

(1925) 10 BOM CK 0005
In the Bombay High Court

(Shri) Satyadhyantirtha Swami

APPELLANT

Vs

Raghunath Daji Patil and Others

RESPONDENT

Date of Decision : 09-10-1925

Acts Referred:

Registration Act, 1908 — Section 49

Citation : AIR 1926 Bom 384

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

Bench : Full Bench

Judgement

Fawcett, J.—The plaintiffs claim to be permanent tenants of the inamdar of their village, who is a Swami of a religious math and sue for an injunction restraining the Swami and others from interfering with their possession of the suit lands. This relief was granted by the trial Court, and has been confirmed by the Assistant Judge on appeal. Both the Courts have held that, so far as the Indian Registration Act is concerned, the documents, Exhibits 24 and 25, which evidence the terms under which the plaintiff got possession of the lands, are inadmissible in evidence, but that those documents can be looked at for the collateral purpose of ascertaining the origin and nature of the plaintiffs' possession of the lands; and that, with these in evidence, plaintiffs have proved that they are permanent tenants through adverse possession, so that they have a right of permanent tenancy. The main question in this appeal is whether the lower Courts have erred in holding that the plaintiffs were entitled to this finding.

2. It has been laid down in many cases in this Court that a right of permanent tenancy can be acquired by adverse possession. See, for instance, *Thakore Fatesingji v. Bamanji A. Dalal* [1903] 27 Bom. 515. But, undoubtedly, the authority of these decisions has been very considerably shaken by certain rulings of the Privy Council of recent years, for instance, in *Madhavrao Waman v. Raghunath Venkatesh* AIR 1923 P.C. 205 and *Nainapillai Marakayar v. Ramanathan Chettiar* AIR 1924 P.C. 65 and as remarked in my judgment in *Juvansingji v. Dola Chhala* AIR 1925 Bom. 390 it may be that, on account of

those rulings, the view, taken by this Court, in cases like the one I have mentioned, will have to be reconsidered. But I do not think that this is a proper occasion to attempt this first of all, because the point has not been very fully argued; and, secondly because Dewan Bahadur Rao, for the appellant, did not himself go so far as to contend that the plaintiffs could not claim to be permanent tenants by means of adverse possession. But he has strenuously contended that the question was wrongly allowed to be raised in the present litigation, no issue having been framed on the point in the trial Court; and, secondly, that in any case clear notice of such a claim must be given to the landlord in order to constitute the requisite assertion of permanent tenancy to the knowledge of the landlord, and this has not been established.

3. On the first of these points, it appears that there was no plea of such adverse possession in the plaint and no issue framed about it; but the question was raised in the trial Court and discussed in the Subordinate Judge's judgment. The Assistant Judge took the view that the plea was involved in the case itself; that it had been considered by the Subordinate Judge; and that quite obviously the defendants had led all evidence within their power to meet this or any other aspect of the plaintiff's case. He has held, therefore, that there was no reason to hold that the point could not be gone into. This view has the support of the Privy Council in *Mt. Mitna v. Syud Fuzl Rub* [1870] 13 M.I.A. 573 and various other cases and the general result of such decisions is that, if there is no issue framed on a question, but the parties have adduced evidence and discussed it before the Court, and the Court decides it as if there was an issue about it, the decree need not be set aside in appeal on the ground merely that no such issue was framed for the mere omission to frame an issue is not fatal to the trial of the suit. But, certainly, it would have been very much better if an issue had been added on this point in the trial Court, and it is difficult to say that the defence may not have been prejudiced to some extent in adducing evidence; for instance, on the point whether in 1883 the then Swami could, in fact, grant a permanent lease, which would, in the circumstances, be binding upon his successor. However, it is not necessary to decide this question because we think that, in any case, the materials upon which the lower Court has arrived at its finding that the plaintiffs had a right of permanent tenancy acquired by adverse possession are not legally sufficient to justify that finding.

4. The first question that is to be decided is, whether these documents, Exhibits 24 and 25, did, in fact, require registration. Mr. Thakor, for the respondents, has argued that the documents do not amount to a present demise, so as to evidence even an agreement for lease within the meaning of the Indian Registration Act, and that in any case a part of these documents, for instance the order about registering the lessee as Khatedar, can be treated as evidence in the case, although the documents, so far as they evidence a lease, require registration. In my opinion, it is quite clear that the two documents read together did, in fact, constitute a present demise of the lands, which were apparently then being cultivated by the applicants Appaji and Ravji who have signed the first

document. The order, which is of the same date, authorizes the immediate occupation of the land on the terms mentioned in the first document, and the mere fact that part of the agreement would not come into operation till some years later does not, in my opinion, operate to make it other than a present demise. It seems to me that the two documents evidence a lease for a term exceeding a -year, and that, without straining the clear meaning of the documents, it is impossible to hold that they did not require registration u/s 17, Sub-section (1). In my opinion, it is not a case where there are two clearly divisible agreements in the documents, one of which makes the document compulsorily registrable and the other does not. In such a case, no doubt, there is authority for saying that you can look at the part of the document which does not require registration. But, in the present case, the two documents are one indivisible transaction, and I can see no adequate ground for saying that Section 49 of the Indian Registration Act does not apply to the whole of the documents.

