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We submit that the lower Court's order is correct and legal under the original sanction.

SARGENT, C. J.:—We cannot agree with the Subordinate Judge that the sanction of the Court to the respondent's proceeding with his suit included a sanction to execute the decree when passed in the suit. The execution of a decree is included in the term "proceedings," as Sir G. Jessel says in *In re Artistic Colour Printing Company*(1) when construing the word "proceedings" in the corresponding sections 85 and 87 of the English Companies' Act of 1862; and the language of section 87 and of section 136 of the Indian Act of 1882 shows that the proceeding with a "proceeding" is regarded as distinct from the proceeding with a suit for the purpose of that section. Moreover, it is obvious that there is an important practical distinction between the proceeding with a suit and the proceeding to enforce execution of the decree as regards the effect on the winding up of a company. We must, therefore, discharge the order of the Court below and reject the application, with costs throughout on respondent.

Order discharged.

(1) 14 Ch. D., 502, at p. 505.

APPELLATE CIVIL.

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

1891. November 30.

KA'LIDA'S LA'LDA'S AND OTHERS, (ORIGINAL PLAINTIFFS), APPELLANTS, v. BHA'LJI NA'RA'N, (ORIGINAL DEFENDANT No. 3), RESPONDENT*.

The Land Revenue Code (Bombay Act V of 1879), Sec. 83—Tenancy not more than forty years old—Tenancy not permanent.

Section 83 of the Land Revenue Code (Bombay Act V of 1879) is applicable only when the evidence as to the commencement and duration of the tenancy is not forthcoming by reason of its antiquity, which, in the case of a tenancy at most only forty years old, there is no reason for presuming will be the case.

THIS was a second appeal from the decision of Venkatráo R. Inámdár, Acting Joint Judge, Ahmedabad.

This action was instituted by the plaintiffs to recover possession of a three-fourths share in a certain field, with mesne profits, alleg-

* Second Appeal, No. 720 of 1890

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ing that they and defendants Nos. 1 and 2, Kushál Ichhábhái and Chhana Ichhábhái, were sharers therein; that the field was leased to defendant No. 3, Bháiji Náran, on condition of his paying separate rent to the sharers according to their shares; that in the year 1881 a notice was sent to him not to cultivate the field without the plaintiffs' permission, otherwise he would be liable to pay enhanced rent; that the defendant failed to comply with the notice, and hence the suit.

Defendants Nos. 1 and 2, Kushál Ichhábhái and Chhana Ichhábhái, did not dispute the plaintiffs' claim, and for themselves claimed a one-fourth share in the field.

Defendant No. 3 pleaded *(inter alia)* that the whole field belonged to him, and had been in his possession from the time of his ancestors.

The Subordinate Judge (Ráo Sáheb Ranchodlál K. Desái) held the tenancy of defendant No. 3 proved, and allowed the plaintiffs' claim.

Defendant No. 3 appealed to the District Court, and the Assistant Judge (G. Jacob) held that the tenancy was not established, and that the claim was time-barred. He, therefore, reversed the Subordinate Judge's decree and rejected the claim.

Against the decree of the District Court the plaintiffs appealed to the High Court. The High Court, holding that the Assistant Judge had omitted altogether to notice Exhibit 28 in the case, which amounted to an admission of the tenancy, reversed the decree and sent back the case for a fresh decision.

On remand the District Court found that defendant No. 3 was a permanent tenant, and on that ground again reversed the decree of the Subordinate Judge.

The following is an extract from the District Judge's judgment:—

"No evidence is produced to prove the nature of defendant No. 3's tenancy, and beyond the mere facts that he and his family have been cultivating the land in question for a number of years and have been paying rent for it, there is nothing to show when their

(1) P. J. 1888, p. 368.

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tenancy began, when it is to terminate, and what are its conditions. In the absence of any such evidence the presumption is that the tenancy is co-extensive with the plaintiffs' own title (*vide* section 83 of Bombay Act V of 1879,(1)) *i.e.*, a permanent tenancy as against them * * * * *."

