

(1938) 03 BOM CK 0011
In the Bombay High Court
Case No : Second Appeal No. 812 of 1932

Babasaheb Appasaheb Sirnadgouda

APPELLANT

Vs

Laxmanappa Ramappa Kallimani

RESPONDENT

Date of Decision : 03-03-1938

Acts Referred:

Bombay Land Revenue Code, 1879 — Section 84
Bombay Watan Act, 1886 — Section 5

Citation : AIR 1938 Bom 492 : (1938) 40 BOMLR 1015

Hon'ble Judges : Macklin, J;Broomfield, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Broomfield, J.—We are concerned here with a batch of four second appeals arising out of suits brought by an inamdar of the villages of Honnihal, Chavadapur and Mudavinkop in the Bijapur district to evict persons in possession of the lands in these three villages, who, he alleges, are his annual tenants. The lands in question are paragana watan lands.

2. The contentions in the written statements of the defendants were that the plaintiff is not the owner of the soil but merely entitled to receive the revenue of the lands, that the defendants are not annual tenants, that legal notice was not given, that the defendants are mirashi khata tenants and have acquired rights similar to those of occupancy tenants in British villages, that they have not been paying rent but assessment as enhanced from time to time in accordance with the custom, and that the plaintiff's claim to recover possession is barred by adverse possession. The tenure claimed by the defendants is explained in paragraphs 6 and 7 of the written statements of the defendants in suit No. 255 of 1930 in which by agreement all the evidence was recorded. It is there stated :

Many years ago when the lands had fallen fallow the ancestors of the plaintiff have let out the land on condition that land should be brought under cultivation and enjoyed as a mirashi khata tenant. From that time the family of the

defendants are enjoying the said land upto now on this right. The defendants therefore have acquired the rights similar to those of khata kuls existing in British villages. The defendants' family have been paying the assessment enhanced by the inamdars taking into consideration the soil of the land, the season and the condition of the locality and local custom and relative assessment of the lands in other inam villages.

3. Subsequently an application was made asking that specific issues should be raised dealing with the claim to permanent tenancy by local custom and also with Section 83 of the Bombay Land Revenue Code. In this application it was stated as follows :-

The Village Officers have entered khatas of tenants in pursuance of the order of the Inamdars in the village accounts. In the same way the original Inamdars have given the suit land to the ancestors of the defendants on khata. Such khata tenants being understood to be permanent tenants have since ancient days been carrying on transactions of mortgage and sale. The tenancy must have been permanent for the purpose of such transactions.

4. In consequence of this application a specific issue was raised as to whether the alleged usage was proved. No special issue was raised as to Section 83 of the Bombay Land Revenue Code, presumably because it was considered to be covered by the issue already raised as to whether the defendants are permanent tenants as contended by them.

5. The trial Judge found that the local usage alleged by the defendants was not proved and he also held that it was not open to them to prove it in view of the language of Section 83 of the Bombay Land Revenue Code. He took the view that it is the landlord who is entitled to offer proof of a local custom. He decided three of these suits in favour of the inamdar, these being suits Nos. 255, 258 and 259 of 1930. In the first of these cases, No. 255, he awarded a sum of Rs. 200 to the defendants as compensation for improvements made by them. But in the case of three other suits, Nos. 256, 260 and 261, he found that there were special features of the tenancy in those cases justifying the conclusion that the defendants there are permanent tenants. The circumstances on which he relied were the alienation of lands by the tenants, the construction of substantial buildings, and the investment of money in improvements of a permanent nature to the knowledge of the landlord and without any objection on his part. He accordingly dismissed these three suits.

6. The inamdar in those cases appealed to the District Court, and the defendants appealed in suit No. 255. The District Judge found that a permanent tenancy had been established by local custom in all the cases with the result that all the suits were dismissed, that is to say, the four suits in which there was an appeal. In two cases where the Subordinate Judge passed a decree in favour of the inamdar there was no appeal to the District Court.

7. Suit No. 255 is the subject of second appeal No. 812 and deals with lands in

Honnihal. Suit No. 256 is the subject of Second Appeal No. 856 and also relates to Honnihal lands. Suit No. 260 is the subject of Second Appeal No. 847, the lands being in Chavadapur. Suit No. 261 is the subject of Second Appeal No. 848, the lands being in Mudavinkop.

8. In our opinion there is nothing in the trial Judge's point based on Section 83 of the Bombay Land Revenue Code, and it is in fact conceded that the claim to permanent tenancy may be based on local custom if it be properly proved : see *Babaji and Nanaji v. Narayan* ILR (1879) Bom. 340 and *Subramanya Chettiyar Vs. V.P. Subrahmanya Mudaliyar*, a Privy Council case. The principal questions in the appeal are (1) whether the facts proved justify a legal inference that the defendants are permanent tenants by local custom, and (2) whether the fact that the lands are watan lands is a legal bar to the claim of permanent tenancy.

