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The Subordinate Judge's opinion on the point being in the negative he dismissed the *darkhást*, contingent on the decision of the High Court.

SARGENT, C. J. :—We agree with the ruling of the Full Bench of Calcutta in *Ambica Pershad Singh* v. *Surdhari Lál*[1], and for the reasons given, that an application to the Court to order the sale of property which has been attached is an application to take some steps in aid of execution; and as the Code does not require a formal application, it is immaterial whether the application be a verbal one or in writing.

Order accordingly.

(1) I. L. R., 10 Calc., 851.

APPELLATE CIVIL.

Before Mr. Justice Telang and Mr. Justice Candy.

VITHU AND ANOTHER, (ORIGINAL DEFENDANTS NOS. 1 AND 2), APPELLANTS, v. DHONDI, (ORIGINAL PLAINTIFF), RESPONDENT.*

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Landlord and tenant—Ejectment—Notice to quit—Notice under Section 84 *of Bombay Act V of* 1879*—Plea of permanent tenancy—Plea raised for the first time in defendant's written statement in ejectment suit—Disclaimer of landlord's title—Objection of want of proper notice raised first in second appeal—Second appeal—Practice.*

The plaintiff sued to eject the defendants as tenants holding over after notice to quit. The notice required the defendants to vacate within eight days. The defendants pleaded that they were *mirási* or permanent tenants. This plea was not proved. The Court of first instance passed a decree awarding immediate possession. The appellate Court held that although the notice to quit was not according to section 84 of the Bombay Land-Revenue Code (Bombay Act V of 1879), still as the suit was brought long after the expiry of the proper period, the plaintiff was entitled to recover possession "at the end of the present cultivating season."

Held, in second appeal, that the notice to quit not being according to law, there was no legal determination of the tenancy. The plaintiff could not, therefore, succeed.

Held, also, that the plea of permanent tenancy set up for the first time in the defendant's written statement in the present case was not such a disclaimer of the landlord's title as to dispense with proof of a legal notice to quit on the part of the plaintiff.

* Second Appeal, No. 876 of 1889.

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Bábá v. *Vishvanáth Joshi*(1) overruled.

Held, further, that it was open to the defendants for the first time in second appeal to raise the objection of want of proper notice.

SECOND appeal from the decision of A. S. Moriarty, Assistant Judge of Sátára, in Appeal No. 300 of 1888 of the District File.

This was a suit in ejectment.

The plaintiff alleged that the field in dispute was his *inám*; that his father had first leased it to the father of defendant No. 3; that it was afterwards let to defendants Nos. 1 and 3 jointly on condition that they should pay the *judi* to Government, and give one-half share of the produce to the plaintiff; that as the defendants had not given him his share of the produce for four or five years, he gave them a notice to quit, but they refused to surrender the land. Hence this suit.

The notice to quit required the defendants to vacate the premises within eight days from the service thereof.

Defendants Nos. 2 and 4 were the brothers of defendants Nos. 1 and 3 respectively. They were, therefore, made parties to the suit.

The defendants Nos. 1 and 2 pleaded that the eastern moiety of the land in suit was held by them on *mirási* (or permanent) tenure from the time of their ancestors; that the western moiety was in the possession of defendants Nos. 3 and 4; and that as the two pieces were held separately, the plaintiff could not sue for them in one suit.

Defendants 3 and 4 admitted the plaintiff's claim.

The Subordinate Judge found that the defendants Nos. 1 and 2 were yearly, and not *mirási*, tenants. He then passed a decree awarding immediate possession to the plaintiff.

On appeal, the Assistant Judge was also of opinion that the defendants Nos. 1 and 2 were not *mirási* tenants. He amended the decree of the Subordinate Judge on the following grounds:—

"It is further contended that the notice issued by the plaintiff was not according to law, as it ordered defendants to quit the land within eight days, instead of being a three-months' notice, in

(1) I. L. R., 8 Bom., 228.

accordance with section 84, Bombay Land-Revenue Code. This, however, cannot bar the present suit. It can only entitle the defendants not to be turned off the land before the end of the present cultivating season.

