1892.

ORIENTAL LOAN ASSOCIATION, LIMITED, v. GEORGE PELHAM HATCH.

was wrong in making this reference under section 617 of the Civil Procedure Code (Act XIV of 1882). For a reference under that section lies only where the decree is final. But this decree, which was sent for execution to Zanzibár, was not a final decree. It was a decree of a division Court against which there might be an appeal. And an order made in execution of that decree would be a decree under section 244 against which an appeal would lie. The question, therefore, ought not to have been referred.

SARGENT, C. J.:—The question referred by the Judge of the Consular Court is one arising in execution of a decree. But section 617 of the Code of Civil Procedure (Act XIV of 1882) only allows of a reference for the decision of this Court in the execution of a decree when the decree was final—which was not the case here. The Judge of the Consular Court must, therefore, decide the question for himself and dispose of the application for execution. The party aggrieved by it will then have his appeal to this Court. Costs to be costs in the case.

Order accordingly.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Chief Justice (Acting), and Mr. Justice Candy.

1892. *October* 7.

DATTA'TRAYA RA'YA'JI PÁI (ORIGINAL PLAINTIFF), APPELLANT, *v.* SHRIDHAR NA'RA'YAN PA'I (ORIGINAL DEFENDANT), RESPONDENT.*

Landlord and tenant—Tenant expending money on land with landlord's knowledge and consent—Standing by—Estoppel—Right of tenant on eviction to be recouped the money so expended—Buildings erected on land held under lease—Removal of such buildings.

The defendant entered into occupation of certain land with the permission of the plaintiff, who was the owner, and erected buildings and otherwise expended money upon it. The plaintiff and the defendant were relations and lived near each other. The plaintiff constantly visited the land and knew what the defendant was doing, but made no objection. Subsequently the plaintiff, being anxious to obtain from the defendant an acknowledgment of his (the plaintiff's) title, induced (but without misrepresentation or fraud) the defendant to sign a rent-note. The Court found that although this rent-note was, in terms, a lease for one year, yet the intention of the

* Second Appeal, No. 398 of 1891.

1892.

DATTÁTRAYA RA'YA'JI PÁ. v. SHRIDHAR NÁRÁYAN PÁI.

parties was not that the defendant should at the expiration of the year, or on any subsequent demand, hand over to the plaintiff the land with the buildings which had been erected by the defendant with the plaintiff's implied consent, without being recouped for the expenditure thus incurred; that subsequently to the execution of the rent-note the defendant had erected other buildings, and that the plaintiff knew of this, and made no objection.

Held, that the plaintiff could not recover possession of the land, or require the removal of the buildings, without recouping the defendant the money he had expended. The plaintiff was estopped from denying the claim of defendant. He had stood by in silence while his tenant had spent money on his land.

THIS was a second appeal from the decision of H. Batty, Acting District Judge of Ratnágiri.

The plaintiff sued to recover from the defendant certain land with arrears of rent for three years. He alleged that the said land formed part of his Inámat Mirache Bág, and that he had let it to the defendant under a rent-note dated 12th April, 1881, for one year; that after the expiration of that period the defendant continued to occupy it with his (the plaintiff's) consent, and had erected buildings upon it; that he had subsequently requested the defendant to remove the buildings and to give up the land, but the defendant refused.

The defendant answered *(inter alia)* that the rent-note sued on had been obtained by the plaintiff through misrepresentation. He denied that he was a yearly tenant of the plaintiff and alleged that he was a joint owner of the land with the plaintiff. He stated that he had built two houses and a stable and had sunk a well on the land with the knowledge of and without objection from the plaintiff, who was, therefore, estopped from requiring the removal of the buildings. He admitted that the stable was erected after the execution of the rent-note sued on, but stated that the other buildings had been erected previously. He contended that the plaintiff was not entitled to possession unless he paid the value of the buildings.

The Subordinate Judge found that the rent-note sued on had not been obtained by any misrepresentation or fraud on plaintiff's part, and he allowed the claim for possession and arrears of rent, with liberty to the defendant to remove the buildings from the land.

