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of limitation, and although the Full Bench, to whom the case was referred by a Division Bench of this Court did not deal with the question referred to them by the Division Bench, they dismissed the appeal, and thereby affirmed the finding of the District Judge who had dismissed the appeal before him as barred by the two years of limitation, the dispossession, as we have said, being by one of several landlords. We have no hesitation in following that ruling. But even if the question had not been already decided, that is the view we would take.

The pleader for the respondent urges that the plaintiff's *jote* is a non-occupancy holding. But we think that this point was never raised in the Court below. The case in the Court below proceeded upon the assumption that the plaintiff's *jote* was an occupancy holding; and that we consider was what he pleaded it to be, because he said in his plaint that it was an ancestral *jote*, which was never denied by the defendants.

In these circumstances we set aside the decree of the Lower Appellate Court and remand the case to the Subordinate Judge to be disposed of in accordance with the above observations.

The costs will abide the result.

Case remanded.

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[135] *Before Mr. Justice Ameer Ali and Mr. Justice Brett.*

NIZAMUDDIN (*Defendant No.* 1) *v.* MAMTAZUDDIN AND ANOTHER (*Plaintiffs*).* [30th July & 3rd August 1900].

Landlord and Tenant—Bengal Tenancy Act (VIII of 1885)—Bengal Act VIII of 1869—Suit for ejectment—Forfeiture—Denial by tenant of landlord's title—Denial in written statement.

In a District where the relations of landlord and tenant are regulated by the provisions of Bengal Act VIII of 1869, a tenant denying his landlord's title forfeits his tenancy, and entitles the landlord to a decree for ejectment, provided there has been an express denial of title prior to the institution of the suit.

A denial, however, in the written statement would not operate as a forfeiture. *Prannath Shaha* v. *Madhu Khulu* (1) followed.

THE plaintiffs sued for the ejectment of the principal defendants (defendants Nos. 1 to 4) from the disputed lands on the declaration of their title by purchase. They alleged that in execution of a decree for specific performance of a contract of sale obtained by them against the vendors, defendants Nos. 5 to 7, they obtained a *kobala* in respect of the disputed lands executed in their favor through the Court on the 19th Pous, 1302 B. S. (2nd January 1896). It was further alleged that the principal defendants had held the lands under the former owners, the vendor defendants, in *bhagi jote* in 1299 B. S. (1892-93), and were since occupying the same, although they had no right to do so; that the plaintiffs after having purchased the said lands are aforesaid, verbally asked the principal defendants to deliver possession of the same to them, but that they refused to do so, by denying the title of the plaintiffs.

The defendant No. 1 contended, *inter alia*, that the disputed lands appertained to their taluq Raj Bullubh, and not to taluq Lakhan Deb,

* Appeal from Appellate Decree No. 2182 of 1898, against the decree of Babu Shyam Kishore Bose, Subordinate Judge of Sylhet, dated the 21st of July 1898, confirming the decree of Babu Tara Prassanna Dass, Munsif of Sylhet, dated the 1st of December 1897.

(1) (1886) I. L. R. 13 Cal. 96.

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as alleged by the plaintiffs, that the alleged vendor defendants had no proprietary title to the same, and that he never obtained *bhag jote* thereof from the vendor defendants.

[136] The Munsif held on the evidence that the vendor defendant No. 5 had been in possession of the disputed lands by receipt of rent from one Fyroddi within 12 years next before the institution of the suit. He also found that the disputed lands appertained to taluk Lakhan Deb, and decreed the suit.

On appeal by the defendant No. 1, the Subordinate Judge confirmed the decision of the Munsif. With regard to the ground taken by the appellant that the principal defendants could not be evicted without notice, as according to the plaintiffs' own case they had tenant right, the Subordinate Judge held that they were not entitled to any notice, as they had denied their landlord's title. He also found that the disputed lands had belonged to the plaintiffs' vendors and passed by sale to the plaintiffs.

The defendant No. 1 appealed to the High Court.

1900, JULY 30. Moulvie *Serajul Islam*, for the appellant.