"In accordance, therefore, with section 84 of the Bombay Land-Revenue Code, I merely awarded the decree of the lower Court by ordering defendants (if they still hold possession) to give up possession of the land to plaintiff by the end of the present cultivating season."

Against this decree the defendants Nos. 1 and 2 appealed to the High Court.

Ganesh Rámchandra Kirloskar for appellants:—The plaintiff cannot eject the defendants without a proper notice to quit. The notice given by the plaintiff is insufficient and not in accordance with section 84 of the Bombay Land-Revenue Code. The lower Court erred in holding that the plaintiff was entitled to recover, because the suit was filed long after the expiration of the proper period. So long as the tenancy is not determined, the landlord cannot sue in ejectment.

Ghanasham Nilkant Nádkarni for respondent:—The question of notice is raised for the first time in second appeal. Not having taken this point in the Courts below, the defendants must be deemed to have waived it. Even assuming that it could be raised here, I contend that they are not entitled to any notice, as they have disclaimed the landlord's title by setting up the plea of permanent tenancy—*Bábá* v. *Vishvanáth Joshi*[1]; *Gopálráo Ganesh* v. *Kishor Kálidás*[2]

Ganesh Rámchandra Kirloskar in reply:—It is not too late to raise the objection of want of notice—*Abdulla* v. *Subbarayyar*[3]; *Subba* v. *Nagáppa*[4]. Unless and until the relation of landlord and tenant is determined by a legal notice to quit, the plaintiff cannot recover. The ruling in *Bábá* v. *Vishvanáth*[5] is not approved of by the High Courts of Calcutta and Madras—*Prannáth*

(1) I. L. R., 8 Bom., 228.
(2) I. L. R., 9 Bom., 527.
(3) I. L. R., 2 Mad., 346.
(4) I. L. R., 12 Mad., 353.
(5) I. L. R., 8 Bom., 228.

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v. *Mádhu*[1] and *Subba* v. *Nagáppa*[2], or even by our Court—*Jamsedji* v. *Lakshmirám*[3]; *Gaudapagavda* v. *Ningápa*[4]; *Háji Sayyad* v. *Venkta*[5]; *Purshotam* v. *Dattátraya*[6].

TELANG, J.:—This action was instituted by the plaintiff for possession of certain land alleged to have been originally let to the first defendant and the father of the third defendant by the plaintiff's father, and subsequently to the first and third defendants jointly by the plaintiff himself. The plaintiff made the second and fourth defendants parties, alleging that they were respectively undivided brothers of first and third defendants. The third and fourth defendants admitted the plaintiff's claim, but the first and second defendants disputed it, alleging, among other things, that the eastern moiety of the land in question "was their *mirás* and had been in their possession from the time of their ancestors." The Subordinate Judge gave the plaintiff a decree for immediate possession; the Assistant Judge, on appeal, amended the decree by ordering possession to be given "at the end of the present cultivating season." On appeal before us, Mr. Kirloskar has contended that the Assistant Judge's finding on the subject of the character of the defendant's tenancy is erroneous in law, and that even if that finding were correct, there could be no decree for ejectment, such as has been made in this case, on the ground that there has been no notice to quit given to the defendants, in accordance with the provisions of section 84 of the Bombay Land-Revenue Code.

Dealing first with the question of notice, we have to consider at the outset whether the defendants are entitled to take the objection of want of notice on second appeal. The point was certainly not taken in the written statement, nor apparently even in the memorandum of appeal. It has, however, been, in fact, dealt with by the appellate Court. And having been so dealt with there, we think that we cannot prevent its being taken in this Court. In Madras it has been held that such a point may be taken, for the first time, in second appeal.