1892.

DATTÁTRAYA RA'YÁJI PÁI v. SHRIDHAR NA'RÁYAN PÁI.

The defendant appealed, and the Acting District Judge varied the decree by declaring the plaintiff to be entitled to possession and removal of the buildings only on payment to defendant of Rs. 1,200, the approximate cost of the buildings. In his judgment the District Judge observed :—

"Defendant's witnesses allege that the house was built a long time previous to the rent-note, and the variations and uncertainty among the plaintiff's witnesses render this not improbable. The bare fact of the value of these buildings seems to this Court to render it very improbable that defendant would have erected them *after* he had not only received a warning from plaintiff, but had consented to execute a *kabuláyat*. It is difficult to believe that defendant would expend, as plaintiff's witnesses admit, as much as Rs. 3,000 on land which defendant knew was not his, unless "in the hope or encouragement" by the real owner that he would be allowed to remain in possession long enough to get a return on his expenditure. Plaintiff, in the circumstances of the case, being near at hand and constantly visiting the spot must have known of the erection of these buildings, as would appear from witnesses adduced on his behalf, yet he took no objection. If the buildings were subsequent to the rent-note (which plaintiff says was intended to prevent unauthorized buildings) then the plaintiff's acquiescence would in the case of buildings of such value be evidence of implied contract.

* * In the present instance the land does not appear to have been available for agricultural purposes. The buildings were not of a temporary nature, but included a dwelling-house and a well. The works were going on under the plaintiff's eyes. He knew that they were going on, and watched their progress. He took no objection. They were not easily removable. He could not suppose that defendant meant them to be only temporary. They lasted at least for eight years and yet plaintiff did not insist on defendant's giving up the land (cf. 17 W. R., 467). There was not space available for agriculture. And though it seems that, if they were erected after the execution of the rent-note, defendant could only have acted on the belief, which plaintiff did not by any proved objection or notice of ejectment disturb, that there was no intention to prevent their erection. If

the buildings were, as defendant alleges, erected before the rent-note was passed, then it would seem that before the defendant recognised the plaintiff's title, plaintiff had allowed him to complete those buildings without raising objection, and the acquiescence and the implied consent of the plaintiff would estop him from asking their removal without giving full compensation (6 Bom. H. C. Rep. 80, and 15 W. R., 161)."

The plaintiff preferred a second appeal.

Dáji A'báji Khare for the appellant (the plaintiff):—The Judge has not distinctly found the date at which the buildings were erected by the defendant, and has held that the plaintiff is estopped because he stood by when those buildings were erected. But the mere standing by does not create an estoppel—*Shiddhesvar* v. *Rámchandraráv* (1); *Onkarápá* v. *Subáji Pándurang* (2); *Basawantapa* v. *Rámu* (3). *Ramsden* v. *Dyson* (4) is in the plaintiff's favour. The lower Court ought to have found as a fact whether the plaintiff did encourage the defendant to erect the buildings. A tenant is bound to give back the land to his landlord in the same condition in which it was when he entered upon it.

Mánekshá J. Taleyárkhán for the respondent:—The plaintiff's case was that the defendant built upon the land after the execution of the rent-note, but the lower Court has not placed any reliance upon this contention. We say that when a landlord stands by and allows his tenant to erect a substantial building on his land, he cannot subsequently insist upon the tenant's removing the building. He is estopped. In such cases the landlord is entitled only to compensation—*Banee Madhub* v. *Joy Kishen* (5). The effect of the lower Court's finding is that the defendant built upon the land in the *bonâ fide* belief that the plaintiff would allow the buildings to stand. It is true that when a person wrongfully builds upon another man's land, he should be compelled to remove the buildings; but here the defendant cannot be said to have built wrongfully. It is important to remember that the parties are not strangers to each other. They

(1) I. L. R., 6 Bom., 463.
(2) I. L. R, 15 Bom., 71.
(3) I. L. R., 9 Bom., 86.
(4) L. R. 1 H. L. at p. 170.
(5) 12 Cale W. R., 495.