9. If the point had not been taken, I should not have thought that it could be even arguable that the questions arising in these cases are pure questions of fact, which cannot be made the subject of second appeal. But the point was taken by the learned advocate for the respondents although not as a preliminary objection. We think that there is no substance in this point. The question is what is the proper legal inference to be drawn from the proved facts of the case. That has been held to be a point of law by the Privy Council in *Wali Mohammad v. Mohammad Baksh* (1929) 32 Bom. L.R. 380 It has also been held in *Sursingji Dajiraj Thakorsaheb Vs. Manilal Vallabhdas Parikh*, that custom is a mixed question of law and fact.

10. Before dealing with these principal issues, however, there are some preliminary and minor points which may first be disposed of. The point that the plaintiff is not the owner of the soil appears never to have been pressed at any stage. The contention that notices were not legally given was according to the trial Judge not seriously advanced in that Court and he says that the plaintiff was merely put to formal proof of the notices. In the appeals to the District Judge nothing seems to have been said about the notices at all, and his judgment is silent on the point. In this Court Mr. Jahagirdar for the respondents contends that the notices in two cases were bad in law because they were sent by registered post, and the evidence shows that they were refused by the recipients without being read. In support of his argument he relies on the decision of a bench of this Court in *Vaman v. Khanderao* (1934) 37 Bom. L.R. 376 The learned Chief Justice said in that case (p. 384) :-

In the case of defendants Nos. 4 and 5 a registered letter containing the notice was sent to them duly addressed, and service is alleged to have been refused. In fact the refusal was not proved, as the postman who took the letter and brought it back was not called. But in any case, even if the refusal had been proved, I should not be prepared to hold that a registered letter tendered to the addressee and refused and brought back unopened, was well-served. There are, I know, some authorities in this Court to the contrary, but it seems to me impossible to say that a letter has been served so as to bring the contents to the notice of the

person to whom the letter is addressed, if the agent for service states that in fact the notice was not served, although the reason may have been that the addressee declined to accept it.

11. The point was not material in that case, firstly, because it was not clear that there had been a refusal of the notice, and, secondly, because service was proved in the case of the other defendants who were joint tenants, and that was sufficient for the purpose of the case. The matter was, therefore, not fully discussed as not being necessary, and there is no reference to the authorities, although it was admitted that there are other rulings of this Court to the contrary effect.

12. In the present case it appears that altogether three notices were sent—two of them by post and one through the village officers. The postal peon was examined and he states that he delivered the registered notices and they were refused. The inamdar's attorney was also examined and he has deposed that the notices sent through the village officers were returned by them as having been refused. The trial Judge states in his judgment that the village officers were actually examined. Their depositions, however, are not to be found upon the record. As he says that the point was not seriously advanced and urged before him, it may be that all the available evidence was not led by the plaintiff. We do not consider that the dictum in *Vaman v. Khanderao* (1934) 37 Bom. L.R. 376 prevents us from holding that there was due service of the notices even in the two suits in which the registered notice was refused. All that Section 84 of the Bombay Land Revenue Code requires the landlord to do is to give to the tenant a notice in writing, and the evidence here shows that he did so, both by post and through the village officers, and that if the defendants did not read the notices it was because they declined to do so. It may be noted that none of the defendants who were examined as witnesses stated that they had not received proper notice of the inamdar's claim. We, therefore, agree with the trial Judge that the notices were properly served.

13. Then as to the point of adverse possession, it is conceded by the learned advocate for the respondents that a claim to permanent tenancy cannot be based upon that ground. He relies, however, on a decision of Mr. Justice Madgavkar in *Narhar v. Ganpati* (1928) 31 Bom. L.R. 218 for the proposition that the present inamdar's suit to recover possession is barred by adverse possession under Article 144. In that case a kulkarni watandar gave his watan lands on permanent lease to defendant in 1886, and received the rent till his death in 1895. On the watandar's death, his son, the plaintiff, received the rent from 1895 to 1919 ; but he sued in 1923 to avoid the lease and recover possession of the lands. Madgavkar J., without expressing any opinion whether the plaintiff's successors were barred, held that the defendant had acquired a title by adverse possession to the limited interest of a permanent tenant as against the plaintiff and accordingly dismissed the suit. Now in the first place the facts were not similar. It appears from the judgment in that case that the plaintiff had admitted in his

deposition that the permanent tenancy at the time of his father was continued even after his death till 1919. There was, therefore, an admission by the plaintiff that the defendant was a permanent tenant. No such admission has ever been made by the present inamdar. That is probably enough to distinguish the case, and apart from that it is very difficult to reconcile this decision with the decision of the Privy Council in *Madhavrao Vaman Vs. Raghunath Venkatesh*, and the recent decision of a bench of this Court following that case in *Lakhamgowda Basaprabhu Sardesai Vs. Jambhu Tavanappa Adake*, .

