

(1942) 11 BOM CK 0001

In the Bombay High Court

Case No : First Appeal No's. 311 and 312 of 1938

Venkatrao Shrinivasrao

APPELLANT

Vs

Basavprabhu Lakhamgouda Sirdesai

RESPONDENT

Date of Decision : 23-11-1942

Acts Referred:

Bombay Land Revenue Code, 1879 — Section 84
Transfer of Property Act, 1882 — Section 106

Citation : AIR 1943 Bom 348 : (1943) 45 BOMLR 754

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

Bench : Division Bench

Final Decision : Dismissed

Judgement

Macklin, J.—The suits out of which these two appeals arise were brought by the Desai of Vantamuri in respect of two pieces of land both of which were granted as permanent tenancies to the ancestor of the defendants in the two suits respectively (who are father and son) by his father in the year 1873. The documents creating the tenancies were not registered, but it is not disputed that the intention underlying the documents was to create a permanent tenancy in each case. The grantor died in 1877, and on his death the grant would ordinarily come to an end, this being watan property. The grants of 1873 were the result of litigation launched by the grantor in 1871 for the eviction of the ancestor of the two defendants. The suits succeeded; but the holder had been in possession of the property for a long time and had spent a good deal of money in improving it, and it was evidently for this reason that the grants of 1873 were made. In 1924 the plaintiff issued notices to each of the defendants calling upon them to vacate the land, though they had all along been, paying the same rent for the land as was provided in the grants of 1873; and eleven years later he brought the present suits for the eviction of the defendants. The Record of Rights from 1904 to the present day shows the defendants to be in possession as permanent tenants. The original plaintiff to the suits died in the Course of the litigation, and the respondent to these appeals is his son. The defence, so far as is material to

the present appeals, was first that the grants of 1873 are valid beyond the lifetime of the grantor because the grantees were watandars of the same watan, secondly that the conduct of the plaintiff after the death of his father indicates that he ratified the grant of his father or has at any rate permitted the defendants to acquire a right of permanent tenancy by prescription, and lastly that in the suit which has given rise to First Appeal No. 312 notice cannot be deemed to have been served on the defendant and the suit is therefore bad. All these points were decided against the defendants by the trial Court, and they have come in appeal.

2. I deal first with the question of whether the defendants can be regarded as "watandars of the same watan" as the grantor so as to permit the grants of 1873 to remain effective beyond the lifetime of the grantor. Their ancestors were admittedly in possession of other property belonging to the watan of the plaintiff, and it was their case that their ancestors were in possession of that other property as watandars and must therefore be regarded as "watandars of the same watan." Their learned advocate complains that his case on this point has been prejudiced by the action of the trial Court in not exhibiting a number of documents, some of them original grants, which he produced at an early stage of the case, and in failing to call upon the plaintiff to produce certain other documents which the defendants asked that he should be compelled to produce. But in our view it is not necessary to consider whether the trial Court was right in not bringing these documents on the record, because we are satisfied that on a strict construction of the expression "watandar of the same watan" they would not show that the defendants came within the definition. This expression has been judicially interpreted in *Tarabai Shrinivas Naik Guttal Vs. Murtacharya Anantacharya*, , where it has been held on a full consideration of the definitions in the Watan Act of 1874 that the primary definition of a "watandar" is that he is a person having a hereditary interest in a watan, and that means not only an interest in the property but an interest in the office also. It is not the case of the defendants that their ancestor ever had any interest in the office appertaining to the watan. It is contended on their behalf in this appeal that this case has not been properly decided, and that it is in conflict with the decision of this Court in *Mallappa v. Tukko* (1936) 39 Bom. L.R. 288, where it was held that the grantee of a pot-inam in that particular case was a watandar of the same watan as the grantor, although it was not found that any share in the office of the watan ever formed part of the grant. We have been asked to consider the correctness of the decision in *Tarabai's* case, and if necessary to refer the matter to a Full Bench. But the earlier decision in *Mallappa's* case did not at all consider the question of whether the office formed part of the grant and the effect of the office not forming part of the grant on the question of the grantees being watandars of the same watan as the grantors, and we cannot refer to a Full Bench a case in which a point was specifically raised merely because a different view has been taken in a case where the point was not specifically raised. In our view the decision in *Tarabai v. Murtacharya* is binding on us, and the defendants must be held not to

be watandars of the same watan as the grantor of 1873. It follows that the grants of 1873 ceased to be effective on the death of the grantor in 1877.

