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Again, he who occupies land in the absence of the possessor does not, according to Savigny, "at the moment acquire juridical possession:" Savigny, page 261. In other words, it must be followed up by other acts of possession of which the third party has notice. This would seem to afford the only possible answer to the abstract question referred to us; for as regards a third person—assuming, as we do, that he was not affected by the decree—it cannot matter that the decree was in a partition suit. In *Rámáji Govind* v. *Yaswáda*[1] it is quite possible that the Court considered that the third person was present and did not obstruct.

With respect to the second question, we are of opinion that, in the case of dispossession of a third party in execution of a decree, section 332 of the Code of Civil Procedure applies, and that it does not constitute a cause of action within the jurisdiction of the Mámlatdár.

(1) P. J., 1878, p. 56.

FULL BENCH.

APPELLATE CIVIL.

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

1895. March 12.

VENKAJI KRISHNA NADKARNI AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* LAKSHMAN DEVJI KANDAR (ORIGINAL DEFENDANT No. 1), RESPONDENT.*

Landlord and tenant—Notice to quit—Land Revenue Code (Bom. Act V of 1879), Sec. 84†—Transfer of Property Act (IV. of 1882), Secs. 111 and 117—Annual tenancy—Denial of lessor's title prior to suit—Sufficient cause to enable lessor to recover possession without notice to quit—Landlord's right of forfeiture.

In cases not falling under section 117 of the Transfer of Property Act (IV of 1882), a denial of the lessor's title prior to suit is, notwithstanding section 84 of the

* Second Appeal No. 883 of 1892.

† Section 84 of the Land Revenue Code (Bom. Act V of 1879):—

"84. An annual tenancy shall, in the absence of proof to the contrary, be presumed to run from the end of one cultivating season to the end of the next. The cultivating season may be presumed to end on the 31st March.

"An annual tenancy shall require for its termination a notice given in writing by the landlord . . . at least three months before the end of the year of tenancy, at the end of which it is intimated that the tenancy is to cease. Such notice may be in the form of Schedule E, or to the like effect."

Land Revenue Code (Bom. Act V of 1879), a sufficient cause of action to enable the lessor to recover possession without notice to quit.

The object of section 84 of the Land Revenue Code is to define the nature of a contract of tenancy, but the landlord's right of forfeiture arising from denial of his title is no part of the contract of tenancy, but is a right which the law implies in all cases from the relationship of landlord and tenant. If the Legislature had intended to exclude the right of forfeiture in cases of annual tenancies, there would have been express provision to that effect.

SECOND appeal from the decision of Ráo Bahádur Káshináth Bálkrishna Maráthe, First Class Subordinate Judge of Ratnágiri with Appellate Powers, reversing the decree of Ráo Sáheb S. M. Karandikar, Second Class Subordinate Judge of Devgad.

Suit by the plaintiffs to recover possession with mesne profits of certain land leased to defendant No. 1 and for the removal of a cattle-shed erected by him. The plaintiff based his claim on a rent-note of 1887 executed by defendant No. 1 as principal and defendant No. 2 as surety, or in the alternative on his general title.

The Subordinate Judge passed a decree for the plaintiff, holding defendant No. 1 was an ordinary yearly tenant of the plaintiff under Bombay Act I of 1880, section 8.

Defendant No. 1 appealed and at the hearing of the appeal contended that the plaintiff had given him no notice to quit, and that without such notice he could not be ejected.

The plaintiff on the other hand alleged that in a previous suit brought by him against the defendant he (the defendant) had denied his title, and that, therefore, notice was not necessary.

The appellate Court reversed the decree and dismissed the suit, holding that the plaintiffs were not entitled to eject the defendant without giving him notice to quit. The following is an extract from the judgment:—

"My finding on the said issue (namely, Is the plaintiff entitled to eject the defendant without giving him notice to quit?) is in the negative; for, under section 84 of the Revenue Code (Bom. Act V of 1879), every landlord can turn out his tenant only upon giving him a formal notice in time. The plaintiff-respondent's pleader urges that the defendant denied his title in the written statement filed in the suit which he withdrew with permission to bring the present suit. The pleader files a copy of the written statement (*vide* Exhibit 11 of the appeal record). I do not think that the former written statement or the written statement filed in the present suit contains any disclaimer of the plaintiff's title to sue for rent. The de-

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fendant admits that he has been paying an amount of rent to meet the *dasta* or assessment, and the defendant admits that, as mortgagee, at least of the khoti, the plaintiff is entitled to receive some rent. The defendant doubtless denies the plaintiff's absolute ownership and possession, but he concedes to the plaintiff being mortgage-owner of the khoti, and thus entitled to treat the defendant as his khoti tenant. The tenant-defendant is, therefore, entitled to a notice before he can be ousted. The plaintiff's former suit and the present are, however, a continuation of the same suit, and if a disclaimer is entered at any stage of the suit, the plaintiff cannot plead the non-necessity of a formal notice to quit according to the ruling in I. L. R., 15 Bom., 407."