14. Mr. Jahagirdar then argued somewhat inconsistently that as the Watan Act only prohibits alienations beyond the lifetime of the incumbent and the plaintiff by accepting the rent from the defendants may be said to have created a new tenancy, it is therefore valid for the duration of his own life. He cited no authority in support of this proposition except the judgment of Mr. Justice Madgavkar just referred to, which of course decided no such point. I think that there is no reason whatever for taking the view that the inamdar by accepting the rent from the defendants thereby created a new permanent tenancy. On the contrary the law is as laid down in *Manohar Vaman Deshpande v. Moro Raghunath Bivalkar* (1896) P.J. 518 that as a permanent tenancy of watan lands ceases on the death of the grantor, the grantee becomes a tenant on sufferance or on acceptance of rent from him a tenant from year to year-not a permanent tenant. There is nothing therefore in this point either.

15. The special features of these tenancies have been summarized in paragraph 23 of the judgment of the District Judge as follows :-

(1) the names of the khata kul are entered in the kamal patrak whereas the names of the annual tenants of the Sheri or khas kamat lands of the Inamdar are not so entered ;

(2) rent or assessment due from such tenants is collected by the village officers and not directly by the Inamdar himself whereas rents of the khas kamat lands are not collected by them, but were collected by the Inamdar himself ;

(3) in addition to the rent or assessment the khata kul had to pay local fund cess whereas the tenants of the khas kamat lands had not to pay it;

(4) the khata kul tenants have never been evicted unless they refused to pay the periodically enhanced reasonable rent;

(5) Warsa inquiry with respect to khata kul was in the first instance made by the Inamdar though it appears that in cases of kadim inam such inquiry was made by Revenue Officers of Government and the names of the heirs were entered after such inquiry, vide exhibit 317 ;

(6) khata tenants have been transferring or alienating the lands either by way of mortgage, sale, gift, or partition and such alienations have been given effect to ;

(7) there have been litigations among the members of the family of the tenants

themselves with regard to their respective rights in such lands ;

(8) the tenancies have been of fairly long duration at uniform rents and the tenants have even effected permanent improvements such as construction of a well, etc., on the lands.

16. As regards (1), (2), (3) and (5), these seem to be in a sense matters of procedure only. There are no doubt differences of treatment between the so-called khata kuls and the tenancies of the sheri or khas kamat lands which show that the former are privileged tenants. It by no means follows however that: the privilege extends to permanency of tenure. It has been pointed out in *Vishvanath Bhikaji v. Dhondappa* ILR (1892) 17 Bom. 475 that the fact that a khata is opened in the name of the tenants in the inamdar's books is by no means conclusive of the fact that they are permanent tenants. Section 85 of the Bombay Land Revenue Code makes it compulsory on the superior holder of alienated villages in which there are village officers to receive his dues on account of rent or land revenue from the inferior holders through the village officers. The definition of " inferior holder " includes a tenant. So that in the case for instance of a fixed tenancy for five years there should properly be a khata in the books and the rent should be collected through the village officers.

17. As regards points (4) and (8), there has been considerable variation in the length of the tenancies in the present case. It is only apparently in a few cases that the land has remained continuously in the same family and descended from father to son. The longest period cannot exceed eighty years, since it is admitted that before 1864 the lands were not cultivated. But mere length of enjoyment or the circumstance that lands have been in practice continued in the same family for several generations is no proof of permanent tenancy as has been held in several cases, for instance, *Gangabai v. Kalapa Dan Mukrya* ILR (1885) 9 Born. 419, *Narayanbhat v. Davlata* ILR (1891) 15 Bom. 647 and *Nabu Mandul v. Cholim Mullik* ; ILR (1898) Cal. 896. see also *Sidhanath Martand Nadgir Vs. Chiko Bhagwantrao Nadgir*, where a tenancy which was as old as 1805 was held to be an annual one. The mere continuance of an arrangement which is beneficial to both parties can hardly be made the foundation of a right to hold the land permanently.

