(1934) 10 BOM CK 0009

Bombay High Court

Case No: First Appeal No. 477 of 1928

Vaman Vithal Kulkarni		APPELLANT
	Vs	
Khanderao Ramrao Sholapurkar		RESPONDENT

Date of Decision: Oct. 20, 1934

Acts Referred:

- Bombay Land Revenue Code, 1879 - Section 83

Citation: AIR 1935 Bom 247 : (1935) 37 BOMLR 376

Hon'ble Judges: John Beaumont, J; Divatia, J

Bench: Division Bench

Judgement

This Judgment has been overruled by : Harcharan Singh Vs. Smt. Shivrani and Others, AIR 1981 SC 1284(1) : (1981) 1 SCALE 401 : (1981) 2 SCC 535 : (1981) 2 SCR 962

John Beaumont, Kt., C.J.
These are two cross-appeals from judgments of the First Class Subordinate Judge of Belgaum. In the suit from which Appeal No. 477 is brought, the plaintiffs are claiming a declaration that they are permanent tenants of the suit land, whilst Appeal No. 471 is an appeal in a suit brought by the landlord, defendant in the first suit, claiming possession of the suit property on the ground that the plaintiffs are annual tenants. So that the real point in both appeals is whether the plaintiffs in the first suit are permanent tenants op annual tenants.

2. For the purposes of determining the plaintiffs'' title, the suit land is divisible into two parts, the claim of the plaintiffs being different in respect of those two parts. There is, first, the property shown on the exhibited plan within the parallelogram A B C D, which I will refer to as the "A property," and then there is the rest of the suit property, partly to the north and partly to the south of the A property, which I will

refer to as the "B property". The A property .consists of six bighas, and the B property of twenty-four bighas. With regard to the A property the relevant facts are these. In the year 1815 the whole of the suit property, so far as we know, was granted by the desai of Nippani to the predecessors-in-title of the defendant (I am referring to the defendant in the first suit, i. e. the landlord). The actual sanad is not produced, although the defendant offered to produce it if called for, and therefore we do not know whether the land was actually in the occupation of the plaintiffs or any body else in 1815. That sanad applies to both the lands A and B, but the next four documents to which I will refer relate only to the A land. The first of those documents is exhibit 182, which is the rent-roll for the year 1837 of the desai of Nippani, showing the cultivators of various lands belonging to him. Amongst those cultivators is included the name of Nilappa Kori as making payment of Rs. 19-14-9 in respect of land in Sankeshvar, which is the village where the land in suit is situated. Then the next document is exhibit 180, which is a similar rent-roll in respect of the year 1841, and that shows that the cultivator of land in Sankeshvar was a man named Vyankappa Sambhu, and the rent he is shown as paying is Rs. 100. Then the next document is exhibit 124, which is a letter written in the year 1844 by the Mamlatdar to the desai of Nippani relating to a quarrel relating to land of the desai in Sankeshvar. It is said that that letter shows that the land in 1844 was in the possession of the defendant''s predecessors-in-title, but we only have the statement in that letter of the Mamlatdar, and we have not got any answer to that letter. The next document which I should refer to is the document marked exhibit 16 (1), of the year 1848, That purports to be an agreement by the predecessors-in-title of the defendant in favour of the predecessors of the plaintiffs, and it recognises the plaintiffs as being in possession of six bighas of land at Sankeshvar, and agrees to their spending money by constructing a well, and grants them the land for a term of twenty-one years at a rent of Rs. 22 a year, and thereafter, at the rent of Rs. 30 a year, The plaintiffs rely on that document, but the learned Judge held that it was not proved, and in my opinion, the learned Judge''s decision on that point was correct. It was sought to prove the document in certain revenue proceedings, to which I will refer presently, which contemned in, 1888, The witness who was called in those proceedings to prove this document stated that he knew the handwriting it was in, but the document was not signed, and that being so, I think the learned Judge was right in holding that it was not proved. We have, therefore, no actual documentary evidence as to the plaintiffs'' title to the A land at any rate before about 1855, and the plaintiffs rely on Section 83 of the Bombay Land Revenue Code as raising in their favour a presumption of permanent tenancy. That section provides :

.. where by reason of the antiquity of a tenancy, no satisfactory evidence of its commencement is forthcoming, and there is not any such evidence of the period of its intended duration, if any, agreed upon between the landlord and tenant, or those under whom they respectively claim title, or any usage of the locality as to duration of such tenancy, it shall, as against the immediate landlord of the tenant, be

presumed to be co-extensive with the duration of the tenure of such landlord and of those who derive title under him.