5. Then, as regards the question of the extent to which these documents can be used for the collateral purpose of ascertaining the origin and nature of the possession of the plaintiffs, the Privy Council have, no doubt, ruled that they can be so used. But it seems to me to be going entirely beyond the proper and legitimate extent to which that origin and nature can be so ascertained, to say that you can look at the whole of the terms of the documents although u/s 49 those terms are inadmissible in evidence. It is true that the documents can be looked at to show that the plaintiffs were in possession as tenants, and if the documents had in clear language said that they were permanent tenants, that might probably also be taken into consideration in view of the ruling in this Court in *Thakore Fatesingji v. Bamanji A. Dalal* [1903] 27 Bom. 515.

6. But certainly in the present case the documents do not in clear terms say that the applicants are to be permanent tenants. It is merely contended that the reference to Raoji eventually becoming Khatedar is an implied acknowledgment that he was a permanent tenant. "But, in my opinion, a mere reference of this kind does not suffice to make the origin of the tenancy obviously one of a permanent character, and the lower Court has, in my opinion, erred in law in treating it in that way. Nor do I agree that the subsequent conduct of the defendants suffices to establish an admission that the plaintiffs were permanent tenants. It is quite clear that to succeed in a case of this kind the tenants must prove by unequivocal evidence that they have set up the claim of permanent tenancy to the knowledge of the landlord; for instance if that claim is put forward in a possessory suit, under the Mamlatdars' Court Act, there is very good evidence on that point. There is nothing of that kind in the case; nor is there anything in the evidence, which clearly favours the view taken in the judgments of the two lower Courts. The eagerness of the defendants to dispossess the plaintiffs does not, in my opinion, constitute any evidence of notice by the plaintiffs that they claimed to be in possession as permanent tenants.

7. Consequently, on that point, I think, the appellant succeeds. It has, however,

been contended by Mr. Thakor that the doctrine of part performance, referred to in the leading Privy Council case of *Mahomed Musa v. Aghore Kumar* [1914] 42 Cal. 801 applies in favour of the plaintiffs. Here again we are faced with the same difficulty. No issue has been raised upon this point; nor is the point discussed in the judgment of the lower appellate Court, and it is only mentioned in a few words in paragraph 7 of the judgment of the trial Court. The doctrine is only applicable in cases where it is found that the parties have so changed their respective positions that the change can only be referable to the alleged contract, as stated by Marten, J., in *Sandu v. Bhikchand* AIR 1923 Bom. 473. It is alleged, and it has been accepted by the two lower Courts, that the plaintiffs have spent a sum of about Rs. 1,600 in improving the land, and it is argued, therefore, that they have been led to believe that they were treated as permanent tenants. But it is not shown that the defendants on their side did anything to show that they changed their position of treating the plaintiffs as ordinary tenants to that of treating them as permanent tenants.

8. The underlying principle is, both sides by their conduct must have shown that, although the documents of title are void for want of registration, yet the transaction has been acted upon, for instance by giving possession to the vendee in the case of an inadmissible sale-deed. But no such circumstances are shown to exist in the present case, and, in my opinion, it is a point which can be very much better considered if the defendant sues the plaintiffs in ejectment and any defence of that kind is raised. It is bairer to limit the issues to the claim of permanent tenancy, and if the plaintiffs can show, in any subsequent litigation, that they have an equitable right to recoupment of the amount expended on the land, that is a separate question to be considered when it arises. It will suffice to say, in the present case, that the plaintiffs have not shown legal grounds, in view of the difficulty about registration, for holding that they are permanent tenants entitled to the injunction sought, and, therefore, the trial Court's decree ordering the defendants not to obstruct the plaintiffs' possession of the suit land, nor to interfere in any way with the use of the suit land by the plaintiffs, is not one to which they are entitled. I do not mean to say that they are liable to be disturbed except in a proper way, but the injunction in effect is intended to prevent the defendants from taking any steps to determine the tenancy of the plaintiffs and eject them in the due course of law.

9. Therefore, I would allow the appeal and dismiss the plaintiffs' suit with costs throughout.

Madgavkar, J.

10. I agree.