1892.

DATTÁTRAYA RA'YÁJI PÁI v. SHRIDHAR NÁRÁYAN PÁI.

belong to the same family and live close to each other. In his written statement the defendant says that he *bonâ fide* believed that the land belonged jointly to him and to the plaintiff.

Dáji Ábáji Khare in reply:—Even supposing that the defendant erected the houses before the execution of the rent-note, still the very fact that he executed the rent-note ought to have put him on his guard and ought to have prevented him from erecting any new building afterwards. When he passed the rent-note he then at all events became aware that he was merely a tenant, and ceased to labour under a mistake as to his title to the land. If he erected the buildings after the passing of the rent-note, then there is no equity in his favour—*Pilling* v. *Armitage* (1); *Plimmer* v. *Mayor, &c., of Wellington* (2).

CANDY, J.:—We think that the District Judge must be taken as having found that the defendant entered into occupation of this land with the permission of the plaintiff; that while he was thus in possession he erected a house at a cost of Rs. 500, and built a well at a cost of Rs. 200; that the plaintiff being a relative of the defendant, and living close at hand, and constantly visiting the spot, knew of the building of the house and well, yet took no objection; that subsequently the plaintiff being anxious to obtain from the defendant an acknowledgment of his (the plaintiff's) title to the land, induced the defendant to sign the rent-note of 12th April, 1881; that in this there was no misrepresentation or fraud on the part of the plaintiff, but that, though the rent-note was, in terms, a simple lease of the land with trees for one year, the intention of the parties could not have been that the defendant should at the expiration of the year, or on any subsequent demand, hand over the land with the buildings, which had been made by defendant with the implied assent of the owner of the land, without being recouped for the expenditure thus incurred; that subsequently to the execution of the rent-note the defendant had erected a "manger" (stable) on the land at a cost of Rs. 500, and that the plaintiff knew of the erection of this building, but made no objection. On these facts the District Judge found that the plaintiff was estopped from denying the

(1) 12 Vesey, 78. (2) 9 App. Cas., 699 at p. 711.

1892.

DATTA'TRAYA RA'YÁJI PÁI v. SHRIDHAR NÁRÁYAN PÁI.

claim of the defendant to be recouped the expenditure incurred on the buildings, which must have been built in the hope or encouragement from the landlord. He, therefore, declared the plaintiff entitled to possession and removal of the buildings only on payment to defendant of Rs. 1,200.

We think that the facts thus found by the District Judge do bring the case within the principles as explained by Lord Kingsdown in *Ramsden* v. *Dyson*[1], and subsequently expounded by the Privy Council in *Plimmer* v. *Mayor, &c., of Wellington*[2]. Here there are special circumstances—the near relationship of the parties, their residing in close vicinity to each other, their ownership of the surrounding lands—pointing to the presumption that the plaintiff by his conduct sanctioned the construction of the building and well, and afforded hope and encouragement to the defendant that he would be allowed to remain in peaceable possession of the same, or at least would not be ejected without a reasonable return for the expenditure incurred by him.

We think, therefore, that the present case is one in which an equity can be claimed, because the landowner has stood by in silence, while his tenant has spent money on his land; and as there is no dispute as to the way in which the equity should be satisfied, we confirm the decree of the District Judge with costs.

Decree confirmed.

(1) L. R., 1 H. L., at p. 170. (2) 9 App. Cas. at p. 710.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice and Mr. Justice Candy.

1892. *October* 12.

NA'RA'YAN LAKSHMAN (ORIGINAL PLAINTIFF), APPELLANT, *v.* BA'PU VALAD HAIBATRA'V AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Registration—Vendor and purchaser—Priority—Notice—Possession—Subsequent purchaser with notice obtaining possession and paying off mortgage—Right to recover sum applied in paying off mortgage.

The plaintiff sued to recover land purchased by him in 1886 from the first defendant, and which was in possession of defendants Nos. 2, 3 and 4. The conveyance to

* Second Appeal, No. 470 of 1891.