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

Nagindás Tulsidás Marphatea (with *Gokuldás Kahandás Párekh*), for the appellants:—The burden of proof lay upon the respondent to show that his tenancy was in any way better than an annual tenancy. When a tenancy is set up, the natural presumption is that it is annual. Section 83 of the Land Revenue Code (Bombay Act V of 1879), which is relied upon by the lower Court, does not help the respondent, because the evidence in the case shows that his tenancy began in the year 1845, and the present suit was filed in the year 1882. Therefore the tenancy is not one of such antiquity as that section contemplates—*Bái Ganga* v. *Dullabh Prag*(2); *Náráyanbhat* v. *Davlata*(3).

There was no appearance for the respondent.

SARGENT, C. J.:—We think the Acting Joint Judge was wrong in applying section 83, Bombay Act V of 1879, to the defendant No. 3's tenancy. That section is only applicable when the evidence as to the commencement and duration of the tenancy is not forthcoming by reason of its antiquity. Here the evidence showed that the tenancy was not more, at the utmost, than forty years old, and afforded no reason for supposing that the evidence as to its commencement or duration was not forthcoming on that account. The lower Court should, therefore, have led

(1) *Section* 83:— * * * * * *

And where by reason of the antiquity of a tenancy, no satisfactory evidence of its commencement is forthcoming, and there is not any such evidence of the period of its intended duration, if any, agreed upon, between the landlord and tenant, or those under whom they respectively claim title, or any usage of the locality as to duration of such tenancy, it shall, as against the immediate landlord of the tenant, be presumed to be co-extensive with the duration of the tenure of such landlord and of those who derive title under him.

(2) 5 Bom. H. C. Rep., A. C. J., 179. (3) I. L. R., 15 Bom., 647.

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that the permanent tenancy, as alleged by defendant No. 3 was not proved, and we must reverse the decree and substitute that of the Subordinate Judge.

Appellants to have their costs.

Decree reversed.

APPELLATE CIVIL.

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

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December 17

IRA'PA BIN MA'LA'PA NÁIK, (ORIGINAL PLAINTIFF), APPELLANT, *v* ÁPA'SÁHEB IRBASÁPA DESÁI, (ORIGINAL DEFENDANT), RESPONDENT.*

Act XI of 1852, *Sec.* 7—*Suit for a declaration—Kadim náik—Inámdár of the village—Government not a necessary party—Jurisdiction.*

In a suit for a declaration that the plaintiff was the *kadim náik* of a particular village and that the defendant, who was the *inámdár* of the village, was not entitled to levy any contribution from the plaintiff in respect of the sum which the defendant had to pay to the Government as agreed upon between him and the Government, the lower Court dismissed the claim for want of jurisdiction under section 7 of Act XI of 1852, and for non-joinder of Government as a party.

Held, reversing the decree of the lower Court, that the question involved in the case being whether the plaintiff was a *kadim náik* as regards the defendant the suit was not barred by section 7 of Act XI of 1852, the object of which is confined to providing a summary mode of disposing of claims to exemption from payment of the revenue as against Government.

Held, further, that Government was not a necessary party to such a suit.

THIS was a second appeal from the decision of T. Hamilton, Acting District Judge of Belgaum.

Suit for a declaration.

The plaintiff, Irápa bin Málápa Náik, alleged that he was the *kadim vatandár náik* of the village of Mutvád; (that is, the grant of the *náik vatan* to his ancestors was anterior to the grant of the village in *inám* to the ancestors of the defendant); that he was liable to pay to the Government only the *mámul jud* (customary quit-rent) on his *vatan* lands; that the defendant Ápásáheb Irbasápa Desái, by false representation before the Inám Commission and without the knowledge of the plaintiff, got his name entered as *jadid* (subsequent) *vatandár* in Government records; and that plaintiff having become aware of his rights in

* Second Appeal, No. 309 of 1890.