The plaintiffs say that by reason of the antiquity of this tenancy there is no satisfactory evidence as to its commencement or as to its duration, and the answer of the defendant is that the three documents to which I have referred, the documents of 1837, 1841 and 1844, establish this, that in those respective yelars somebody other than the plaintiffs was in possession of the property, and therefore, it is said, the plaintiffs'' possession must have started after 1844, somewhere between 1844 and 1851. It has been held by this Court in a good many cases that Section 83 of the Bombay Land Revenue Code, in referring: to the absence of satisfactory, evidence of the commencement of a tenancy, does not mean that there must be satisfactory evidence as to the exact date of commencement, that is, the day on which the tenancy commenced, but that it is sufficient if the evidence shows that the tenancy must have commenced in. a particular period ; and the degree of elasticity permissible in relation to the period has been the subject-matter of a good many decisions. Here it is-suggested by the defendant that as the period is fixed between 1844 and 1851, there is sufficient evidence as to the commencement. I doubt that proposition, but in any case, to my mind, the documents relied on by the defendant do> not afford any satisfactory evidence that the plaintiffs were not in possession before 1844 or 1837. There is, as I have pointed out, no definite evidence that the plaintiffs were not in possession before 1815, because we have not seen the actual sanad. The rent-rolls of the desai in 1837 and 1841, although they refer to land in Sankeshvar, and although it has been admitted that the desai owned no land in that village except the suit land, do not prove that the occupiers referred to in that rent-roll were in occupation of all the desai''s land in Sankeshvar. It was found in 1857 in the revenue suit hereafter referred to that property A. had been in the enjoyment of the plaintiffs'' predecessors from a very old time, and that the occupation of that land and property B had become severed by about 1851. There was no particular reason why the desai''s rent-roll should have referred to the names of the cultivators of land, or to the rent they paid, where the land had been granted out to the predecessors of the defendant at a fixed rent of Rs. 100, The letter from the Mamlatdar, exhibit 124, is also, to my mind, a very weak piece of evidence. It is merely a statement of what the Mamlatdar was told, and we have not got the answer to tee letter. Therefore, I am not prepared to say that on those documents I consider that there is any satisfactory evidence as to the commencement of the plaintiffs'' title in respect of the A property, or as to the duration of their tenancy. Indeed, if exhibit 16 (1) be not proved,] .there is no evidence at all as to the duration of the tenancy. Therefore, to my mind, the presumption u/s 83 arises. There is nothing in the future &#65533; history of the land to affect that presumption. That future history is bound up with property B, and I will refer to it in connection with the other part of the case.

3. Now coming to property B, the plaintiffs'' contention was that they entered into possession of that land as permanent tenants in the year 1851 on the terms of an agreement, which is exhibit 16 (2). The learned Judge held that that exhibits was not proved. It appears that in the year 1855 a suit was commenced in the revenue Court by the landlords of this property against the tenants for possession, and in those proceedings this document, exhibit 16 (2), was put in, and a witness was called, who said that he had been a clerk employed by the landlord, that the document was in his handwriting, and that the last words "these are the blessings" were in the handwriting of the landlord. Assuming that the evidence of that witness can be let in u/s 33 of the Indian Evidence Act, I agree with the learned Judge in thinking that this document is not proved. The important thing about it is that it was never signed, and therefore the document written out by the witness was really nothing more than a draft, possibly a fair copy. It is to be noticed, too, that in the revenue proceedings the Court refused to accept the document. Assuming that the document, exhibit 16 (2), is not proved, then the plaintiffs put their case as to the B land in this way. They say that admittedly their title to the B land commenced in 1851, even if they do not prove the actual agreement under which it arose. In these revenue proceedings, started in 1855, the plaintiffs asserted that they were permanent tenants, no doubt relying on exhibit 16 (2), but at any rate there was an assertion that they were permanent tenants. From 1851 both property A and property B have been held together at one rent, and if there is a presumption that the plaintiffs'' interest in property A is that of a permanent tenant, the mixing up of that land with property B suggests a similar interest in property B. A uniform rent was paid for both properties down to the year 1879 at the rate of Rs. 127 a year, and thereafter it was enhanced. The plaintiffs'' case is that it was never enhanced beyond a figure recognised by local usage, and therefore the enhancement would come within the provisions of Section 83 of the Bombay Land Revenue Code, and would not be inconsistent with permanent tenancy. It is said, further, that in the revenue proceedings of 1855 the Collector refused to make an order for possession, and referred the landlord to a civil suit, and for upwards of sixty years no steps whatever were taken to file any suit or challenge the alleged title of the plaintiffs. It is contended, therefore, that the assertion by the tenants of a permanent tenancy, acquiesced in by the landlord for sixty years, and confirmed by acts of the tenant, such as spending money on the property and paying a much smaller rent than the value of the property warranted, leads to a presumption of permanent tenancy, apart from Section 83 of the Bombay Land Revenue Code, and further, that the landlord having acquiesced in that assertion, his title is barred under Article 144 of the Indian Limitation Act. It is of course admitted that the presumption u/s 83 of the Bombay Land Revenue Code does not arise in the case of the B property, because the date of the commencement of the title is known. To the plaintiffs'' case the defendant answers that the only assertion of a permanent title was based on exhibit 16 (2),, which is not proved, and .further, that even if that document was proved, it does not constitute a permanent tenancy, and further again, if it does constitute a

