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## APPELLATE CIVIL.

APPEL-  
LATE  
CIVIL.*Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.*

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DODHU AND OTHERS (*Original Defendants Nos. 12 to 18*), Appellants  
v. MADHAVRAO NARAYAN GADRE AND OTHERS (*Original  
Plaintiff and Defendants Nos. 1 to 11*).<sup>\*</sup> [23rd January, 1893.]

*Landlord and tenant—Suit for possession—Denial of landlord's title—Plea of permanent tenancy—Notice to quit—Yearly tenant—Practice—Procedure—Second appeal—Point taken for first time on second appeal—Specific performance, suit for—Parties made defendants who were not parties to the agreement.*

The plaintiff sued the jaghirdars of a certain village (defendants Nos. 1 to 11) and certain of their tenants (defendants Nos. 12 to 18) for specific performance of an agreement made between the plaintiff and the jaghirdars, by which the jaghirdars agreed to give up to the plaintiff possession of certain lands, which were in possession of the tenants (defendants Nos. 12 to 18). The jaghirdars (defendants Nos. 1 to 11) pleaded that they were unable to give possession, as the tenants (defendants Nos. 12 to 18) were permanent tenants and refused to quit the land. The tenants (defendants Nos. 12 to 18) put in a separate defence, also alleging that they were permanent tenants of the jaghirdars. The lower appellate Court held that the tenants (defendants Nos. 12 to 18) were yearly tenants and did not hold in perpetuity, and that the jaghirdars (defendants Nos. 1 to 11) had power to eject them. That Court, therefore, passed a decree for the plaintiff, for specific performance of the agreement as against the jaghirdars (defendants Nos. 1 to 11) and for possession as against the other defendants (Nos. 12 to 18). The latter defendants (the tenants) appealed to the High Court. They there contended that if they were yearly tenants as held by the decree of the lower Court they could not be dispossessed without notice to quit, and that no such notice had been given.

*Held* (1) that the objection was good, and that no decree against the tenants (defendants Nos. 12 to 18) could be made in favour of the plaintiff, and that he was only entitled to a declaration that the said defendants were mere yearly and not permanent tenants.

[11] (2) That the tenants (defendants Nos. 12 to 18) had claimed to be permanent tenants before the suit was filed and at that time they were not tenants of the plaintiff but of the jaghirdars (defendants Nos. 1 to 11). Under the circumstances that claim could not be taken to have worked a forfeiture of their tenancy as a denial of their landlord's title, or in any case it must be deemed to have been waived by the jaghirdars (defendants Nos. 1 to 11). The plaintiff, therefore, could not rely upon it as an answer to the defendants' contention that a notice to quit was necessary.

(3) That the objection as to the necessity of notice to quit was one which might be taken in second appeal.

*Held*, also, that an objection that certain of the defendants should not have been made parties to a suit for specific performance, because they were not parties to the agreement, could not be taken for the first time in second appeal, as it only involved a question of practice.

[R., 17 A. 45 (47); 18 B. 256 (259); 20 B. 759 (761); 24 B. 426 (434) = 2 Bom. L.R. 228; 26 B. 360 (362) = 4 Bom. L.R. 58; 26 C. 927 (932) = 13 C. W.N. 949 = 2 Ind. Cas. 656; 5 Ind. Cas. 336 (337).]

SECOND appeal from the decision of Rao Bahadur N. N. Nanavati, First Class Subordinate Judge of Dhulia with appellate powers.

Suit for specific performance of an agreement and for possession of land.

The plaintiff sued for specific performance of an agreement by which defendants Nos. 1 to 11, Bhivrao Govind and others, who were jaghirdars,

<sup>\*</sup> Second Appeal, No. 394 of 1891.

agreed to grant to plaintiff a *sanad* in respect of two pieces of land and to deliver possession to him of the said lands, and that, in the event of the lands being found to contain less than 70 bighas, to give other land of the same quality in accordance with the agreement. The plaintiff also charged defendants Nos. 12 to 18, who were tenants of the jaghirdars, with colluding with them, and prayed that possession be given him by all the defendants.

