

(1929) 08 BOM CK 0004
In the Bombay High Court
Case No : Appeal No. 69 of 1927

Mansukh Panachand Shah

APPELLANT

Vs

Trikambhai Ichhabhai Patel

RESPONDENT

Date of Decision : 09-08-1929

Acts Referred:

Bombay Land Revenue Code, 1879 — Section 83
Evidence Act, 1872 — Section 90

Citation : AIR 1930 Bom 39 : (1929) 31 BOMLR 1279

Hon'ble Judges : Murphy, J;Madgavkar, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Madgavkar, J.—The question in this appeal was, whether the defendant-respondent was a permanent or merely an annual tenant of the plaintiff's-appellants. The trial Court held in favour of the plaintiffs-appellants and the District Court in favour of the respondent-defendant. The plaintiffs' appeal was summarily dismissed by this Court and the present appeal is under the Letters Patent.

2. The question of permanent tenancy, though it is to be decided on facts, is a legal inference from facts and therefore a question of law, which it is open to consider in second appeal: Dhanna Mal Vs. Moti Sagar, and Rama Ranchhod Vs. Sayad Abdul Rahim, .

3. The history of the land is as follows:?

4. It was alleged by the appellants, but not admitted by the respondent, that the original title to the land vested in the respondent's ancestors and that they made a gift of it for their spiritual benefit to the ancestors of the vendors of the appellants, who were Brahmin priests. The appellants set up such a document of gift Exhibit 80, purporting to have been made in 1798 A.D. The respondent challenged its genuineness. From 1825 onwards the title of the appellants"

predecessors as owners is, however, not contested. The field in question was known as "Rayanwalloo" and is so shown in the village register. Though from 1825 onwards the ownership was that of the ancestor of the vendor of the appellants, the cultivation was with the ancestors of the defendant-respondent. In 1877 the Government issued a Sanad in respect of this present inam land wherein the holder is shown as Ichharam Ratneshwar, the ancestor of the vendor of the appellants.

5. In 1907 before the agency of the record of rights was elaborated to its present extent, that record Exhibit 64 shows in column 9 as the Khatedar Gor Hargovan Makan, the father of the vendor of the plaintiffs-appellants, and in column 12 the cultivator is shown as Valand Khoda Natha, a witness in this case. It is common ground that in that year the land was actually cultivated by Khoda Natha, but each claims him as his own direct tenant. The respondent in support of his claim sets up a rent-note, Exhibit 42, which bears, however, a date nearly a month later than the date of a rent-note as stated in the record of rights, Exhibit 64. Khoda Natha states that he was a tenant of the respondents.

6. In 1923, the Brahmin sold the land under a deed, Exhibit 60, to the appellants. Apart from this question of whether in 1907 Khoda Natha was a tenant of the appellants' predecessor or the respondent, it is not seriously disputed that the respondent and his ancestors have throughout been holding this land as tenants under the appellants' predecessors.

7. On the question of the genuineness of the two documents Exhibits 80 and 42 the two lower Courts have differed, The trial Court held Exhibit 80 to be genuine and Exhibit 42 to be fabricated and the lower appellate Court held that Exhibit 80 was fabricated and Exhibit 42 genuine. The trial Court in holding its view in regard to these documents relied on the view of this Court in cases, such as *Chikko v. Shidnath* (1921) 24 Bom. L.R. 226 held the presumption of permanent tenancy under the second clause of Section 83 of the Bombay Land Revenue Code was not open to the respondent, and allowed the claim awarding Rs. 40 as rent for the two Bighas of land in suit. The lower appellate Court held that Exhibit 80 was not genuine and Exhibit 42 was and that the presumption under the second clause of Section 83 applied and the respondents were permanent tenants, only liable to pay, as stated, Rs. 2 Babashahi, i. e., Rs. 1/8 to the plaintiffs-appellants. It is necessary, therefore, at the outset to consider the genuineness of these two documents, Exhibits 80 and 42.