3. The next question is whether the present plaintiff can be deemed to have ratified the grant of 1873, or at any rate whether the conduct of the plaintiff coupled with the assertions of the defendants are sufficient to give them a right of permanent tenancy by prescription. The Record of Rights of 1904 enters the defendants as permanent tenants and refers to the agreements of 1873; and the current Record of Rights also gives the defendants as permanent tenants, presumably carrying on the entry of 1904, and therefore in effect based upon the documents of 1873. But the presumption arising from these entries is at once rebutted by the fact that the arrangement of 1873 came to an end in 1877; and if therefore the defendants are to resist the plaintiff's claim successfully, they must show either that the plaintiff can be deemed to have ratified this arrangement and treated the defendants as permanent tenants or that in some way they have acquired a right of permanent tenancy by prescription.

4. It is established that as against watandars ordinary tenants cannot acquire a title to permanent tenancy by adverse possession merely by reason of their having continued in undisturbed possession for more than twelve years after the death of the lessor: see the decision of the Privy Council in *Madhavrao Vaman Vs. Raghunath Venkatesh*, . It is also established that a grant of permanent tenancy of watan lands ceases on the death of the grantor and the tenants then become tenants on sufferance or tenants from year to year, if rent is accepted from them : see *Babasaheb Appasaheb Sirnadgouda Vs. Laxmanappa Ramappa Kallimani*, . In *Vishvanath Haibatrao Deshpande Vs. Ranganath Dhondo Deshpande*, it was held that persons who came upon land as mirasdars or permanent tenants by virtue of a grant that was invalid for want of registration could acquire a title of permanent tenancy as against the grantor by holding the land as permanent tenants openly and adversely for more than twelve years; but the case does not decide that they could so succeed as against the successor of the grantor after the grantor's death. The decision principally relied upon by the defendants for the establishment of their right of permanent tenancy as against the original grantor's successor is *Narhar v. Ganpati* (1928) 31 Bom. L.R. 218. It was there held by Mr. Justice Madgavkar that the watandar must be taken to have ratified the grant of permanent tenancy by his predecessor not only because he accepted rent and continued the previous arrangement undisturbed, but also because he had expressly admitted that the permanent tenancy continued even after the death of his father. In this case the plaintiff's karbhari says that the defendants were continued in possession of the land as a matter of grace, and that is inconsistent with any recognition of their right to remain on the land as permanent tenants. The admission of the watandar in *Narhar v. Ganpati* clearly distinguishes that case from the present case so far as the occupancy of the land is concerned. It was also held in *Narhar v. Ganpati* that the tenants had acquired by adverse possession a title to the limited interest of a permanent tenant because the watandar had for more than twelve years allowed

them to assert the validity of a lease which was invalid beyond the grantor's lifetime. The question of adverse possession however did not strictly survive for determination once it was decided that the tenants could not be evicted during the lifetime of the plaintiff owing to plaintiff having ratified and continued the previous arrangements. But here again the position of the tenants was much stronger than in the present case. The arrangement of 1873 may perhaps be regarded as an invalid arrangement, since neither of the documents was ever registered. But the defendants are not relying on any assertion of the validity of these documents after the death of the plaintiff's father. They rely on the plaintiff's conduct after the death of his father as ratifying the previous arrangement and as showing an intention to treat them as permanent tenants.