The following is the translation of the defendant's written statement in the previous suit referred to in the above extract:—

"Written statement of Lakshman Devji Kandar, defendant No. 1, is as follows:—

"1. The *thikán* (plot) mentioned in the plaint does not belong to the plaintiff by right of ownership, nor is it under his *vahivat*, nor did I pass to the plaintiff the *kabulâyat* referred to in the plaint, and there was no reason for me to give it in writing. As there is disagreement between plaintiffs and us, the plaintiffs with the aid of persons acting in collusion with them and their debtors fabricated the said *kabulâyat* with the intention of taking away my property.

"2. The village of Manje Bavsi is a vatni khoti village belonging to us and other bhâubands; and out of the said village, the plot in dispute belongs to us by right of *khâsgi* (private) ownership, and the possession thereof has been with us by right of ownership from the time of our ancestors.

"3. The khoti right in connection with our village has gone to the plaintiffs by mortgage from the ancestors of us and other bhâubands, and they have been carrying on the *vahivat* of the khoti as such (*i. e.* mortgagees). Therefore we have paid to the plaintiffs every year 0—3—3, three maunds and three quarters of paddy and rupee one in cash as assessment of the land in dispute. Accordingly we offered the amount of assessment for the year in dispute, but the plaintiffs did not take it. I am willing to pay the same to the plaintiffs.

"4. As I am not a private tenant of the plaintiffs, I am not liable to pay them the amount of *khand* or income, and no statement made in the plaint is true.

"5. The suit filed by the plaintiffs without ground may be rejected and my costs awarded from them."

The plaintiff preferred a second appeal.

Mánekshâh J. Taleyârkhân appeared for the appellants (plaintiffs).

Nagindás T. Márphatia appeared for the respondent (defendant No. 1).

The second appeal came on for hearing before Bayley, Acting C. J., and Fulton, J., and the following judgment referring the case to a Full Bench was delivered by

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FULTON, J. :—In this case the plaintiffs sued to recover possession of land leased to the defendant under a rent-note and for rent and mesne profits. The Second Class Subordinate Judge, while holding that the rent-note was not proved, awarded the claim on the ground that the defendant was an ordinary or yearly tenant within the meaning of section 8 of Bombay Act I of 1880. On appeal, the First Class Subordinate Judge, A. P., reversed the decree for want of the notice, which, under section 84 of the Land Revenue Code, was required to terminate the tenancy. The plaintiffs have now appealed; and on their behalf Mr. Mánekshán has urged that no notice was necessary, as previous to the institution of the suit the tenant had disclaimed the landlord's title. The question then arises, whether there has been a legal termination of the tenancy.

The 84th section of the Land Revenue Code (Act V of 1879) is as follows :—

"An annual tenancy shall in the absence of proof to the contrary be presumed to run from the end of one cultivating season to the end of the next. The cultivating season may be presumed to end on the 31st March.

"An annual tenancy shall require for its termination a notice given in writing by the landlord to the tenant or by the tenant to the landlord at least three months before the end of the year of tenancy at the end of which it is intimated that the tenancy is to cease. Such notice may be in the form of Schedule E or to the like effect."

It will be observed that unlike the corresponding provisions of section 106 of the Transfer of Property Act (IV of 1882), which declare a tenancy from year to year to be "terminable" by notice without excluding the operation of the other modes of termination recited in section 111, section 84 of the Land Revenue Code enacts that an annual tenancy shall require a notice for its termination, and thus uses language which seems to preclude the suggestion that it can be terminated otherwise. Mr. Mánekshán endeavoured to distinguish between the termination of a tenancy and its forfeiture; but we are unable to see how it can be held that any proceeding which brings to an end the relation-

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ship of landlord and tenant does not involve a "termination" of the tenancy. The phraseology of section 111 of the Transfer of Property Act, and the remarks in section 9 of Chapter VIII of Woodfall's Treatise on the Law of Landlord and Tenant, show that where the doctrine of forfeiture prevails, a disclaimer of title is treated as determining the tenancy at the election of the landlord.