permanent tenancy, it also fixes a permanent rent, and subsequent enhancement of the rent is inconsistent with title based on a document fixing the rent.

4. The real question as to property B is one of law, namely, whether when a tenant in occupation of land paying an annual rent asserts at the commencement of his tenancy that he is a permanent tenant, and that alleged claim, although disputed by the landlord, is not challenged by a suit for more than sixty years, the position results in law in the acquisition of a permanent tenancy either under some presumption apart from that contained in Section 83 of the Bombay Land Revenue Code, or under the Indian Limitation Act. On that point of law there are some relevant decisions of the Privy Council. There is, first of all, the case of Mohammad Mumtaz Ali Khan v. Mohan Singh (1923) L.R. 50 IndAp 202 in which it was laid down by their Lordships of the Privy Council that they were unable to affirm as a general proposition of law that "a person who is, in fact, in possession of land under a tenancy or occupancy title can, by a mere assertion in a judicial proceeding and the lapse of six or twelve years without that assertion having been successfully challenged, obtain a title as an under-proprietor to the lands." I think that the decision comes to this, that where a person is given possession of land as a tenant, the mere fact that he asserts that the tenancy is of a particular kind will not by the lapse of time convert the tenancy into one of that kind. Whether a tenancy is permanent or not must depend on the facts of the case and the agreement between the parties and not on mere assertions. In my opinion that principle applies to the present case, Then the Privy Council went rather further in AIR 1924 65 (Privy Council) , where they definitely held that the defendants being tenants could not obtain a right of permanent occupancy by prescription. But Mr. Desai on behalf of the appellants relies on another decision of the Privy Council, AIR 1928 146 (Privy Council) . In that case lands were held under a mukarrari agreement and the mukarrari tenant died. The Court held that the tenancy was a tenancy for life which terminated on the death of the mukarraridar, but the mukarraridar''s descendents alleged that it was a permanent tenancy and they remained in occupation and continued to pay rent asserting that they were permanent tenants. On the other hand, the landlord always denied their tenancy, and it was held by the High Court, and affirmed by the Privy Council, that the landlord''s suit for possession was barred, and the defence set up by the defendants that they were permanent tenants by reason of their occupation and assertion of that right, was accepted. But their Lordships of the Privy Council, after referring to the earlier decision of AIR 1923 205 (Privy Council) and Nainapillai Marakayar v. Ramanathan Chettiar, and to other cases, say that it is not necessary to consider those cases in detail, because the facts of that case did not bring it within the rulings in question. Then they say (p. 223) : "In this case the evidence goes to j show that after the expiration of the lease for lives the plaintiff''s predecessor-in-title did not, in fact, claim to be the landlord, he did not admit any tenancy on the part of the defendants or their predecessors, and he did not, in fact, allow the defendants or their predecessors to be in possession as

tenants". No doubt the landlord had accepted rent annually from the successors of the tenant. But the view their Lordships took was that the legal result which would normally follow from that course of conduct, namely, the creation of a tenancy between the landlord and the persons who paid the rent was prevented by the fact that the landlord had given receipts for the rent in the name of the deceased mukarraridar. I find it myself rather difficult to, follow how the legal consequences resulting from the acts of the parties in the payment and acceptance of rent could be affected by the receipt for rent having been given in the name of somebody who was dead and had not paid it. But at any rate the whole basis of that decision was that the landlord had never recognised the defendants as tenants, and therefore their possession had always been adverse to him. That is not the position here. Assuming that the tenants have asserted that they were permanent tenants, that alleged title has never been in any way recognised by the landlord, and he has always accepted rent every year, and given a receipt in no special form to the persons who paid the rent, and thereby he has in my opinion recognised those persons as tenants. If they are not permanent tenants, they must, I apprehend, be annual tenants, and it cannot be said, therefore, that their possession has ever been adverse to the landlord. That being so, in my opinion, the learned Judge was right in holding that the plaintiffs had failed to establish a permanent tenancy in respect of the B property. But I think that his judgment was wrong in respect of the A property, and that the plaintiffs do establish a permanent tenancy as to that.