5. The evidence comes to this. The plaintiff has accepted an unchanged rent of Rs. 50 from 1877 till now, and that was the rent fixed under the agreements of 1873. This undoubtedly indicates that the defendants were the tenants of the plaintiff. But it is not an indication that the tenancy was a permanent tenancy or was ever regarded as such by the present plaintiff. Then in 1882 the brother of the defendants' ancestor asked that the grant of 1873 should be recognised by the plaintiff, and the plaintiff, while not in terms, accepting this suggestion, did not actually refuse it. In fact he ignored the request and merely reminded the defendants' ancestor that he had to pay the assessment and local fund on the lands: (see Exhibit 29 in the case). This circumstance obviously cannot help the defendants. The Record of Rights has shown them as permanent tenants since 1904, and the plaintiff must have known of it; but he has never attempted to have the entries corrected. Also the plaintiff has waited for eleven years after the issue of notices to the defendants before filing these suits in spite of the fact that the defendants have been earning about Rs. 800 every year and paying only Rs. 50 as rent. But none of these circumstances necessarily involves an inference that the plaintiff ever recognised the tenancy as permanent or that the defendants had ever asserted it as such. In our view the evidence is altogether insufficient to establish the defendants' case.

6. The last point argued is the question of notice to the defendant in one of the suits. The defendant lived at Nippani, where there is a Post and Telegraph Office; and according to the evidence given by the plaintiff's servant the notice was sent for service by the Nippani Post Office with the assistance of the plaintiff's servant. This servant Baburao says that he went with the postman to the defendant's house but found that he had just had a bath and put on holy clothes, and he was asked by the defendant to come again the next day. He went again the next day but could not find the defendant. On the third day, according to the evidence of this witness, the defendant was served with the registered letter but refused to accept it. The cover shows a number of endorsements including the endorsement "refused" and the date "3rd January 1925." There is also an endorsement "treated as refused," and there are endorsements suggesting that the addressee had gone to Belgaum and had gone to the Congress, which we are told was holding a meeting in Belgaum at that time.

There is also an endorsement stating that the addressee had not accepted the packet. It is argued on behalf of the defendant that the endorsements showing the addressee to have gone to Belgaum or to the Congress are inconsistent with the endorsements showing that he had refused to accept the packet. But if there is any truth in the evidence of the plaintiff's servant that the defendant could not be found on the second day, that might be because he was believed to have gone to Belgaum or to the Congress. It is also argued that the endorsement "refused" cannot be accepted because of the further endorsement "treated as refused". The plaintiff's servant Baburao says that the letter was definitely refused; and if that were all the evidence, we should not necessarily be prepared to accept his word on the point. But there is also the evidence of one of the plaintiffs Karbharis, who is presumably a man of some substance, and he says that both father and son came to Vantamuri and complained against the issue of notices, to them saying that they would have come if only a messenger had been sent; and there is really no reason for rejecting the evidence of this witness. Moreover the defendant who says that he was not served with notice admits that he heard about the notice having been served on his father about two months after the event. In *Harihar Banerji v. Ramsashi Ray* (1918) 21 Bom. L.R. 522 it was held by the Privy Council that a notice proved to have been properly directed and posted (especially if registered) is to be presumed to have reached the person to whom it is directed in the ordinary course of postal business, unless the contrary is proved. The Privy Council were dealing with a notice issued u/s 106 of the Transfer of Property Act, which did not say at that time anything about service of notice by post. Notices in the present case were presumably served u/s 84 of the Land Revenue Code, which also says nothing about service of notice by post. If in spite of the silence of Section 106 on that point notice by post u/s 106 was treated to be permissible, presumably notice by post u/s 84 of the Land Revenue Code also may be treated as permissible; and the same presumption would arise in the case of a notice posted with reference to Section 84 of the Land Revenue Code as the Privy Council held to arise in the case of notice posted with reference to Section 106 of the Transfer of Property Act. We think therefore that there is no ground upon which we can differ from the finding of fact reached by the trial Court that notice in this case was refused.

7. Reference was made to *Vaman v. Khanderao* (1934) 37 Bom. L.R. 376 in support of the contention of the learned advocate for the defendant that a notice contained in a registered letter which is tendered to the addressee but refused by him and brought back unopened is not a valid service of the notice; but the authority of the decision on this particular point is doubted in *Babasaheb Appasaheb Sirnadgouda Vs. Laxmanappa Ramappa Kallimani*, and strictly speaking the point did not arise for decision in *Vaman v. Khanderao* (1934) 37 Bom. L.R. 376. If correct, the decision would obviously give rise to considerable practical difficulties.