Consequently, as the law of this Presidency provides that an annual tenancy shall require a written notice for its termination, it seems at least doubtful whether such a tenancy can be terminated in any other way, unless there has been an agreement between the parties (as in the case of a surrender accepted by the landlord) to waive the requirements of the section.

It was contended, however, that apart from the section the decisions of this Court showed that a tenancy can be terminated in consequence of a disclaimer of title prior to suit. The subject is very fully discussed in *Vithu* v. *Dhondi*(1), in which the learned Judges, dissenting from *Bába* v. *Vishvanáth*(2), held that a plaintiff seeking to dispossess an annual tenant must allege a cause of action prior to suit, and could not rely on a subsequent disclaimer, and doubted whether the setting up of a permanent tenancy was such a disclaimer as would work a forfeiture. In *Krishna* v. *Ladu*(3), Sargent, C.J., and Telang, J., said: "We agree in the opinion expressed by the Court in *Vithu* v. *Dhondi* that the setting up by the defendant of a permanent lease does not constitute such a denial of title as to relieve the owner from giving notice to the tenant." The question, however, still remains, whether by a denial of title prior to the suit there can be a termination, in this Presidency, of an annual tenancy of an agricultural holding. No decision expressly on the point has been cited to us, and, apart from the cases, of which *Bába* v. *Vishwanáth* is the type, in which the defendant in his written statement denied the annual tenancy, and was, therefore, held to have waived his claim to notice, we have not been able to find any case in which an annual tenant has been ejected on the

(1) I. L. R., 15 Bom., 407. (2) I. L. R., 8 Bom., 228.
(3) P. J., 1893, p. 292.

ground that he had denied his landlord's title prior to the institution of the suit. *Gopalrâo* v. *Kishor*[1] may perhaps be relied on; but it is not clear whether the decision that the plaintiff was under no obligation to prove notice was based on the defendant's plea or on the fact of his previous denial of title. It must, however, be conceded that in *Vithu* v. *Dhondi*, *Raghunâth* v. *Kika*[2] and *Krishna* v. *Ladu* it appears to have been assumed that an express disclaimer of the landlord's title by the tenant prior to suit would operate as a forfeiture; but it is to be observed that the wording of section 84 was not discussed.

Under these circumstances it seems, having regard to the uncertain state of the law in India about forfeiture as shown by the conflicting nature of the decisions noticed in *Purshotum* v. *Dattatraya*[3] and further illustrated in *Vithu* v. *Dhondi* and subsequent cases, desirable to refer to a Full Bench the question now under consideration. On the one hand, there has been a considerable expression of opinion that under certain circumstances a disclaimer may work a forfeiture of an annual tenancy, and on the other there are the terms of section 84, which may have been intended to place the relationship of landlord and tenant on a secure basis and to prevent unnecessary litigation by removing all uncertainty as to the method by which it may be terminated. The corresponding provisions of section 43 of Bombay Act I of 1865 were differently worded.

In case it be held that a disclaimer of title may operate as a forfeiture of an annual tenancy, the further question will arise whether Exhibit 11, on which Mr. Mánekshâh relies, contains such a disclaimer. On this point the recent decision that the mere setting up of a permanent tenancy is not such a denial of title as to relieve the owner from giving notice to the tenant (which seems to show that in this respect *Vivian* v. *Moat*[4] cannot safely be followed in India) leaves it uncertain whether such a statement as is recorded in Exhibit 11 can be looked upon as sufficient to justify the landlord in determining the tenancy without notice.

(1) I. L. R., 9 Bom., 527.
(2) P. J., 1892, p. 421.
(3) I. L. R., 10 Bom., 669.
(4) 16 Ch. D., 730.

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The questions to be referred are :—

(1) Whether in this Presidency a disclaimer of the lessor's title by the annual tenant of a holding to which section 84 of the Land Revenue Code (Bom. Act V of 1879) applies, is, if made prior to suit, a sufficient cause of action to enable the lessor to recover possession without proof of notice to quit?

(2). If so, whether the statements contained in Exhibit 11 constitute a disclaimer of title?

If these questions are decided in favour of the plaintiffs, the appeal will have to be remanded on the other points raised in it; and in any case it will have to go back for decision as to the plaintiffs' right to recover rent for the years in dispute. This point appears to have been overlooked in the lower appellate Court. It was also passed over in the memorandum of second appeal; but as Mr. Mánekshán has explained that the omission was due to oversight, we have allowed him to raise it in argument.

The reference was argued before a Full Bench composed of Sargent, C. J., and Jardine and Candy, JJ.

