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another legal character, and that such legal character makes this or that provision of the limitation law applicable to it, we are not to be understood by this judgment as to the provision *primâ facie* applicable to pronounce in any way conclusively upon the nature of the cause as it may become apparent upon a full examination of the merits.

Order confirmed.

APPELLATE CIVIL.

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

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PURSHOTAM BA'PU, (ORIGINAL PLAINTIFF), APPELLANT, *v.* DATTA'TRAYA RA'YA'JI AND OTHERS, (ORIGINAL DEFENDANTS), RESPONDENTS.*

Landlord and tenant—Tenant setting up a permanent lease—Notice to quit —Ejectment suit.

The plaintiff sued for possession of certain land which had been demised to him by the first defendant. The fourth defendant set up a previous purchase from the third defendant, who, he alleged, was a permanent lessee from the first defendant's father, and he contended *(inter alia)* that his vendor not having been served with a notice to quit, he could not be ejected. The lower Appellate Court held that the plaintiff could sue the defendant No. 1 only for specific performance, and could not eject the former tenants with or without notice. On appeal by the plaintiff to the High Court, it was contended for him that the defendant No. 4, having set up a permanent lease, had denied the landlord's title, and was not, therefore, entitled to any notice to quit.

Held, confirming the lower Appellate Court's decree, that the plaintiff could not recover, in ejectment, without previous notice to quit. By his statement, that his alienor (defendant No. 3) was a permanent tenant and had not received notice to quit, the defendant pleaded an alternative defence he was entitled to make, and could not, therefore, be regarded as having consented to the contract of yearly tenancy, (which was alleged by the plaintiff), being treated as cancelled.

THIS was a second appeal from the decision of G. Jacob, Acting Assistant Judge of Ratnágiri.

On the 2nd December, 1882, the plaintiff obtained from the first defendant a permanent lease of the land in dispute, alleged to have been in possession of the second and third defendants as yearly tenants under a former lease of 1838. The plaintiff brought the present suit to obtain possession. The first defendant admitted the lease, and did not object to the delivery of possession. The

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second defendant did not dispute the plaintiff's right; the third defendant did not appear; but the fourth defendant alleged that in 1842 he had purchased the land from the third defendant, who had represented himself to be a permanent lessee from the first defendant's father. He contended *(inter alia)* that the first defendant had no right to lease it to the plaintiff; that the defendant No. 3 was not a yearly tenant; and that no notice to quit was served on his vendor (defendant No. 3).

The Subordinate Judge of Málvan held the permanent lease to the third defendant proved, and disallowed the plaintiff's claim to that extent.

Cross appeals were filed by the defendant No. 4 and the plaintiff, and the Assistant Judge held that the lease enabled the plaintiff to sue the defendant No. 1 for specific performance by putting him in possession, but gave him no right to eject his tenants with or without notice.

The Assistant Judge made the following remarks :—" * * * * * Defendant No. 4 occupies the position of a yearly tenant with respect to the defendant No. 1 (leaving out of sight at present the ulterior question of the permanent tenancy), and has admittedly been in occupation accordingly for ten years. He is, therefore, entitled to a six-months' notice to quit, which has not been given in this case. The six months must expire before the institution of the suit, and, moreover, the notice must be given by the landlord, not by a subsequent lessee, as is the plaintiff: so that the verbal notice, spoken of by witnesses 51 and 52, is of no avail. The plaintiff, moreover, has no cause of action as against any of the defendants, except No. 1. The latter only constituted the plaintiff his tenant by exhibit 93, and did not convey to him his right as landlord. The plaintiff, therefore, might have sued the defendant No. 1 for specific performance by giving notices to quit and putting him in possession, but he has no right to eject former tenants in occupation with or without notice. It is not, therefore, necessary to enter into the merits of the case. I confirm the decree of the lower Court in so far as a portion of the plaintiff's claim is rejected, and reverse the remainder of the decree, *i.e.*, I reject the plaintiff's claim *in toto*."

The plaintiff preferred a second appeal to the High Court.

