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not parties to it—*Shivapa* v. *Dod Nagaya* (1); *Kedar Nath Chatterji* v. *Rakhal Das Chatterji* (2). The order then made cannot be held to have the effect of *resjudicata*.

Narayan Ganesh Chandavarkar, for the respondent.

JUDGMENT.

PER CURIAM:—The District Judge, on the authority of *Netietom Perengaryprom* v. *Tayanbarry Parameshwaren* (3), has held that the order of the Court in the attachment proceedings is conclusive. But the authority of that case has been doubted; see *Shivapa* v. *Dod Nagaya* (1); *Kedar Nath Chatterji* v. *Rakhal Das Chatterji* (2). As was pointed out in the former of these two cases, a judgment-debtor cannot necessarily be regarded as having been a party to the investigation against whom the order was made, but it must depend upon the facts of each case.

We must, therefore, reverse the decree of the District Judge and remand the case, that he may investigate the facts and pass a decree accordingly. Costs to abide the result.

Decree reversed and case remanded.

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Before Mr. Justice Bayley, Chief Justice (Acting), and Mr. Justice Candy.

LALU GAGAL (*Original Plaintiff*), *Appellant* v. BAIMOTAN BIBI (*Original Defendant*), *Respondent.** [6th September, 1892.]

Landlord and tenant—Suit by tenant to recover possession claiming as full owner—Subsequent claim as yearly tenant unjustly dispossessed—Notice to quit—Denial of landlord's title.

A plaintiff sued to recover possession of certain fields, &c., alleging that he was a permanent tenant of the defendant, having purchased the right of occupancy from previous occupants of the land. The lower Court held that the plaintiff's vendors were mere yearly tenants and not permanent tenants, but that the sale of their right to the plaintiff was valid, and that the plaintiff had been wrongfully dispossessed by the defendant, no notice to quit having been given. But,

Held, that the plaintiff could not recover, inasmuch as his plaint and the conduct of his case amounted to a denial of his landlord's (defendant's) title. In his suit the plaintiff claimed to be full owner, and he could not afterwards claim [632] to be restored to possession on the ground that he was a yearly tenant entitled to notice to quit, which was not given.

Vithu v. *Dhondi* (4) distinguished.

[R., 20 B. 759 (763).]

SECOND APPEAL from the decision of E. M. H. Fulton, District Judge of Ahmedabad, in appeal No. 333 of 1889.

The plaintiff sued to recover possession of certain fields and houses, alleging as follows:—

"In Thori Mubarak there is a field of 12 bighas which belonged to Bhala Rupa's occupancy, and was in his possession and enjoyment. He sold it to me for Rs. 50 by a registered deed dated 14th May, 1886. The said field was made over to my possession. *Since then I have been*

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* Special Appeal, No. 522 of 1891.

(1) 11 B. 114. (2) 15 C. 674. (3) 4 M.H.C. R. 472. (4) 15 B. 407.

full owner. Besides, there are two houses near the chowra and four fields measuring about 64 bighas belonging by proprietary title to Ladha Mona. These he sold to me for Rs. 351 by a registered deed dated 19th May, 1886, and put them into my possession.

"Since then I have been *full owner* of altogether five fields and two houses. I began to cultivate the five fields through my servants, but the defendants obstructed me in July, 1886, and neither allowed me to cultivate the fields or to occupy the houses. In July, 1888, the defendants took possession of the property in dispute."

The defendant denied the plaintiff's right to recover, alleging that his (the plaintiff's) vendors were not owners of the property in suit, but were mere tenants holding under the defendant; that the sale was collusive and illegal, and that the plaintiff had no title to the property in dispute.

The Subordinate Judge held that the plaintiff's vendors were permanent tenants; that they had a right to transfer their occupancy rights by sale or mortgage, and that the sale to the plaintiff was valid. He, therefore, awarded the plaintiff's claim.

On appeal the District Judge found that the plaintiff's vendors were not permanent but yearly tenants; that the sale to the plaintiff was valid, and that he had been wrongfully dispossessed by the defendant. He held, however, that the plaintiff being a yearly tenant could only claim to be restored to possession by [633] alleging that he was a yearly tenant who had been dispossessed without notice from the defendant. The plaintiff, however, had not done this, but by his plaint and the conduct of his case wholly denied the defendant's (his landlord's) title. The District Judge said:—

"His plaint and the way in which his case has been conducted amounts to a denial of the lessor's title. He could only claim to be restored to possession by alleging that he was a yearly tenant who had been dispossessed without notice. He cannot come into Court, claiming a permanent tenancy, and on failure to establish that position be awarded possession and damages as a yearly tenant illegally dispossessed. The principles laid down in *Baba* v. *Vishvanath* (1) appear to govern this case. I have considered the case of *Purshotam Bapu* v. *Dattatraya*(2) and the decisions in printed judgments for 1880, p. 10 and p. 25 (*Ramchandra Appaji* v. *Dowlatji*; and *Hari Yamaji* v. *Ramabai*), but in all those cases the tenants were defendants who were held entitled to set up alternative defences. Here the facts are different. The plaintiff comes into Court alleging himself to be 'owner' which the subsequent conduct of the case shows was intended to mean permanent tenant; and the allegation on which his suit is based not being proved, his claim fails."

On these grounds the District Judge reversed the decree of the Subordinate Judge, and rejected the plaintiff's claim.

Against this decision the plaintiff preferred a second appeal to the High Court.

