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order. In the present case the plaintiff alleges that he was wrongfully dispossessed by the defendant on the 10th of October, 1900. He filed his suit in the Mámlatdár's Court on the 6th of March, 1901. Taking it as an ordinary case, not hampered by an order under section 145 of the Code of Criminal Procedure, the plaintiff would have to prove that he was wrongfully dispossessed within six months before the 6th of March, 1901. His allegation that he was in possession on and till the 10th of October, 1900, if proved, would entitle him to a decree. But, it is said, the Magistrate's finding under section 145 comes in his way. The answer to that is that, assuming it to be a conclusive finding which cannot be re-opened in any civil litigation, it is conclusive only to the extent that the defendant was in possession on the 20th of October, 1900, and has been since then in possession. Section 145 did not empower the Magistrate to find who was in possession before that. He could only go into that question incidentally for the purpose of finding who was in possession at the date of his order. It is, therefore, competent to the Mámlatdár to decide whether the plaintiff was in possession before the 20th of October, 1900.

I would, therefore, make the rule absolute and send back the case to the Mámlatdár for disposal according to law. Costs, in my opinion, should abide the result.

Rule made absolute. Case remanded.

APPELLATE CIVIL.

Before Mr. Justice Fulton and Mr. Justice Chandavarkar.

1901, *December* 17.

GANOO AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* SHRI DEV SIDHESHWAR AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Landlord and tenant—Ejectment—Notice to quit—Necessity of proving service of proper notice to quit—Land Revenue Code, Bombay Act V of 1879, section 84—Issues to be raised by the Court—Practice—Procedure.

The plaintiffs sued to eject the defendants from certain land, alleging that they were yearly tenants. The defendants (*inter alia*) pleaded that they were

* Second Appeal No. 257 of 1901.

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permanent tenants. The plaintiffs at the hearing did not prove service of notice to quit as required by section 84 of the Land Revenue Code (Bombay Act V of 1879), but contended that service of notice was admitted by the defendants in their written statement.

Held, that the defendants in their written statement, although not expressly denying the receipt of a notice, disputed its legality, and thereby threw on the plaintiffs the burden of proving the service of a proper notice. No such proof was given. Consequently, even assuming that the defendants were yearly tenants, the plaintiffs had not proved the termination of the tenancy or their right to recover possession.

The fact that no issue is raised as to matters which the plaintiff is bound to prove does not justify the inference that the defendant intends to admit them. The duty of raising issues rests under the Civil Procedure Code with the Court.

SECOND appeal from the decision of G. D. Madgaonkar, Assistant Judge of Ratnágiri, amending the decree passed by Ráo Sáheb V. N. Bhide, Joint Subordinate Judge of Vengurla.

Suit for possession and rent.

The plaintiffs alleged that they were managers of certain property belonging to certain deities. They filed this suit as such managers to recover possession of certain land from the defendants, whom they alleged to be yearly tenants. They stated that they had given the defendants "notices in writing for terminating their living."

The defendants denied that they were yearly tenants and claimed to hold the land in question as permanent tenants. They further pleaded "that plaintiffs had no right to give a notice to terminate the tenancy, and that it was not a proper and legal notice."

The Subordinate Judge held that the plaintiffs were not entitled to recover possession, but awarded the rent only.

On appeal by the plaintiffs the Assistant Judge varied the decree and awarded possession to the plaintiffs.

The defendants appealed to the High Court.

N. V. Gokhale for the appellants (defendants) :—The plaintiffs have not proved service of a proper notice to quit. The objection as to want of due notice was taken in the written statement, and it can be raised in second appeal: *Dodhu* v. *Madhavrao*.[1]

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H. C. Coyaji for respondents (plaintiffs):—The defendants in their written statement admit the receipt of notice. They contend that it was not a proper notice. It was, therefore, for them to produce the notice that was served upon them and to show that it was not a legal notice. They raised no issue on the point. They have waived the objection to it and cannot take the point now.

FULTON, J.:—Under section 50 of the Civil Procedure Code the plaintiffs were bound to state the cause of action and where and when it arose, and they were, therefore, under the necessity of setting forth in their plaint the precise nature of the notice to quit on which they relied and the date on which it was given. The defendants in their written statement, while not expressly denying receipt of a notice, disputed its legality, and thereby threw on the plaintiffs the burden of proving the service of a proper notice according to the requirements of section 84 of the Land Revenue Code. No such proof, however, has been given. Consequently, even on the assumption that the defendants are annual tenants, the plaintiffs have not proved the termination of the tenancy or their right to resume possession.

Mr. Coyaji contended that as no issue was raised on this point in the Court of first instance the defendants must be deemed to have waived it. We cannot, however, accept this contention. In *Dodhu* v. *Madhavrao*[1] this Court has held that in an ejectment suit the objection of want of notice is fatal even if taken for the first time in second appeal. With this decision we entirely concur. Waiver implies a conscious assent, and it seems unlikely that the defendants intended to admit the sufficiency of the notice. But however that may be, there is no proof of any such admission which cannot be inferred from the omission to ask the Court to raise an issue. The duty of raising issues rests under the Code of Civil Procedure on the Court, and it would be unsafe to presume from the failure of the Court to raise the necessary issues an intention of the defendant to admit the facts which the plaintiff was bound to prove. Such a presumption would in many cases be manifestly contrary to fact. As the law

(1) (1893) 18 Bom. 110.

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about necessity of proof of notice has been clearly laid down by this Court, there would seem no hardship in insisting on its observance even if we had the power to dispense with it. But we have no such power. The plaintiff when he files his suit must allege the cause of action in the manner prescribed in section 50, and must prove the necessary allegations in so far as they are not admitted by the defendant.

In these circumstances, without expressing any opinion as to the nature of the defendants' tenure, we must reverse the decree of the lower Appellate Court and restore that of the Subordinate Judge, with costs of both appeals on the plaintiffs.

Decree reversed.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

1902. *January 6.*

KUNDANMAL (ORIGINAL DEFENDANT), APPELLANT, v. KASHIBAI (ORIGINAL PLAINTIFF), RESPONDENT.*

Mortgage—Mortgagee in possession—Redemption—Accounts—Mode of taking accounts.

A mortgagor seeking to redeem must prove how much of the debt and interest has been repaid.

The duty of a mortgagee in possession is to keep a full, true and accurate account of the actual receipts and disbursements.

In taking accounts between a mortgagor and mortgagee, the Judge must decide as to the accuracy or otherwise of the accounts presented to him by the parties, and it is upon these accounts and the evidence before him in the case that he must find the amount payable on redemption.

SECOND appeal from the decision of A. Lucas, District Judge of Ahmednagar, modifying the decree of Ráo Sáheb G. K. Kanekar, Subordinate Judge of Nevása.

Suit for redemption and possession.

The plaintiff filed this suit in the year 1898 to redeem and recover possession of certain land, alleging that it had been mortgaged in September, 1874, by her deceased husband to the defendant's father for Rs. 445-8-0 at 10 annas per cent. per

* Second Appeal No. 232 of 1901.