

(1940) 04 BOM CK 0002
In the Bombay High Court
Case No : Second Appeal No. 524 of 1938

Bai Kaba

APPELLANT

Vs

Ramniklal Sunderlal Inamdar

RESPONDENT

Date of Decision : 05-04-1940

Acts Referred:

Bombay Land Revenue Code, 1879 — Section 65, 83

Citation : AIR 1940 Bom 342 : (1940) 42 BOMLR 747

Hon'ble Judges : John Beaumont, J

Bench : Single Bench

Judgement

John Beaumont, Kt., C.J.—This is an appeal from the Extra Assistant Judge at Ahmedabad. The plaintiff is an inamdar of the village of Mithipur under a sanad granted in 1864, and defendant No. 1 is in possession of the suit property paying an annual rent of Rs. 22-8-0, and in 1929 defendant No. 1 leased the property to defendant No. 2 for the purpose of constructing a cotton mill, which in fact has not been constructed. This suit was filed in 1932, and in it the plaintiff claimed possession of the suit property, and in the alternative an injunction restraining the defendants from making non-agricultural use of the suit land. The defendants in their written statement alleged that defendant No. 1 was owner of the soil, subject only to the liability to pay an annual sum of Rs. 22-8-0 to the inamdar, but in the course of the suit, by a purshis, they claimed that defendant No. 1 was a permanent tenant. Both the lower Courts held that defendant No. 1 was a permanent tenant, under the provisions of Section 83 of the Bombay Land Revenue Code, 1879, since, by reason of the antiquity of the tenancy and no satisfactory evidence of its commencement and no evidence of the period of its intended duration, the presumption was that the tenancy was co-extensive with the duration of the tenure of the landlord. Defendant No. 1 being held to be a permanent tenant u/s 83, the lower Courts granted an injunction to restrain the defendants from using the suit land for purposes other than agricultural purposes. The question in this appeal is whether a permanent tenant, whose tenancy arises by reason of the [presumption in Section 83, is entitled to change

the user of the property. So far as the general law is concerned, it is no doubt well settled that as between a landlord and tenant the tenant is not entitled to alter the character of the property. That general principle has been applied to permanent tenancies in *Rammadhan v. Zaminddr of Ramnad* 1893 ILR 16 Mad. 407, and *Bhau Mahadu v. Vithal Dattatraya* 1919 ILR 44 Bom. 609: s.c. 22 Bom. L.R. 793, but there is of course a difficulty in dealing with a tenancy arising under the provisions of Section 83, because the Court does not know the purposes for which the land was originally granted, and the question arises whether evidence of user during a certain period for agricultural purposes is sufficient to justify a finding that the land was originally granted for agricultural purposes.

2. However, it is not, I think, necessary to deal with the question under the general law, because, in my opinion, the rights of a permanent tenant u/s 83 are really governed by the Land Revenue Code. u/s 65 of that Code an occupant of the land, who wishes to use his holding for any purpose other than agricultural, is required to obtain the Collector's permission, An "occupant" is defined as meaning a holder in actual possession of unalienated land, other than a tenant. So that Section 65 in terms only applies to unalienated land, and I am dealing in this case with alienated land. But then Section 217 provides that when a survey settlement has been introduced into an alienated village, the holders of all lands to which such settlement extends shall have the same rights and be affected by the same responsibilities in respect of the lands in their occupation as holders of land in unalienated villages have or are affected by, under the provisions of the Act, and all the provisions of the Act relating to holders of land in unalienated villages shall be applicable, so far as may be, to them. It is not disputed that a settlement has been introduced into the village of Mithipur, and, therefore, prima facie Section 217 would make the provisions of Section 65 applicable to the land in suit. But then Section 218 provides that nothing in the Act, which applies in terms to unalienated land or to the holders of unalienated land only, shall be deemed to affect alienated land, or the rights of holders of alienated land. It is said that, although Section 65 does not use the expression "unalienated land," nevertheless by reason of the definition of "occupant" it is in terms restricted to unalienated land, and, therefore, it is suggested that, by virtue of Section 218, Section 65 does not apply to the suit land. I do not find it easy to reconcile the provisions of Section 217 and Section 218, but I think the problem is solved by a reference to Section 88 of the Code, which provides that it shall be lawful for the Commissioner at any time to issue a commission to any holder of alienated lands, conferring upon him certain powers in respect of the lands specified in such commission, and amongst the powers which may be conferred is the right to exercise the powers of a Collector u/s s 65 and 66. So that it is clear that the Legislature considered that the powers of a Collector u/s 65 would or might apply to alienated land. If the Legislature had not been of that opinion, they would have had to use some such expression as "powers analogous to those which a Collector has in the case of unalienated land." Reading all the Section s together,

it seems to me that Section 65 does apply to the land in suit in this case.

3. Then one has to look at the rules made by Government under the Bombay Land Revenue Code, and Rule 94 provides that when the Collector receives an application u/s 65 for permission to use for any other purpose land assessed for purposes of agriculture only, he shall forthwith forward to the holder or holders of the alienated village in which the land is situated a copy of the application and shall as soon as possible thereafter also forward to such holder or holders a letter showing the altered assessment leviable upon use of land for such other purpose and requesting such holder or holders to intimate within one month of the date of the letter whether the application should be granted or refused, and then Sub-rule (2) provides that if such holder or holders intimate that the application should be granted, it shall be granted accordingly, but if such holder or any of such holders intimate that the application should be refused or do not make any intimation within the time specified, the application shall be refused. So that the Collector not merely has to ask for the consent of the holder to the order he proposes to make, but has to comply with the wishes of the holder. There is no evidence here that defendant No. 1 has in fact applied for the permission of the Collector, and in my opinion she is not entitled to use the land for non-agricultural purposes without such permission, whether or not she can do so under the general law.

4. I think, therefore, substantially the injunction granted by the lower Courts is correct. But I think that it should be modified. Mr. Shah for the appellant has complained that there ought to have been a declaration in the orders of the lower Courts to the effect that defendant No. 1 is a permanent tenant, but the plaintiff had not claimed such declaration, and I think that there would be technically a difficulty in making a declaration not asked for by the plaintiff. But, on the other hand, I think the order of the Court ought to show that it is based on the view that defendant No. 1 is a permanent tenant u/s 83, and I think that the injunction should be confined to altering the user without the permission of the Collector.

5. Therefore, I propose to modify the form of the injunction by saying that " The Court, being of opinion that defendant No. 1 is a permanent tenant of the suit property, having regard to the provisions of Section 83 of the Bombay Land Revenue Code, restrains both the defendants from making or allowing to be made any use of the suit land for purposes other than agricultural purposes, without obtaining the permission of the Collector u/s 65 of the Land Revenue Code."

6. With regard to costs, I think the fair order is for the appellant to pay her own costs and to pay half respondent No. 1's costs.