Defendants Nos. 1 to 11, Bhivrao Govind and others, answered that they could not give the plaintiff the lands mentioned in the agreement, as defendants Nos. 12 to 18 were permanent tenants and were reluctant to quit, but that they were ready to give the plaintiff other land in lieu of those mentioned in the agreement.

Defendants Nos. 12 to 18 pleaded that the land called Hari Mali Vale had been granted in permanent tenancy to them by the father of defendants Nos. 1 to 8, and that as regards the other piece of land it belonged to defendants Nos. 13 to 18, and that the jaghirdars were only entitled to assessment.

[112] The Subordinate Judge found that the agreement relied on by the plaintiff was proved, and also that defendants Nos. 12 to 18 were entitled to hold the land as long as they paid assessment.

On appeal by the plaintiff the Court found that the jaghirdars had the right to eject the defendants Nos. 12 to 18, and passed a decree for specific performance as against defendants Nos. 1 to 11 and for delivery of possession as against defendants Nos. 12 to 18.

Defendants Nos. 12 to 18 preferred a second appeal.

*Jardine* (with *Ganpat Sadashiv Rao*), for the appellants (defendants Nos. 12 to 18).—As these defendants were not parties to the agreement of which the specific performance is sought, they were wrongly joined in the suit. A suit for specific performance of an agreement cannot lie against a stranger.

[SARGENT, C.J.—That objection was not taken in either of the lower Courts.]

Our next point is that the Judge found these defendants to be yearly tenants, and that being so the suit ought to have been dismissed, so far as they are concerned, for want of notice to quit—*Vithu v. Dhondi* (1).

*Mahadeo Chimmaji Apte*, for the respondent (plaintiff).—The objections taken have been now raised for the first time. They cannot be taken in second appeal. In the lower Courts the appellants alleged a permanent tenancy. Such a plea being a direct denial of the landlord's title, no notice to quit can be held necessary. In the case relied on, the question of permanent tenancy was raised after suit. Here the appellants disputed the plaintiff's title to possession before the suit was filed.

#### JUDGMENT.

SARGENT, C.J.—This was a suit by the plaintiff for specific performance of an agreement by which the defendants Nos. 1 to 11 agreed to grant plaintiff a *sanad* in respect of certain lands in their *jaghir* and to deliver possession to him of the said lands, and in the event of the lands being found to contain less than 70 bighas, to give other land of the same quality in accordance with the agreement. The plaintiff also charged defendants Nos. 12 to 18, who were tenants of the jaghirdars, with

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colluding with [113] them, and prayed that possession be given him by all the defendants.

The defendants Nos. 1 to 11 by their written statement said they could not give the plaintiff the lands mentioned in the agreement, as defendants Nos. 12 to 18 were permanent tenants and were reluctant to quit, but that they were ready to give the plaintiff other lands.

The defendants Nos. 12 to 18 pleaded that the land Hari Mali Vale had been granted in permanent tenancy to them by the father of defendants Nos. 1 to 8, and that as regards the other piece of land it belonged to defendants Nos. 12 to 18, and the jaghirdar was only entitled to assessment. The agreement was found proved by the Subordinate Judge, who also held that the defendants Nos. 12 to 18 were entitled to hold the lands as long as they paid assessment. On appeal by plaintiff the Court found that the jaghirdar had the right to make the defendants Nos. 12 to 18 quit the land, and passed a decree for specific performance as against the defendants Nos. 1 to 11 and for delivery of possession against the defendants Nos. 12 to 18.