Mánekshán J. Taleyárkhán, for the appellants (plaintiffs) :—The defendant did not admit his tenancy but set up his title as absolute owner. He denied our title before the suit. He thus waived his right to notice to quit—*Vithu* v. *Dhondi*[1]; *Jamsedji* v. *Lakshmirám*[2]; *Vivian* v. *Moat*[3]. There are various modes of terminating a tenancy, and a notice to quit is only one of those modes—Woodfall on Landlord and Tenant, Chapter VIII.

Nagindás T. Márphatia, for the respondent (defendant No. 1):—The Judge has found that there was no denial on our part of plaintiff's title. Section 84 of the Land Revenue Code (Bom. Act V of 1879) is applicable to the present case, and the tenancy must be put an end to in the way mentioned in that section—*Vithu* v. *Dhondi*[1]. The language of the section is imperative, and no tenancy can be determined without notice. See also sections 111 and 117 of Act IV of 1882.

(1) I. L. R., 15 Bom., 407. (2) I. L. R., 13 Bom., 323.
(3) 16 Ch. Div., 730.

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The next point is whether the defendant's written statement (Exhibit 11) amounts to a denial of the plaintiff's title. We submit that it does not. We say in it that we are entitled to hold the land on payment of the assessment. Under the Khoti Act (Bom. Act I of 1880) assessment is considered as rent. The fact that there is a dispute between the parties does not amount to a denial of the landlord's title—*Krishna* v. *Ladu*[1].

The judgment of the Full Bench was delivered by

SARGENT, C. J.:—The first question for determination is, whether by a denial of the lessor's title prior to suit there is in this Presidency, having regard to section 84 of the Land Revenue Code (Act V of 1874), a sufficient cause of action to enable the lessor to recover possession without notice to quit in the case of an annual tenant to which that section applies. The object of section 84 is to define the nature of the contract creating an annual tenancy, which, it is to be remarked, may be for agricultural or other purposes both as regards the period during which it runs and the landlord's power of determining it. The landlord's right of forfeiture, however, arising from disclaimer of his title, although it is treated as determining the tenancy at his election, is no part of the contract of tenancy, but is a right which the law implies in all cases from the relationship of landlord and tenant. Had it been the intention of the Legislature to exclude the right of forfeiture in the case of all annual tenancies, we should have expected to find it expressly provided for.

Section 111 of the Transfer of Property Act (IV of 1882), which gives the right of forfeiture, is, in common with all the provisions of Chapter V of the Act, declared to be inapplicable by section 117 of the Act in the case of all leases for agricultural purposes, except so far as the Local Government may have otherwise declared. That Act, however, did not become the law of this Presidency before January, 1893, subsequent to the institution of this suit. In *Vithu* v. *Dhondi*[2], which was a case in which it was assumed that notice was required by section 84 of the Land Revenue Code, it was not contended that the right of forfeiture had been taken away by the section.

(1) P. J., 1893, p. 292. (2) I. L. R., 15 Bom., 407.

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We think, therefore, that the first question should be answered in the affirmative assuming the case not to be governed by section 117 of the Transfer of Property Act. To the second question, *viz.*, whether the disclaimer contained in Exhibit 11 constituted a disclaimer of title, the only answer we can give to it is that it depends upon the construction of Exhibit 11 read in connexion with the evidence in the case.

The Full Bench having sent back the case to the Division Bench which had made the reference to the Full Bench for final disposal, the following judgment was given :—

Judgment.—The First Class Subordinate Judge A. P. has not found as to the nature of the defendant's tenure, and it, therefore, is impossible for us, having regard to the judgment of the Full Bench, to determine whether the statements in Exhibit 11 constitute a disclaimer of title such as to enable the plaintiffs to recover possession without notice to quit.

Under these circumstances we must reverse the decree of the lower appellate Court and remand the appeal for a fresh decision on the various points which arise, including the question as to the plaintiffs' right to recover rent for the years in dispute. Costs to follow the result.

Decree reversed and case remanded.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Jardine, and Mr. Justice Fulton.

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KYTE, PETITIONER, *v.* KYTE, RESPONDENT, AND COOKE, CO-RESPONDENT.*

Divorce—Husband and wife—Indian Divorce Act (IV of 1869*)—Jurisdiction of District Court—Place of marriage—Marriage by petitioner before decree of District Court confirmed by High Court—Ignorance of law—Damages against co-respondent—Practice.*

Under section 2 of the Indian Divorce Act (IV of 1869) a District Court has jurisdiction to make a decree for dissolution of marriage upon being satisfied that the adultery charged has been committed in India without going into evidence as to the place of the marriage of the parties.

* Civil Reference, No. 9 of 1894.