(*Branson* with him *Ganpat Sadashiv Rao*), for appellant (plaintiff):—The plaintiff is entitled to recover possession. He was dispossessed by the defendant without notice to quit. It is true he claimed as permanent tenant, but the setting up of a permanent tenancy by the plaintiff does not amount to such a disclaimer of the landlord's title as to dispense with the necessity of a notice to quit to a tenant—*Kali Kishen* v. *Golam Ali* (3); *Kali Krishna* v. *Golam Ally* (4). In the present case, no notice

(1) 8 B. 228. (2) 10 B. 669. (3) 13 C. 3. (4) 13 C. 248.

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to quit was given to the plaintiff, and he is, therefore, [634] entitled to be restored to possession. The ruling in *Baba* v. *Vishvanath* (1) is dissented from in *Vithu* v. *Dhondi*(2).

Jardine (with him *Bhaishankar, Dinsha and Kanga*), for respondents.—The plaintiff has sued as *owner*, and not as a yearly tenant, to recover possession of the lands in suit. In the plaint he does not even say that he is a permanent tenant entitled to hold as long as he pays the rent. That case he put forward at a very late stage of the suit. His whole conduct amounts to a denial of the landlord's title. He is, therefore, not entitled to any notice to quit.

JUDGMENT.

CANDY, J.—The District Judge held that the plaintiff "cannot come into Court claiming a permanent tenancy, and on failure to establish that position be awarded possession and damages as a yearly tenant illegally dispossessed. The principles laid down in *Baba* v. *Vishvanath Joshi* (1) appear to govern this case.....The allegation on which his suit is based not being proved, his claim fails."

It is contended that as *Baba* v. *Vishvanath* (1) has been dissented from in *Vithu* v. *Dhondi*, (2) it follows that the plaintiff is entitled to recover possession as claimed. We are unable to accept that contention.

In *Baba* v. *Vishvanath* (1) the landlord sued in ejectment, asserting that he had given the defendant tenant a valid notice to quit. The defendant among other things contended that he was a permanent tenant not liable to ejectment as long as he paid a fixed rent, and that the plaintiff had no right to give him any notice to quit. The Court held, quoting *Shahaba Khan* v. *Balya*, (3) that "when the defendant did not admit a yearly tenancy, he could not claim the notice due only to a yearly tenant"; and, quoting *Vivian* v. *Moat* (4) and other English cases, "that setting up a right to hold at a customary rent in answer to a claim for increased rent is a repudiation of the landlord's title, which dispenses him from giving notice to quit."

In *Vithu* v. *Dhondi* (2) the plaintiff landlord sued in ejectment, asserting that he had given a valid notice to quit. Defendants [635] set up a plea of permanent tenancy, which the lower appellate Court held not proved. It was held by this Court that the notice alleged by the plaintiff was not in accordance with law, and that, therefore, there was no legal determination of the tenancy, and without such legal determination the plaintiff was not entitled to recover possession of the property from the tenant. Further, with reference to the two cases quoted above, it was pointed out that "in none of the cases relied upon in the judgment of the Court in *Baba* v. *Vishvanath* with the exception of the case of *Shahaba Khan* v. *Balya* 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 (5), 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 (6).' And if the

(1) 8 B. 228.
(2) 15 B. 407.
(3) P.J. for 1873, p. 66.
(4) L.R. 16 Ch. 730.
(5) Woodfall's Landlord and Tenant, p. 78 (14th Ed.).
(6) Cole on Ejectment, p. 288.

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 observations in *Purshotam* v. *Dattatraya* (1) 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 *Baba* v. *Vishvanath*, or from the judgment in *Shahaba Khan* v. *Balya*, that this distinction was mentioned in argument or was otherwise present to the mind of the Court." Further, with reference especially to *Baba* v. *Vishvanath*, it was pointed out that it may well be doubted whether a man's claiming to be a *mirasi* tenant ought of itself to be held to be a disclaimer of the landlord's title, and it was shown that the considerations urged by the Calcutta High Court in *Kali Kishen* v. *Golam Ali* (2) and *Kali Krishna* v. *Golam Ally* (3) and the remarks of this Court in *Haji Sayyad* v. [636] *Venkta* (4) did not appear to have been brought to the notice of the Judges who decided *Baba* v. *Vishvanath*. It was, therefore, decided in *Vithu* v. *Dhondi* that that suit in ejectment could not be maintained.

Now in the present case the plaintiff is the purchaser from the tenants, and he brought his suit claiming to be "full owner, and complaining that the defendant landlord interfered with his possession. Defendant, among other things, pleaded that the plaintiff's vendors had no rights of ownership. The District Judge held that the plaintiff came into Court, alleging himself to be "owner," which the subsequent conduct of the case shows was intended to mean permanent tenant. No doubt, as the District Judge remarked, the plaint, and the way in which the plaintiff's case was conducted, amounted to a denial of the lessor's title.

Can the plaintiff then, according to the principles laid down in *Vithu* v. *Dhondi*, claim to be restored to possession, and to be given damages, on the ground that as a yearly tenant he was entitled to a notice which was not given? We think not. In the cases quoted above the claims brought by the landlord plaintiff were founded on the alleged notices to quit, which were held to be invalid, and thus there had been no legal determination of the tenancies. The foundation of the claims failed. Here there could be no plea with regard to notice, for the form of the tenant's suit rendered such a plea wholly irrelevant. Accordingly no such plea was in fact put forward, and the question of the rights of the parties on the footing of the tenancy having been one from year to year was not raised or tried. Under these circumstances we hold that the ruling in *Vithu* v. *Dhondi* does not apply to the present case; and we confirm the decree of the District Judge with costs.

Decree confirmed.

(1) 10 B. 669. (2) 13 C. 3. (3) 13 C. 248.
(4) P.J. for 1880, p. 122; see also 15 B. 514, foot-note (*a*).