Mánekshá Jehángirshá for the appellant:—The defendant could be ejected without notice. By setting up permanent tenancy he denied the landlord's title, and a notice was not, therefore, necessary. See *Bábá* v. *Vishvanáth Joshi*(1); *Shanoba* v. *Bálya*(2); *Gopálráv* v. *Kishor Kálidás*(3).

Ghanashám Nilkanth Nádkarni for the respondents:—The defendant was entitled to six months' notice. His transferor even had no notice. He could not, therefore, be sued in ejectment without previous notice to which he was entitled—see *Rámchandra Appáji Angal* v. *Dowlatji*(4); *Hari Yámáji Kábádi* v. *Rámabai*(5); *Abdálla Rawutan* v. *Subbarayyar*(6); *Báláji Sitárám* v. *Bhikáji Soyare*(7); *Chaturi Sing* v. *Makund Lall*(8). By setting up a permanent lease the defendant did not deny the yearly tenancy which the plaintiff also has admitted.

SARGENT, C. J.:—This is a suit to recover possession of certain lands alleged to have been demised to the plaintiff by the owner, the first defendant, on a permanent lease, dated 2nd December 1882. The defendant No. 4 claims as purchaser from the defendant No. 3, who, he said, held the land under a permanent lease granted to his father by the defendant No. 1 in 1842. The plaintiff's lease was not in dispute; but the Assistant Judge held it only enabled him to sue the defendant No. 1 for specific performance by putting him in possession, and gave him no right to eject his tenants; but, in any case, the Assistant Judge held that the defendant No. 3 had not received legal notice to quit.

Exhibit 93, on which the plaintiff bases his claim, is not an agreement for a lease, but an actual demise in perpetuity of the land in question, described as being then in the occupation of the defendants Nos. 2 and 3 as yearly tenants, to whom notice to quit, it was stated, had been given. Assuming, therefore, that the proper notice had been given, or that it was not requisite, the plaintiff could sue in ejectment as being entitled to the possession.

(1) I. L. R., 8 Bom., 228.
(2) Printed Judgments for 1873, p. 66. I. L. R., 9 Bom., 527.
(3) Printed Judgments for 1880, p. 10.
(5) Printed Judgments for 1880, p. 25.
(6) I. L. R., 2 Mad., 346.
(7) I. L. R., 8 Bom., 164.
(8) I. L. R., 7 Calc., 710.

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The Assistant Judge has found that the notice was not given; but it has been contended before us that it was not necessary, owing to the defendant's having set up a permanent lease in his defence; and the case of *Bábá* v. *Vishvanáth Joshi*[1] was relied on in support of that contention. On the other hand, the cases of *Rámchandra Appáji Angal* v. *Dowlatji*[2], *Hari Yámáji Kálbádi* v. *Rámábái*[3], and *Abdulla Rawutan* v. *Subbarayyar*[4] were cited by the defendants.

It is doubtless difficult to reconcile those cases. However, in *Bábá* v. *Vishwanáth Joshi* the Court would appear to have held that notice was not necessary, on the ground that, by setting up a permanent lease, the defendant had virtually authorized the plaintiff to treat the yearly tenancy as rescinded. It is not necessary to express an opinion on that view of the rights of the parties in the general case, as here the defendant No. 4, who is the real defendant, having purchased the third defendant's interest, not only alleged by his written statement that his alienor was a permanent tenant, but also that the defendant No. 3 had not received legal notice to quit; meaning, that, even if he were only a yearly tenant, as alleged by the plaintiff, the latter had not given him the legal notice, and could not recover in ejectment. Having thus pleaded an alternative defence, as he was entitled to do, the defendant cannot, we think, be regarded as having consented to the contract of yearly tenancy being treated as cancelled.

We must, therefore, confirm the decree with costs.

Decree confirmed.

(1) I. L. R., 8 Bom., 228.
(2) Printed Judgments for 1880, p. 10.
(3) Printed Judgments for 1880, p. 25.
(4) I. L. R., 2 Mad., 346.