Defendants Nos. 12 to 18 now appeal on the authority of *Javherbai v. Haribhai* (1), and have taken the objection that defendants being strangers to the agreement, they could not be made parties to a suit for specific performance; this objection, however, was not taken in either of the Courts below, and as it only involves a question of practice cannot be taken for the first time on second appeal. It has also been objected to the decree that notice to quit not having been given to the defendants Nos. 12 to 18, who have been found by the lower Court of Appeal to be yearly tenants, a decree for possession could not be made against them. This objection raises a question on which there has been some difference of judicial opinion and decision. It was urged, indeed, that it could not be taken for the first time on second appeal. But it has been already decided, and we think rightly, that it can be so taken—*Vithu v. Dhondi* (2), following *Haji Sayad v. [114] Venkta* (3), *Abdulla v. Subbarayyar* (4), and *Subba v. Nagappa* (5). In *Vithu v. Dhondi* (2), where the effect of a defendant setting up a permanent tenancy by his written statement is fully discussed, it was pointed out that, according to English law, the plaintiff could not rely on a disclaimer of title operating as a forfeiture of the tenancy, when the disclaimer had been made subsequent to the day mentioned in the writ of ejectment as the time when the plaintiff was entitled to possession, and that on general principles the same rule would apply where the plaintiff, in this country, filed his suit before the disclaimer took place. In the present case, however, although there is no distinct finding on the question, it can scarcely be doubted that the defendants Nos. 12 to 18 had set up a permanent tenancy as the ground of their objection to quit before the suit was filed. Assuming this to have been so, it remains to consider what would be the effect of that claim being set up by the tenants. It is to be remarked that they were not the plaintiff's tenants when they set up the claim, and so far as the defendants Nos. 1 to 11 are concerned, it cannot, under the circumstances of the case, be taken to have worked a forfeiture of the tenancy, or in any case it must be deemed to have been waived by defendants Nos. 1 to 11.

(1) 5 B. 575 (577).  
 (4) 2 M. 346.

(2) 15 B. 407.  
 (5) 12 M. 853.

(3) 15 B. 414 (N).

We are of opinion, therefore, that no decree for possession as against defendants Nos. 12 to 18 can be made in favour of the plaintiff in this suit, and that he is only entitled to a declaration that the said defendants are only yearly and not permanent tenants. We must, therefore, reverse the decree, so far as it directs the defendants Nos. 12 to 18 to deliver possession to plaintiff, and direct that a declaration be inserted in the decree that the said defendants are only in possession of the land as yearly tenants. In other respects the decree is confirmed. Appellants to have their costs of this appeal.

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*Decree partially reversed.*

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[115] ORIGINAL CIVIL.

*Before Mr. Justice Starling.*

KANJI BAVLA (*Plaintiff*) v. ARJUN SHAMJI AND OTHERS  
(*Defendants*). [10th August, 1893.]

*Caste-matter—Custom of caste—Funeral ceremonies—Right to assistance of fellow-members of caste—Refusal to assist—Cause of action—Suit not maintainable.*

The plaintiff, a Hindu and *kharva* by caste, alleged in his plaint that, pursuant to a usage of his caste, he, on the occasion of his child's death, called upon the defendants, who were his caste-fellows, to assist him in removing the dead body and performing caste ceremonies incidental thereto; that the defendants refused to do so, and induced other members of the caste to refuse also; that, in consequence thereof, the plaintiff was injured in his caste-status, and he prayed for a declaration that the defendants' acts were unlawful, and that he was lawfully entitled to exercise and enjoy all his customary caste-rights and privileges; and also for damages and for an injunction restraining the defendants from preventing other members of the caste from recognising him and treating him as a member of the caste.

*Held*, that the plaint disclosed no cause of action, and must be rejected.

[*Rel.* 26 B. 174 (152) = 3 Bom. L. R. 718.]

IN chambers. The plaintiff presented a plaint alleging that he was a member of the *kharva* caste of Hindus in Bombay; that it was a custom in the caste that, in case any death took place in the house of any member of the caste, such member was entitled to call upon his caste-fellows to assist him in the removal of the dead body to the burial-ground and to take part in performing the customary caste ceremonies connected with the funeral; that in January, 1893, his child died, and he called upon the defendants, two of whom were trustees of the caste, to aid him and take part in the customary performance of caste rites, but they maliciously and without any cause refused to do so, and induced others also to refuse, and that, in consequence thereof, the plaintiff suffered in his *status* and character as a member of the caste, and was treated as if he had been out-casted. He prayed for a declaration: (1) that the acts of the defendants were illegal, and contrary to the usages of the caste; (2) that he was still a member of his caste, and had done nothing to forfeit the rights and privileges of his caste, and was lawfully entitled in every respect to exercise and enjoy all his customary caste rights, and reciprocate the same to his fellow-castemen. He further prayed for damages and for an injunction restraining the defendants from