8. The applicability of Section 90 of the Indian Evidence Act in regard to these documents and particularly in regard to Exhibit 80 has been discussed. The law is laid down in cases such as *Uggrakant Chowdhry v. Hurro Chunder Shickdar* I.L.R. (1880) Cal. 209 regarding the caution to be exercised in making the presumption u/s 90 of the Indian Evidence Act, which the Court may but is not bound to make, merely because of the alleged age of the document. The difficulty, on the other hand, of proving execution of ancient documents and the reasons in favour of such presumptions where small doubt exists as to their genuineness are set

forth in cases such as *Govinda Hazra v. Protap Narain Mukhopadhyaya* I.L.R.(1902) Cal. 740. The law on the point has been laid down by their Lordships of the Privy Council in *Shafiq-un-nissa v. Shaban Ali Khan* I.L.R.(1904) All, 581 . In the case of documents more than thirty years old, the genuineness of which is disputed, it is necessary, therefore, for the Courts to consider the evidence external and internal of the document in order to enable them to decide whether in any particular case they should or should not presume proper signature and execution.

9. It is the appellants' own case that their vendors who lived at a village about four miles away from the land left the management entirely to the respondent, who lived in that village and that they entrusted all the papers relating to the land in the custody of a deceased police-patil, whose widow was unable to place them in possession of any of these documents, The single exception to this, according to the appellants, was the document, Exhibit 80, which was in their possession and which they made over to the appellants when about a year after the sale deed Exhibit 60 the appellants came and asked them for any documents relating to the land. This document Exhibit 80 has nowhere been referred in any of the village registers, or in the sanad or the record of rights. There is no reference to it even in the sale-deed, Exhibit 60 of 1923. There is thus no reference to it during the century between the alleged deed of gift and the sale-deed to the appellant, nor is it clear if the appellants' vendors had it, why it was not referred to in the sale deed or made over to the appellants.

10. Further, as the learned Assistant Judge has pointed out, the field in suit is referred to in Exhibit 80 as "Bhadiu" perhaps meaning field where rice was cultivated, On the other band, in all the other documents such as Exhibits 40, 41, 46, 63 and 64, whether village register, sanad or record of rights from 1825 to 1907, the field is consistently referred to by the name of "Rayanvalu", the name Bhadiu occurring for the first time in the respondent's rent-note Exhibit 42 of 1907 and being repeated in the appellant's sale-deed Exhibit 60 of 1923. Without attempting to enter into a minute examination of the document itself, we are of opinion that on the face of it the document does not appear to be a document which is one hundred years old. It is, in fact, in a far better state of preservation than the document Exhibit 42 of 1907 put forward by the respondent, which the trial Court was unable to accept as genuine. On the whole, therefore, we agree with the lower appellate Court that there is considerable doubt as to the genuineness of the document, Exhibit 80.

11. As regards the document, Exhibit 42, its genuineness is supported by the evidence of the tenant Khoda Natha and one of the attesting witnesses besides the respondent himself. It is common ground that Khoda Natha was the person who actually cultivated the land, According to the appellants' own case the management was left to the respondent, and no reason is shown why in this particular year that management should have been taken out of the respondent's hands and Khoda Natha himself placed in possession as a tenant

direct of the appellants' predecessors. The only difficulty with regard to Exhibit 42 is the difference in its date as compared with the date of the rent-note in the record of rights, Exhibit 64. That single circumstance is, in our opinion, insufficient as against the evidence adduced. On the whole, therefore, we agree with the lower appellate Court and not with the trial Court and hold that the document Exhibit 42 is genuine. It is conceivable, particularly in 1907, when the record of rights entries were not exact, that the khata being admittedly with the appellants' predecessors and Khoda Natha being the person in actual cultivation of the lands, the fact that Khoda Natha held, not under the Khatedar, but under the respondent, escaped notice and was omitted from the record of rights. These conclusions are corroborated to a certain extent by Exhibit 43, a similar rent-note for 1908 produced by the respondent.

12. If Exhibit 80 is not genuine, then the origin of the title of the appellants, much less the commencement of the respondent's tenancy is not proved. The respondent's tenancy is nearly a hundred years old prior to the suit. There is no satisfactory evidence of its commencement and there is no such evidence of its intended duration. Moreover, as against the sum of Rs. 2 Babashahee rent set up by the respondent, no consistent rent on the other aide was set up by the appellants, apart from the evidence of one witness that Rs. 30 was paid in one year. It is important to note that throughout this long period of a century no demand for enhancement and no attempt to eject the respondent or put in any other tenant was ever made. Such a claim is only made two years after the sale by the Brahmins to the appellants Banias. On these grounds, holding that Khoda Natha was a tenant of the respondent, the respondent is entitled to the presumption in the second clause of Section 83 of the Bombay Land Revenue Code: *Maneklal Vamanrao Vs. Bai Amba*, .