(1) I. L. R., 13 Calc., 96.
(2) I. L. R., 12 Mad., 353.
(3) I. L. R., 13 Bom., 323.
(4) P. J. for 1890, p. 218.
(5) P. J. for 1880, p. 122; see *post*, p. 414, Note (*a*).
(6) I. L. R., 10 Bom., 669.

See *Abdulla* v. *Subbarayyar*[1], followed in *Subba* v. *Nagáppa*[2]. And, apparently, the same view was also taken in the case of *Háji Sayyad* v. *Venkta*[3] in this Court. It being, then, open to the defendants to take the objection of want of proper notice, we must in this case hold that the Assistant Judge came to a wrong conclusion in regard to that objection. The notice given, admittedly, was not one conformable to the provisions of section 84 of the Bombay Land-Revenue Code, but the Assistant Judge says that although the period fixed in the notice for the defendants to quit possession falls short of that fixed by the Bombay Land-Revenue Code, still the plaintiff's suit has been, in fact, filed long after the expiry of the proper period, and he thinks that the plaintiff in ejectment is in such a case entitled to succeed. But this view of the learned Judge is erroneous. The notice not being one in accordance with law, there is no legal determination of the tenancy, and without such a legal determination, the plaintiff is not entitled to recover possession of the property from the tenant (see Woodfall's Landlord and Tenant, p. 362; *Ramchandra* v. *Dowlatji*[4]; and *Hari* v. *Rámábái*[5]).

But it has been argued for the respondent by Mr. Ghanasham, that the defendants, having in their written statement in this case set up a *mirási* title in themselves, and thus disclaimed the title of their landlord, have no right now to insist on a notice to quit, in accordance with the provisions of the Bombay Land-Revenue Code. And he relies on a decision of West and Nánábhái, JJ., in *Bábá* v. *Vishvanáth*[6], and of Sargent, C. J., and Birdwood, J., in *Gopálráo* v. *Kishor*[7] in support of his argument. Mr. Kirloskar has, on the other side, drawn our attention to the cases of *Subba* v. *Nagáppa*[8] and *Prannáth* v. *Mádhu*[9] and *Purshotam* v. *Dattatráya*[10] as disapproving more or less directly of the doctrine laid down in *Bábá* v. *Vishvanáth;* and also to the cases of *Háji Sayyad* v. *Venkta*[11], and *Jamsedji* v. *Lakshmi-*

(1) I. L. R., 2 Mad., 346.
(2) I. L. R., 12 Mad., 353.
(3) P. J. for 1880, p. 122; see *post*, p. 414, Note (*a*).
(4) P. J. for 1880, p. 10; see *post*, p. 415, Note (*b*).
(5) P. J. for 1880, p. 25.
(6) I. L. R., 8 Bom., 228.
(7) I. L. R., 9 Bom., 527.
(8) I. L. R., 12 Mad., 353.
(9) I. L. R., 13 Calc., 96.
(10) I. L. R., 10 Bom., 669.
(11) P. J. for 1880, p. 122; see *post*, p. 414, Note (*a*).

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ráu[1] and *Gaudapagavda* v. *Ningáppa*[2] as laying down or implying a contrary doctrine.

Upon an examination of these and other authorities, we have come to the conclusion that the argument urged on behalf of the respondent cannot be sustained. In the first place, it is to be remembered that the alleged disclaimer of the landlord's title, upon which this argument is based, is not shown to have occurred before the institution of this suit. Such disclaimer as there was, occurred for the first time in the written statement of the defendants. And we are of opinion that *such* a disclaimer is not enough to dispense with proof of notice to quit on the part of the plaintiff. Of the cases relied on by Mr. Ghanasham, *Gopálráo* v. *Kishor* is not in his favour on this point. It is not clear from the report that the disclaimer there relied upon was after action brought. The contrary would rather seem to be the case, from the reference to the proceedings in the Mámlatdar's Court prior to the institution of the action. The other case of *Bábá* v. *Vishvanáth* is, no doubt, on all fours with this case, and the question which we have to consider is whether that case is to be followed. Now it is to be remarked, in the first place, that in none of the cases relied upon in the judgment of the Court in that case, with the exception of the case of *Shahabkhán* v. *Bálya*[3], had the disclaimer occurred subsequently to the filing of the plaintiff's suit. And as those cases were all decided in the English Courts it may be desirable to point out that by English law[4], "where a disclaimer is relied on, it must appear to have been made *before or on the day* mentioned in the writ of ejectment as the time when the claimant was entitled to possession," and generally, "in ejectment the plaintiff's title to actual possession must be shown to have accrued *on or before* the day on which possession is claimed in the writ[5]." And if the legal effect of a disclaimer is a "forfeiture" of the tenancy or "a determination of the tenancy at the election of the landlord" (as to which the

