1891.

SUBHÁNA v. KRISHNA.

scribed time, the plaintiff became foreclosed and the land passed to the defendant as absolute owner, and the defendant is, therefore, now entitled to the possession thereof—*Ladu Chimáji* v. *Bábáji Khanduji*[1]. The decree in execution of the Assistant Judge must be reversed and that of Subordinate Judge restored, with costs on the respondent throughout.

Order reversed.

(1) I. L. R., 7 Bom., 532.

APPELLATE CIVIL.

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

1891.

January 27.

NA'RA'YANBHAT BIN BA'LAMBHAT AND ANOTHER, (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* DAVLATA BIN MYRALJI AND OTHERS, (ORIGINAL DEFENDANTS), RESPONDENTS.*

Landlord and tenant—Tenure in perpetuity, proof of—Long possession at an invariable rent—Local usage.

A tenure in perpetuity cannot be established merely by evidence of long possession at an invariable rent, unless it appears that such tenancy may be so acquired by local usage.

Bábáji v. *Náráyan*(1) referred to.

THIS was a second appeal from the decision of M. H. Scott, District Judge of Sátára.

Suit to recover possession of land with mesne profits.

The plaintiffs Náráyanbhat and Harbhat sought to recover possession of a certain field with mesne profits, alleging that the field belonged to them and was let out to the forefathers of the defendants on condition they should pay two-thirds of the produce thereof on account of rent; that owing to the defendants' neglect the land yielded a smaller amount of produce than it ought to yield; that they had served the defendants with a notice to pay rent at a higher rate, and that the defendants declined to comply with the notice.

The defendants Davlata and Dhondi and others pleaded *(inter alia)* that the land was their *mirás*, and that the plaintiffs had no

* Second Appeal, No. 130 of 1890.

(1) I. L. R., 3 Bom., 340.

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right either to enhance the rent, or to recover the land and the trees standing thereon.

The Court of first instance (Ráo Bahádur Jayasatyábodhráo Tirmalráo, First Class Subordinate Judge) found that the defendants had not proved their *mirási* right to the land in dispute, and that the plaintiffs had not adduced evidence strong enough to entitle them to enhance the rate of rent as claimed. The Subordinate Judge on these grounds rejected the plaintiffs' claim. Both the parties appealed to the District Court, which held that the land was the defendants' *mirás*, and amended the decree of the lower Court by making a declaration to that effect; in other respects the decree was confirmed.

In his judgment the District Judge remarked :—

"Plaintiffs admit that the defendants and their ancestors have held the land for upwards of seventy years. They have failed to prove that the rent has varied, or that defendants are liable to ejectment. The Subordinate Judge finds that the defendants have always paid two-thirds of the produce as rent to plaintiffs, but as the value of the two-thirds varied, he takes that the rent varied. I cannot concur in this. Defendants paid a fixed proportion, and it makes no difference that the cash value of the payment in kind varied. The agreement between the parties remained the same."

Against the decree of the District Court, the plaintiffs appealed to the High Court.

Ganesh Rámchandra Kirloskar for the appellant :—This case involves a mixed question of law and fact. We contend that the defendants are not the *mirásdárs* of the land. The very fact that two-thirds share of the produce was given to us, shows that there was an agreement to recover rent by *wátá*. There are circumstances in the case to show that the defendants are our *wátekari* tenants. The fact that the defendants always paid the same share of the produce, would not make the land their *mirás*—*Bái Ganga* v. *Dullabh Parág*[1]; *Endar Lála* v. *Lallu Hari*[2]; *Náráyan Visáji* v. *Lakshuman Bápuji*[3]. Section 83 of the Land Revenue Code (Bombay Act V of 1879) is not applicable

(1) 5 Bom. H. C. Rep., A. C. J., 179. (2) 7 Bom. H. C. Rep., 111.
(3) 10 Bom. H. C. Rep., 324.

to the present case, because there was a time when the land in dispute was held by persons other than the defendants as our tenants, and because there is no evidence in the case as to local usage with respect to perpetual tenancy—*Bábáji* v. *Nirávan*[1].

Vásudeo Rámchandra Joglekar for the respondent:—The land has been in our holding for upwards of seventy years without any variation in rent. At the time we entered upon the land, the amount of rent could not be definitely fixed, because the land was not then arable. The agreement between the parties as to the amount of rent to be paid has up to this time remained unchanged, and there was no attempt made by the plaintiffs, or their ancestors, either to enhance the rent or to eject us. These circumstances afford a sufficient indication as to the intention of the parties. We have held the land at a fixed rent for a long time; we, therefore, submit that we hold the land as *mirási* tenants, and that the plaintiffs have no right to evict us so long as we pay the fixed rent.

SARGENT, C. J.:—Both Courts have assumed that the tenure in perpetuity, as alleged by defendants, could be established by merely long possession at an invariable rent. This is opposed to the rulings of this Court, unless it appears that it may be so acquired by local usage—*Bábáji* v. *Náráyan*[1]. It is also worthy of remark that the fixed rent in this case was not in cash or a fixed amount of grain, but a fixed share of the produce.

We must, therefore, as was done in the above case, reverse the decree and send back the case for a fresh trial on the merits, with power to take fresh evidence. Costs of this appeal to abide the result.

Decree reversed.

(1) I. L. R., 3 Bom., 340.