18. As regards the improvements the evidence is very unsatisfactory. The only expenditure which the trial Judge has found proved is a sum of Rs. 200 in suit No. 255. There is a reference to the construction of a well in one of the lands, but that it appears was built in 1922, after the record of rights inquiry had commenced and the defendants had already set up their claim to be permanent tenants. The spending of money on developing and improving the lands would be the natural result of the landlord's policy of non-interference. It may give rise to a claim for compensation on eviction, but it does not seem to be a very good ground for holding that the tenancy is permanent in law.

19. As regards points (6) and (7), the evidence is not very clear that the

transfers have been effected as of right. In the survey numbers which are the subject of these suits, moreover, alienations have been comparatively few, although a long list of sales and mortgages has been put in in connection with other lands in the villages, not the subject of the suits. It may be said, I think, that the evidence shows that mortgages and even sales of these lands have been permitted or acquiesced in by the inamdar. It may also be said, however, that this is part of the privilege of these tenancies. What has been alienated in these cases is a privileged tenancy not liable to disturbance in ordinary practice. That again would not *prima facie* prove that the tenancy was in law a permanent one. So that looking at the matter apart from authority, the facts do not seem to justify a finding that the defendants are permanent tenants.

20. The finding of the learned District Judge is really based on certain observations of this Court in *Vishvanath Bhikaji v. Dhondappa* ILR (1892) 17 Bom. 475. The facts found by the lower Court in that case or rather the facts held to be notorious and admitted were very similar to those in the present case. The same distinction was made between *khata* and *sheri* tenants and the incidents ascribed to the tenure of the former were essentially the same as here. But the findings on those points were not based on evidence and the case was therefore sent back for further inquiry and disposal in accordance with the observations in the judgment of this Court. It is quite true that some of these observations may be said to lend colour to the view that assuming that the facts had been proved this Court might have accepted the findings of the lower Courts that a permanent tenancy was established. But we do not know what the result of the case actually was, and no case has been cited before us in which the claim to a permanent tenancy based on a local custom of this nature has been actually successful. On the other hand a similar claim was rejected by Barlee and Divatia JJ. in *Parmanand Channappa v. Mohamad Multani* (1937) F.A. No. 107 of 1932. decided by Barlee and Divatia JJ., on March 5, 1937 (Unrep.) which was also a case from the Bijapur district.

21. The local custom alleged appears to be analogous to what is known as a custom of the country in England. Such a custom need not be immemorial nor necessarily ancient, though of course unless a custom has been in operation for a reasonably long time it could hardly be held to be established. But in other respects at any rate the requirements are the same as in the case of any other custom. It must be certain, invariable and reasonable, and it must be exercised as of right. I am not at all sure that any of these requirements can be said to be satisfied, and anyhow I can find no certainty about the custom alleged.

22. I have already referred to the pleadings which are decidedly vague. It is easy enough to say that *khata* tenants are by custom permanent tenants. But when you attempt to analyse the position, it is by no means easy to discover what is implied in this. The defendants' case, however, as put to us, is that the tenancy of such *khata kuls* is permanent *ab initio*, that is, from the moment a man's name is entered in the *kamal patrak* he becomes a permanent tenant, whether it

happened eighty years ago when the land was first taken up for cultivation, or whether it happened only yesterday, and the land was ordinary cultivated land. The earliest of the tenancies referred to in the evidence commenced in 1864, others in 1874, 1881, 1884 and 1891, the latest in 1920 (by purchase). It is common ground that none of the lands in question were cultivated before 1864. Before that they were waste or occasionally let for grazing. The District Judge thinks that the custom began in 1847, but there is no evidence whatever of that. How can it be said that a tenant let into in the land in 1864 obtained a tenure, which was by custom heritable and transferable, when admittedly no tenancies of the kind had previously existed ? In the absence of any allegation of a special agreement to that effect, this position seems to be untenable. But if it is given up, what follows ? One has to suppose either that the custom took time to develop and that it was only after the lapse of some period that tenants entering on the land as khata kuls had permanent rights or else that the tenancies were never permanent ab initio, and only became so after the lapse of time. In either case the insuperable difficulty arises that it is impossible to determine on the evidence what length of time is necessary to establish the custom or what period of enjoyment is required to convert a tenancy, which was originally annual, into a permanent one. I fail to see how it is possible to deduce a legal custom from the facts proved in this case.