(1) I. L. R., 13 Bom., 323.
(2) P. J. for 1890, p. 218.
(3) P. J. for 1873, p. 66.
(4) Woodfall's Landlord and Tenant, p. 78 (14th ed.)
(5) Cole on Ejectment, p. 288.

observations in *Purshottam* v. *Dattatraya* and Woodfall's Landlord and Tenant, p. 376, are material) it would seem that such "forfeiture" or "determination" ought not, on general principles, to assist a plaintiff whose suit had been filed before it took place. It does not appear from the report of *Bábá* v. *Vishvanáth*, or from the judgment in *Shahabkhán* v. *Bálya*, that this distinction was mentioned in argument or was otherwise present to the mind of the Court.

Again, it may well be doubted whether a man's claiming to be a *mirási* tenant ought of itself to be held to be a disclaimer of the landlord's title. The judgment in *Bábá* v. *Vishvanáth* relied on the decision in *Vivian* v. *Moat* [1], as an authority on that point; and *Vivian* v. *Moat* certainly does, in principle, decide it. It was with reference to that point only that it was cited in *Bábá* v. *Vishvanáth*; and the remarks on this last mentioned case made by the High Court of Madras in *Subba* v. *Nagáppa* do not seem to us to be quite accurate. But it is difficult to reconcile *Bábá* v. *Vishvanáth* on that point with *Háji Sayad* v. *Venkta*, (see *post*, p. 414) where Westropp, C. J., and F. Melvill, J., held that the defendant's unsuccessful attempt to prove himself to be a *mulgenidár*, (which is substantially the same as a *mirásdár* or customary tenant), did not "exonerate the plaintiffs from proving the due termination of the *chalgeni* holding to which they admitted the defendant to be entitled." The question has also been considered by the Calcutta High Court in two recent cases, *viz.*, *Kali Kishen Tágore* v. *Golám Ali* [2] and *Kali Krishna Tágore* v. *Golám Ally* [3], expressly with reference to the decisions in *Vivian* v. *Moat* and *Bábá* v. *Vishvanáth*. In both of those cases, one of which was decided by Petheram, C. J., and Ghose, J., and the other by Field and Macpherson, JJ., the Courts held that *Vivian* v. *Moat* and the reasons upon which the judgment of Fry, J., in that case were founded are not applicable in this country. It is true that *Vivian* v. *Moat* was relied upon and followed by Sargent, C. J., and Birdwood, J., in *Gopálráo* v. *Kishor* [4], but there it was followed only to the extent of

(1) L. R., 16 Ch. Div., 730.
(2) I. L. R., 13 Calc., 3.
(3) I. L. R., 13 Calc., 248.
(4) I. L. R., 9 Bom., 527.

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holding that proof of notice is unnecessary where there is a disclaimer. It was not followed on the point now under discussion, *viz.*, whether setting up a *mirási* title constitutes a disclaimer—which point did not call for decision in *Gopálráo* v. *Kishor*. Upon that point the observations of the learned Judges in both the Calcutta cases above cited appear to us to be entitled to great weight. And as their view is in harmony with that which is involved in the decision of Westropp, C. J., and F. D. Melvill, J., which we have above referred to, we think that we may properly act upon that view, in preference to the doctrine enunciated in *Bábá* v. *Vishvanáth*, where neither the considerations urged by the learned Judges of Calcutta nor the remarks in *Háji Sayyad* v. *Venkta* appear to have heen brought to the notice of the Court.

