

1890

DEC. 11.

APPEL-

LATE

CIVIL.

15 B. 405.

15 B. 405.

APPELLATE CIVIL.

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

MANEKLAL JAGJIVAN (*Original Decree-holder*), Applicant v. NASI
RADDHA (*Original Judgment-debtor*), Opponent.*
[11th December, 1890.]

*Decree—Execution—Verbal application for the sale of attached property—Limitation—
Step-in-aid of execution—Limitation Act (XV of 1877), art. 179, cl. 4.*

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 Civil Procedure [406] Code does not require a formal application, it is immaterial whether the application be a verbal one or in writing.

Ambica Pershad Singh v. Surdhari Lal (1) followed.

[R., 19 B. 261 (267); 22 B. 722 (726); 125 P.L.R. 1908=95 P.W.R. 1908.]

THIS was a reference submitted for the opinion of the High Court, under s. 617 of the Code of Civil Procedure (Act XIV of 1882) by Ray Sahab Ranchodlal K. Desai, Second Class Subordinate Judge of Surat.

On the 11th February 1887 Maneklal Jagjivan obtained a decree against Nasia Raddha in the small cause jurisdiction of the Second Class Subordinate Judge's Court at Surat.

On the 23rd July 1887 the decree-holder, Maneklal Jagjivan, made an application (No. 809 of 1887) for the execution of his decree. On the 27th September 1887, on the verbal application of the decree-holder, an order was passed for the sale of the attached property.

On the 19th August 1890 the decree-holder presented another application; the subject of the present reference, for execution of the decree.

In making the reference the Subordinate Judge observed :—

“The present *darkhast* being made three years after the date of the previous *darkhast* No. 809 of 1887 (dated 23rd July 1887), it would be time-barred, unless it be held that the applicant took some ‘step-in-aid of execution of the decree’ within the meaning of art. 179, cl. 4, sch. II of Act XV of 1877, within three years preceding the date of the present *darkhast*.

“It is alleged by the applicant in the *darkhast* that the order for the sale of the attached property was made by the Court on his verbal application, and it is contended on his behalf that the application for the order of the sale of the attached property is a sufficient step-in-aid of execution of the decree within the meaning of art. 179, cl. 4, sch. II of Act XV of 1877.”

The question referred was as follows :—

“I. Whether a verbal application by a decree-holder to the Court executing a decree for an order for the sale of attached property is a step-

in aid of execution within the meaning of art. 179, cl. 4, of sch. II of Act XV of 1877."

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

ORDER.

SARGENT, C. J. :—We agree with the ruling of the Full Bench of Calcutta in *Ambica Pershad Singh v. Surdhari Lal*(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.

15 B. 407.

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*. * [12th December, 1890.]

Landlord and tenant—Ejectment—Notice to quit—Notice under s. 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 *mirasi* 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 s. 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.

[408] *Baba v. Vishwanath Joshi* (2) 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.

[F., 28 Ind. Cas. 533; R., 18 B. 107; 18 B. 110 (113); 20 B. 354 (F.B.); 20 B. 759 (763); 32 B. 78=9 Bom. L.R. 1332; 36 C. 927=13 C.W.N. 949=2 Ind. Cas. 656; 31 M. 261=18 M.L.J. 153=3 M.L.T. 265; 2 C.L.J. 389=9 C.W.N. 928; 6 Ind. Cas. 927=6 N.L.R. 83; L.B.R. (1893-1900), 36; D., 17 B. 631; 1 C.L.J. 116=9 C.W.N. 460; 14 C.P.L.R. 162 (164).]

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

* Second Appeal No. 876 of 1889.