23. Mr. Jahagirdar for the respondents has relied on (1907) L.R. 34 I.A. 160 (Privy Council) . The facts in that case were these. The tenure, had been in existence for about eighty years, and probably much more, when the suit was instituted. The rent was an almost nominal one, and had never been enhanced, though the value of the holding, as measured by its sale price, had greatly increased. It had been sold again and again by kabalas purporting to convey an absolute interest; it had passed by will; and the rent had been accepted from the new tenants after such devolutions. Their Lordships thought that from these facts only one inference was possible, namely that the tenant held a permanent tenure. This was not a case in which custom was set up. What was relied upon was the special features of a particular tenancy; and so far as it goes, it gives support to the view taken by the trial Judge here and not that taken by the District Judge. But the facts were not identical. Only a few of the tenancies in the present case have lasted as long as eighty years. Many of them have been in existence for only a short period. It does not appear that the rent can be described as an almost nominal one. It has admittedly been enhanced periodically, and the inamdar's right to do this is not disputed. No doubt great importance was attached by their Lordships to the circumstance that the land had been transferred (repeatedly in that case) and that the landlord had recognised the transferee as his tenant, but it can hardly be said that the case is an authority for holding that that circumstance alone is a sufficient proof that the tenancy is a permanent one.

24. I now come to the second main point in these appeals which arises from the fact that the lands in suit are watan lands which by law are inalienable beyond

the lifetime of the alienor. The lower Courts attached no importance to this point, but we think that they were wrong. The tenancy in this case must have been created either by the grandfather of the plaintiff who died in 1867 or by his father who died in 1896. Regulation XVI of 1827 provided in Section 19 that the Collector was to keep a record of lands and allowances attached to hereditary offices and in Section 20 that the allowances should be considered as official remuneration and should not be subjected to alienation by any incumbent. In *Manohar v. Mow Ragkunath*, to which I have already referred, it was held that on a permanent tenancy of watan land ceasing on the death of the grantor the grantee becomes a tenant on sufferance or on acceptance of rent a tenant from year to year. In *Purshottam Talvar v. Mudkangavda Shidmgavda* ILR (1883) 7 Bom. 420 a lease was held to be invalid under the Regulation as a partial alienation. In *Balku Sidu Kumbhar Vs. Vyankatesh Vaman Deshpande*, it was held that under the Regulation alienations of watan lands whether effected by the Court or the watandar were inoperative beyond the lifetime of the watandar. Finally it was held by the Privy Council in *Madhavrao Woman v. Raghunalh Venkatesh* ILR (1923) 47 Bom. 798 : 25 Bom. L.R. 1005: L.R. 50 IndAp 255 that a grant of a right of permanent tenancy is an alienation within the meaning of the Regulation and the Watan Act. A permanent lease is expressly prohibited by Section 5 of the Watan Act.

25. The trial Judge has referred to a Government resolution which he seems to think shows that a permanent tenancy is not an alienation within the meaning of the Watan Act. That view cannot be maintained in the light of these authorities. The District Judge seeks to draw a distinction between alienations beneficial to the estate and alienations which are detrimental to it, and thinks that the former are not prohibited. For this he relies on *Dada-bhai v. Dadabhai* ILR (1908) 32 Bom. 516 : s.c. 10 Bom. L.R. 745 which has nothing to do with permanent tenancies, and on some observations of Mr. Justice Fawcett in *Madhavrao v. Imam Bapu* (1925) 28 Bom. L.R. 433 The learned Judge says at p. 439 of the report :-

A permanent "lease may undoubtedly amount to a sale, or be otherwise so detrimental to the estate, as to constitute a clear case of alienation. But, on the other hand, as the passage I have just cited shows, it may be justifiable from necessity, or as a bona fide act of management benefiting the estate.

26. But he was dealing with a case of saranjam lands which are not governed by the Regulation of 1827 or the Watan Act. He made it quite clear at the beginning of his discussion on the point that he was not considering the case of watans at all. It seems to me to be sufficiently obvious that if the law prohibits alienations and the particular transaction is an alienation within the definition, it is prohibited, and it is not for the Courts to consider the question whether it is beneficial or not to the estate.

27. On the view that these tenancies were permanent ab initio, whether from 1864 or from some later time, it is perfectly clear that they would be alienations

prohibited by the Regulation and the Watan Act, and the rule laid down in *Manohar v. Mow Raghunath* must apply. It would, I think, be a more difficult question whether a permanent tenancy acquired by custom which has grown up during the incumbency of successive watandars would be a prohibited alienation. But it is not necessary to consider this question because it is not the defendants' case and because anyhow no legal custom of that nature has been proved.

28. The result is that all these appeals must be allowed, and the appellant is entitled to get his costs throughout from the defendants. The decree of the trial Court in suit No. 255 of 1930 will be restored and in the other suits Nos. 256, 260 and 261 there will be a similar decree that the plaintiff do recover possession of the suit lands and that there should be an inquiry as to future mesne profits under Order XX, Rule 12, Civil Procedure Code.