Babu *Gobinda Chandra Das*, for the respondents.

Cur. adv. vult.

1900, AUGUST 3. The judgment of the High Court (AMEER ALI and BRETT, JJ.) was as follows :—

The suit out of which this second appeal arises was brought by the plaintiffs to recover possession from the principal defendants of 3 *kedars* of land appertaining to taluk Lakhan Deb ; that the plaintiffs had purchased the same from the vendor defendants who, not having executed a *kobala*, were sued therefor ; and upon a decree obtained by the plaintiffs the *kobala* was executed by them in respect of the said land. They further allege that the principal defendants were holding the lands in question under the vendors of the plaintiffs, under a *bhagidar jote* right, and that after the execution of the *kobala* they asked the defendants to give them possession, and upon their refusal to do so they bring this suit to obtain *khas* possession. They base their cause of action upon the refusal, and put the date as the 19th of Pous 1302 B. S., the date of their purchase ; and also the 5th of Joist 1303 (17th May 1896) when the principal defendants were verbally requested to give up the lands.

The defendants, among other pleas, alleged that the land in **[137]** suit appertained to *mehal* Raj Bullubh and not to taluk Lakhan Deb ; they further alleged that the vendors of the plaintiff's had no title ; that as a matter of fact, one Shibjoy Surma and others were proprietors of a 12 annas share, which the defendants had purchased from them, and that in respect of the remaining 4 annas, they were in possession of the same, by virtue of a *ryoti* title derived from Brojo Mohan Chowdhry.

The Munsif in a judgment, which is by no means satisfactory, held against the defendants and made a decree in favour of the plaintiffs.

The defendants appealed to the Subordinate Judge who sets out in full the allegations of the parties ; and deals with the principal questions involved in the case, and which we are concerned in the present appeal. One of the objection taken before the learned Subordinate Judge against the decree for *khas* possession was that, inasmuch as, according to the plaintiffs' own showing, the defendants had a tenant right, they could not be evicted without notice ; and the learned Subordinate Judge dealt with that question first. He says : " In the written statement the tenants right was not set up ; on the contrary the defendants expressly denied having

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held as tenants. It is, however, clearly proved in the case that previously one Fyroddi held the land as tenant under the plaintiffs' vendors, and that subsequently the defendants themselves held the land as tenants under the said vendors. The plaintiffs' case is that on their demanding the defendants to surrender the land, the latter denied the plaintiffs' title and thus forfeited the tenants' right;" and then he adds: "I, therefore, find that there was a denial of plaintiffs' title." The defendants appear to have contended before him that the statement made in the plaint and proved in the case did not amount to a denial of plaintiffs' title, but only refers to their right to re-enter. With reference to that contention the learned Subordinate Judge says as follows: "Reading however, the statement in the light of the written statement in which the defendants most clearly denied the plaintiffs' title and their vendors title to the land, I can have no doubt that by the previous statement the defendants meant to deny not the plaintiffs' right of re-entry only, but also their title to the land itself. That being so, the denial operated a forfeiture, and the defendants [138] were, therefore, entitled to no notice." He accordingly affirmed the decree of the First Court.

The defendants have appealed to this Court from the judgment and decree of the Subordinate Judge; and the question which we have to determine in this case is whether the order for *khas* possession was right and proper under the circumstances.