8. We think, therefore, that the appeals fail on all the points raised and must be dismissed with costs.

Broomfield, J.

9. I agree, and I only desire to add some observations on the issue of permanent tenancy. There can be no doubt I think about the proposition laid down in *Manohar v. Moro* (1896) P.J. 518 and affirmed by *Babasaheb Appasaheb Sirnadgouda Vs. Laxmanappa Ramappa Kallimani*, that a permanent tenancy of watan lands ceases on the death of the grantor, and the grantee becomes a tenant on sufferance or on acceptance of rent from him a tenant from year to year. That proposition indeed Mr. Jahagirdar who appears for the appellants has not contested. It follows that the defendants cannot base their case on the leases of 1873, apart from the fact that these documents were not registered.

10. The gist of the case put forward by Mr. Jahagirdar is that a new tenancy was created by the plaintiff himself which it is not open to him to repudiate during his lifetime. The circumstances on which he relies are these. In 1882 the brother of the grandfather of one of the defendants wrote to the Karbhari of the Vantamuri estate asking him to see that the karar of 1873 was not affected. At that time the estate was being managed by the District Judge, who made an order that assessment and local fund should be recovered from the occupants. This was no doubt in accordance with the arrangement made in 1873, but there is nothing in the order which can be regarded as a recognition of the tenant's right to hold permanently. The second circumstance relied upon is that the same amount, i.e., assessment and local fund only, has been accepted by the plaintiff up to the date of the suit, although there is reason to believe that the lands would have fetched a high rent. The third circumstance is that when the Record of Rights was introduced in 1903-1904 the defendants were shown as permanent (nirantar) tenants, reference being made to the leases of 1873, and this description, though without the reference to the leases, has been subsequently continued. No objection to this description has been raised by the plaintiff.

11. I cannot accept the position that these circumstances are sufficient to create a tenancy for the duration of the plaintiff's life. Agricultural leases are not necessarily required to be in writing; but if the plaintiff ever intended to recognise the right of the defendants to hold the lands permanently or even during his lifetime, there probably would have been a writing. In the absence of any writing, which of course would have had to be registered, evidence of the kind which is relied upon as to the conduct of the parties is of very little use in my opinion unless it is sufficient to show one of two things, either estoppel or adverse possession. There is obviously nothing which amounts to estoppel, and Mr. Jahagirdar has not contended that there is. Nor can it be held that the defendants were in adverse possession, for that would be contrary to the Privy Council cases referred to in *Vishvanath Haibatrao Deshpande Vs. Ranganath Dhondo Deshpande*, . So far as the plaintiff is concerned, the defendants commenced their occupation of the lands as tenants from year to year, that is ordinary and not permanent tenants.

12. As regards the entries in the Record of Rights no doubt those made after

1913 raise a presumption in the defendants' favour. But as after examination of the facts it appears that the defendants cannot have been legally permanent tenants, this presumption is rebutted. Mr. Jahagirdar has strongly relied on Mr. Justice Madgavkar's judgment in *Narhar v. Ganpati* (1928) 31 Bom. L.R. 218. But in that case there was an unequivocal admission by the succeeding watandar that the tenancy was permanent, which is wanting in our case. It is true that the learned Judge also says "Such an inference (namely the) inference that the tenancy was (permanent) would have been permissible even from the appellant's own conduct from 1895 to 1919 in continuing the arrangement during his father's time undisturbed, even though he knew of it and knew of its entry, being himself Kulkarni." But with respect I am unable to agree with this expression of opinion. *Vishvanath Haibatrao Deshpande Vs. Ranganath Dhondo Deshpande*, on which Mr. Jahagirdar relies, does not in my opinion assist him at all for two reasons: (1) the lands in suit were not watan lands and the permanent lease did not therefore come to an end on the death of the grantor, and (2) the persons in occupation of the lands were mirasdars and not ordinary tenants, and moreover the evidence of adverse possession was of quite a different character from that available in the present case.

13. On the other points I have nothing to add to what my learned brother has said.