Upon the whole, therefore, we are of opinion that it is at least doubtful whether there was anything in the defendants' written statement in this case which can be fairly treated as a disclaimer of the landlord's title; and that even if there had been any disclaimer, its occurrence after the institution of the suit prevents the plaintiff from succeeding in this case without proof of a legal notice to quit. And as we have already held that the only notice alleged is admittedly not a good notice in accordance with the provisions of the Bombay Land Revenue Code, we must come to the conclusion that this suit in ejectment cannot be maintained. It, therefore, becomes unnecessary to consider Mr. Kirloskar's argument that the Assistant Judge's view as to the nature of the defendants' tenure is incorrect in law. And we must accordingly vary the decrees of the Courts below, and dismiss the plaintiff's suit as regards the eastern moiety of the field claimed. But as the point of notice was not taken by the defendants in their written statement or memorandum of appeal, we think that the parties should bear their own costs throughout.

Decree reversed.

NOTE (*a*).—The following is the judgment of Westropp, C.J., and F. D. Melvill, J., in *Háji Sayyad* v. *Venkta* (P. J. for 1880, p. 122) referred to in the above decision :—

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We are unable to concur with the learned District Judge in holding that the matter in this suit is *res judicata* between the present parties. The present plaintiffs do not claim through Govind as required by section 13 of Act X of 1877. On the contrary, Govind in his suit (369 of 1868) claimed through them. Again, the former suit of the present plaintiffs (546 of 1872) was not decided on the merits, but under section 8 of Act VIII of 1859 upon a question of misjoinder.

But the plaintiffs have throughout this suit treated the defendant as having been *chalgenidár* at least. It behoved them, therefore, to prove a determination of the *chalgeni* holding. So far as the plaint is concerned, the plaintiffs therein alleged a *chalgeni* lease by them to defendant in June 1864, for three years, which period no doubt had expired long before the commencement of this suit in 1878, but the plaintiffs did not produce or prove any such lease. The Subordinate Judge, too, has found the defendant to have been a *chalgenidár*, but has not found when or how the *chalgeni* holding has expired, and the plaintiffs have not given in evidence any notice to the defendant terminating the *chalgeni* holding, *i. e.*, the tenancy-at-will. The plaintiff was bound to prove such a case as would entitle him to recover on the strength of his own title, which is alleged to be that of *mulivargdár*. The defendant indeed attempted, but in the opinion of the Subordinate Judge failed, to prove himself to be a *mulgenidár* under the plaintiffs, but we do not perceive how that exonerated the plaintiffs from proving the due termination of the *chalgeni* holding to which they admitted the defendant to be entitled.

The history of the litigation between the parties, or of Govind, who, certainly claimed under the plaintiffs, is not such as to induce this Court to strain any point in favour of the plaintiffs. Accordingly, upon the ground that the admitted *chalgeni* tenancy of the defendant has not been proved to have been terminated either by expiration of a *chalgeni* lease, or by notice or otherwise, we affirm the decree of the District Judge with costs.

NOTE (*b*).—The following is the decision of Sargent, C.J., and Melvill, J., in *Rámchandra Appáji Angal* v. *Daulatji* (P. J. for 1880, p. 10) also referred to in the above decision :—

Whether the *miráspatra* be held to be valid or not (a question which it is not necessary at present to decide), the plaintiff must fail in his action. If it be valid, no ground has been even alleged to justify the defendant's being turned out of the land. If, on the contrary, it be invalid, as contended by the plaintiff, the defendant must be deemed to be still in, as of his original yearly tenancy, as the notice of 3rd November, 1876, requiring the tenant to give up possession in March, 1877, was an insufficient one. The decree of the Court below is confirmed with costs.