Under Act VIII of 1385, there is no forfeiture arising out of a denial by the tenant of the landlord's title. On this question we need only refer to the case of *Debiruddi* v. *Abdur Rahim* (1). In that case the tenant had persistently denied the landlord's title, and yet the learned Judges held that the Bengal Tenancy Act does not recognize forfeiture on the ground of the denial of the landlord's title. But the present case has arisen in a District where Act VIII of 1885 is not applicable, and the relations of landlord and tenant are still regulated by the provisions of Bengal Act VIII of 1869, and although there is no provision in that Act providing that a tenant denying his landlord's title should forfeit his tenancy, it has been held in several cases, which have proceeded chiefly upon considerations of the English law, that such a denial would cause a forfeiture. As at present advised we do not wish to dissent from that view; and we must, therefore, take it that if the defendants denied before suit the title of the landlord it must be held that they have forfeited the tenancy. But a penal provision of this character can be enforced only upon an express denial; it must not be inferential or proceed upon an *ex post facto* circumstance. For example, the Subordinate Judge refers to the written statement to explain what transpired previously between the plaintiffs and defendants. A denial, however, in the written statement, as has been held in the case of *Pranath Shaha* v. *Madhu Khulu* (2) would not operate as a forfeiture. The cause of action must arise before the institution of the suit; the real question for determination, herefore, is whether there was an express denial by the defendtants prior to the institution of the suit. If what transpired before suit is ambiguous in its character, it would be irregular and hardly in accordance with the principles of law to refer to the [139] written statement to explain the intention of the defendant, for that would be proceeding upon a mere inference. The learned pleader for the appellant desired to refer to the evidence to show that what took

(1) (1888) I. L. R. 17 Cal. 196. (2) (1886) I. L. R. 13 Cal. 96.

place before suit did not amount to a denial of plaintiffs' title. In second appeal we are unable to look into the evidence to see whether there was or was not an express denial of the landlords' title in this case. Having regard, however, to the circumstances to which we have already adverted, we think this case must be sent back to the lower Appellate Court for the purpose of coming to a finding on the point of the express denial upon which alone the forfeiture can be based.

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The appeal will remain on the file of this Court. The learned Judge will make the return of his finding within a month from the date of the receipt by him of the record.

Case remanded.

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28 C. 139.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Banerjee and Mr. Justice Stevens.

ISHAN CHANDRA DEY (*Defendant*) *v.* GONESH CHANDRA PARSI AND OTHERS (*Plaintiffs*).* [28th May 1900].

***Registration Act** (III of 1877), s. 50—Priority—Registered and unregistered documents—Purchaser under a registered deed whether entitled to priority over purchaser in execution of a subsequent decree obtained by a prior mortgagee under an unregistered deed.*

A purchaser of immoveable property under a registered deed of sale is entitled to priority over a purchaser of the same property in execution of a subsequent decree obtained by a mortgagee under a prior unregistered deed. *Baijnath* v. *Lachman Das* (1) dissented from.

This appeal arose out of an action brought by the plaintiffs to recover possession of a certain plot of land on declaration of their title thereto. The lands in dispute admittedly belonged to the defendant No. 2 and to the predecessors of defendants Nos. 3 to 5. On the 20th Pous 1297 B.S. (3rd January 1891) these defendants **[140]** by an unregistered deed mortgaged the said lands to defendant No. 1 Ishan Chandra Dey, and on the 26th Bhadro 1300 B.S. (10th September 1893) sold them to the plaintiffs by a registered conveyance. There was nothing to show that the plaintiffs had any notice of the mortgage. In 1894 Ishan Chandra brought a suit upon his unregistered mortgage deed without making the plaintiffs parties, and obtained a decree. In execution of that decree the mortgaged lands were sold and purchased by Ishan Chandra (defendant No. 1) on the 13th September 1895, and later on he obtained symbolical possession. The plaintiffs then brought the present suit. The Court of first instance having decided that the registered deed of sale set up by the plaintiffs had a priority over the unregistered deed of mortgage, decreed the suit. On appeal the decision of the Lower Court was affirmed by the Subordinate Judge of 24-Pergunnahs, Babu Rajendra Kumar Bose.

Against this decision the defendant No. 1 appealed to the High Court.

Dr. *Ashutosh Mookerjee*, and Babu *Jnanendra Nath Bose*, for the appellant.

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* Appeal from Appellate Decree No. 2890 of 1898, against the decree of Babu Rajendra Coomar Bose, Subordinate Judge of 24-Pergunnahs, dated the 27th of July 1898, affirming the decree of Babu Chandi Charan Sen, Munsif of Alipur, dated the 21st of February 1898.

(1) (1885) I. L. R. 7 All. 888.