

Landlord and tenant—Lessor and lessee—Kabuláyat—Suit for rent—Notice of surrender—Surrender of land by tenant.

The plaintiff was a mortgagee of certain land, and sued the defendant for the rent thereof for the three years 1871, 1872 and 1873. He alleged that in 1866 the defendant had passed to him a *kabuláyat* for one year; that the defendant did

* Special Appeal, No. 299 of 1875.

1875

VENKA'TESH NA'RA'YAN PA'I v. KRISHNA'JI ARJUN.

not vacate the land on the expiry of his term; that he (plaintiff) had sued him in 1868 and 1870 for rent, and obtained decrees against him; that the defendant had not yet surrendered the land, and had not paid the rent and hence the present suit. The defendant answered that he had not occupied the land during the years in dispute, and that it had been in the possession of the owner (the mortgagor). The Subordinate Judge awarded the plaintiff's claim; but the District Judge, in appeal, rejected it, holding that the plaintiff had failed to prove that the defendant had occupied the land during the three years in dispute, and that the defendant's conduct in the former suits was ample notice to the plaintiff that he (defendant) had surrendered the land. On appeal to the High Court,

Held that the result of the former suits was to establish the fact that the defendant's tenancy or liability as a tenant had continued until the end of the cultivating year 1870. By the terms of the lease the defendant was liable until he restored the property to the lessor. He had, therefore, to show, as against the plaintiff's claim for rent, that he (defendant) had terminated the tenancy by some intimation to the lessor (plaintiff) and put him in the way of acting on it by a re-entry on the premises.

The High Court, accordingly, finding that there was no evidence in the case either of notice given to the plaintiff or of an opportunity afforded to him of resuming possession of the land, remanded the case for the determination of that question, observing that if such notice were given, and such opportunity afforded, the plaintiff could not legally claim rent after the end of the cultivating year.

THIS was a special appeal from the decision of A. D. Pollen, Acting Assistant Judge at Ratnágiri, reversing the decree of the Second Class Subordinate Judge of Malwán.

The plaintiff was a mortgagee of the land in dispute from one Pundalik Mahadshet, and sued the defendant for three years' rent under a *kabuláyat* executed by him as tenant in possession to the plaintiff for one year in 1866. He alleged that the defendant did not vacate the land on the expiry of his term; that he (plaintiff), therefore, had sued him for rent twice before,—once in 1868 and again in 1870, and had obtained decrees against him that the defendant nevertheless did not surrender the land; and that the present suit was for rent since accrued due.

The defendant answered that he did not occupy the land for the years in dispute; that it was in the possession of Pundalik, the original mortgagor.

The Subordinate Judge awarded the plaintiff's claim, holding that the defendant was liable under his *kabuláyat* of 1866.

In appeal, the defendant contended that the *kabuláyat* was only for one year; that he was not liable under it for the years

1875

VENKATESH NÁRÁYAN PÁI v. KRISHNÁJI ARJUN,

in dispute, as he was not in possession of the land. The District Judge raised the issue whether the plaintiff was entitled to rent for the years in dispute. He found it in the negative, and rejected the plaintiff's claim. The following are his reasons:—

"The lease in 1866 was in terms for one year only. The plaintiff has twice sued the defendant for rent, and each time the defendant's answer has been that he was not in possession. Plaintiff has now for a third time sued defendant for three years' rent, and he has nothing to bring forward in support of his case, but the original *kabulâyat* of 1866 and the two previous decrees. He has not offered any evidence whatever as to the defendant having been in possession of the property. I certainly think that the conduct of the defendant in two former suits was ample notice to the plaintiff that defendant had ceased to be his tenant, and, therefore, he should have been prepared to show that defendant really was his tenant. He has not shown this. Defendant, on the other hand, called three witnesses to prove that he was not in possession. Of these, Pundalik, the original owner and mortgagor of the property, alone was examined by the Subordinate Judge, and he (Pundalik) states that he himself, and not the defendant, was in possession of the property in dispute for the years in suit. It does not appear to me that the Subordinate Judge is right in his view of the law. I, therefore, reverse his decision, and reject the plaintiff's claim with costs throughout."

The plaintiff appealed to the High Court.

G. N. Nádkarni for the appellant.—The defendant's plea, that he was not in possession, was not valid. He denied the *kabulâyat* in the present suit as he had done in the former ones. But it has been found proved in this, as it was in the former cases. The District Judge was wrong in allowing the defendant to contend that he was not liable under it. The Judge was legally bound to presume that so long as the defendant did not restore the land to the plaintiff, he (defendant) continued in possession as a tenant. The defendant's conduct in the previous suits was no notice to the plaintiff that he ceased to be a tenant. There is no evidence in the case that the defendant gave any notice to the plaintiff that he terminated his tenancy. The Judge wrongly laid

upon the plaintiff the burden of proving that the defendant had occupied the land for the years in dispute. He did not give proper legal effect to the decrees obtained by the plaintiff against the defendant in the former suits. The most material question in this case is whether the defendant has given a proper notice to the plaintiff that he (defendant) surrendered the land and terminated his tenancy.

Bhaíravnáth Mangesh for the respondent.

WEST, J.—The Assistant Judge has held in this case that the conduct of the defendant in the former suits was ample notice to the plaintiff that he had ceased to be his tenant. But the result of the former suits was to establish the fact for judicial purposes that Krishnáji's tenancy, or liability as a tenant, continued until March, 1870. By the terms of his lease he was to be liable until he restored the property to the lessor. He had, therefore, to show, as against the claim for rent, that he determined the tenancy by some intimation conveyed to the lessor, and put him in the way, if he desired it, of acting on that intimation by a re-entry on the premises. It does not appear that evidence has been put in this case either of notice given to the lessor or of an opportunity afforded to him of resuming possession of the land. If such notice was given, and such opportunity afforded, the plaintiff could not legally claim rent after the end of the year, and the attention of the Courts should have been directed to those essential points which, notwithstanding the irrelevant defence put forward by the defendant, were obviously the points on which the case must turn. We must reverse the decrees of the Courts below and remand the cause for retrial with reference to these remarks. Costs to follow.

Decrees reversed and case remanded.