13. But, even if on the view of the lower Court Exhibit 80 is genuine, we are of opinion that that Court was wrong in inferring that the respondent's tenancy also must have dated from 1798. That inference does not necessarily follow. In this view, strictly speaking, it is unnecessary for us to express an opinion as regards a certain difference of view on the construction of Section 83 of the Bombay Land Revenue Code. The question has been well stated by Fawcett J. in *Narayan Ramchandra Thite Vs. Pandurang Balkrishna Deshpande*, , and shortly put, is whether the word "commencement" in the second clause must be taken to mean a definite point of time or whether it can be extended to a longer period, which might even be twenty or thirty years, or whether if the landlord proves the commencement of his own title and the tenant admits holding as tenant of that landlord, because the tenancy has necessarily commenced after the date of the landlord's title, that evidence suffices to defeat the presumption as to the permanent duration of the tenancy. It was held in *Hari Vasudev Atre v. Tukaram* (1893) P.J. 323 that the mere fact that the tenancy came into existence since the beginning of the landlord's tenure does not prevent the application of Section 83 of the Code in cases in which owing to the antiquity of the tenancy no satisfactory evidence of its commencement is forthcoming. That was a case of a

grant in 1724 of an unoccupied land by a Miraspatra, the tenant having been in actual cultivation for a period of ninety years. Similarly, the tenant was entitled to the benefit of Section 83 in Ramchandra Narayan Mantri v. Anant I.L.R.(1893) 18 Bom. 433 . Some doubt, however, was cast on the last case and it was explained by Macleod C, J. sitting singly in Sidhanath Martand Nadgir Vs. Chiko Bhagwantrao Nadgir, where, however, the tenancy was held to have commenced in the year 1905. In appeal it was held by Shah and Pratt JJ. in Cikko v. Shidnath (1921) 24 bom. L.R. 226 that the fact that the tenancy commenced after a definite date after the landlord's title began was sufficient to defeat the presumption u/s 83, el view not easy to reconcile with the earlier two judgments stated above. To the same effect is the judgment of Pratt and Fawoett JJ. in Narayan v. Pandurang (1922) 24 Bom. L.R. 1258 where the difficulty was elaborated by Fawcett J. as also in Ramchandra Trimbak Mantri Vs. Dattu Rama Patil, .

14. The question, no doubt, presents some difficulty and in our 1929 view that Exhibit 80 is not proved to be genuine, it is not necessary for us to express a definite opinion, But, obviously the Legislature intended to lay down a general rule in view of the existence of two sets of facts at the time of the enactment and to a large extent now. Permanent tenancy very often exists, particularly in Gujrat and Kathiawar, without a document. But on the other hand an annual tenant is often allowed to hold over without the original rent-note being renewed. To exclude the latter class of cases and to include the former, presumably Section 83(2) was enacted in its present form. It appears to us that where, as in the case of Hari v. Tukaram, the tenant has been in occupation for a period of nearly a century without disturbance or enhancement of rent, this presumption that he is a permanent tenant can hardly be defeated from the simple fact that the owner is able to produce his own title deed, which may be years before, as in that case. On the other hand, in the absence of documentary evidence, difficult to procure in the case of ancient tenancy, it is not enough if the landlord proves that the tenancy, notwithstanding its long duration, commenced at a definite date, meaning thereby hot the day, month and year, but at least an approximate period when it began and not merely large periods such as twenty-five years or thirty years between which it began, Such an approximate point of commencement might be sufficient to defeat the presumption of a permanent tenancy which might otherwise be made.

15. As regards the right to enhance rent, even where the respondent is held to be a permanent tenant, it was held by this Court in Giriappa Subanna Vs. Govindrao Ganrao, that in the case of a permanent tenancy the onus is on the landlord to prove a right to enhance by agreement, by usage or otherwise. No such right has been proved in the present case. The lower appellate Court was, therefore, in our opinion, right.

16. In the Result, therefore, we dismiss the appeal and confirm the decree of the lower appellate Court with costs.