5. With regard to the other Appeal, No. 471, certain objections are taken to the landlord''s suit, which, as I have said, is a suit for possession. It is based on a notice to quit expiring in April 1922, and I am clearly of opinion that that notice to quit was waived by a subsequent notice to quit given on September 26, 1925, which is exhibit 172 in the case. The latter notice to quit in terms recognised the defendants as being annual tenants, and paying an annual rent, and the recognition of the tenancy amounts, in my opinion, to-a waiver of the earlier notice to quit. Therefore the plaintiff''s suit, in my opinion, was bad, but Mr. Coyajee has asked for leave to amend his claim, by basing his right to possession on the notice of September 26, 1925f exhibit 172, and on terms as to costs we are prepared to give that leave. The notice is also challenged as being an insufficient notice to quit. It is said that it is really a notice to enhance rent, or at any rate only a contingent notice to quit; but as I read the document, I think it is a notice to quit on March 31. 1926" accompanied by an offer to abandon that notice if the tenant would agree to pay a further enhanced rent. Coupling that offer with the notice does not, in my opinion, invalidate the notice. Then it is said that the notice was not served upon defendants Nos. 3, 4 and 5. In the case of defendant No. 3, admittedly it was not served. 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. One cannot assume that because an addressee declines to accept a particular sealed envelope he .has guessed correctly as to its contents. Many people in this country make a practice of always refusing to accept registered letters, a practice based, I presume, on their experience that such documents usually contain something unpleasant. So that, in my opinion, it is clear that this notice was not served on three of the defendants. But it was served on the other defendants, and the defendants are joint tenants of the land, and I think we can follow the ruling of the Privy Council in the case of Harihar Banerji v. Ramshahi Roy I.L.R.(1918) Cal. 458 : S.C. 21 Bom. L.R. 522., and decide that service of a notice to quit on one of several joint holders affords prima facie evidence that it has reached the rest. The defendants in question did not go into the witness box to deny that they had received the notice, and therefore the prima facie presumption must prevail. I think, therefore, that subject to the defendant''s amending his plaint, and with the necessary variation in the order as to mesne profits, Appeal No. 471 must be dismissed as to property B.
Divatia, J.

6. I concur. With regard to the grants of 1848 and 1851 on which the appellants rely for the creation of permanent tenancy, I think the lower Court was right in holding that they were not proved. They purport to be only uncertified copies, and are not signed by the executant. It is urged that there are certain words, viz. ''blessings'', in these two grants which are deposed to in a previous deposition as having been written by the executant. But it appears from certain receipts in this case, for instance, exhibits 91, 92 and others that the executant Khanderao did affix his signatures to documents, and that being so, it is not shown how it is that in these grants, if they are executed by Khanderao, he has not put his signature but has only written the words, ''blessings''. Besides, in the revenue dispute before the Collector, these two documents, which were relied upon, have been held not proved and it is stated that thereafter they remained in the Collector''s record, and are sought to be produced and proved now, mainly by the deposition of a Witness in former revenue proceedings, who says that some of the writings of these two grants are in the handwriting of Khanderao. But that is not sufficient for the proof of these two documents. Even assuming, however, that they are proved, I doubt very much if these two documents would create permanent tenancy at all. At the most they might create a tenancy for the life of the persons in whose favour the grants are made. Therefore these two documents being out of question, the appellants have to rely on Section 83 of the Bombay Land Revenue Code for alleging permanent tenancy. Now with respect to the land of six bighas, the lower Court has held that

the origin of the defendants'' title to possession of this land is known as having commenced some time between 1844 and 1851, and reliance is placed on three exhibits, 180, 182 and 124, I agree that it cannot be said that the commencement of the tenancy is proved satisfactorily within the meaning of that expression in Section 83 by these three documents. The respondents'' ancestors'' names are not shown in documents, exhibits 180 and 182, and exhibit 124 is simply a letter by the Mamlatdar with regard to some dispute raised by one Vyankappa, who seems to be a cultivator on that land. If these three documents go out of the question, then the only thing on which we have to go upon is the statement made in the judgment given by the Deputy Collector in 1857, exhibit 84. That would, however, show that with regard to the A land, he was of opinion that the tenant''s ancestors were on that land from very ancient times, and in that judgment a clear distinction is made between the A land and the rest of it, and it is stated there that with regard to the A land the tenant''s ancestors were in possession from ancient times, and with regard to the entire land, that is, A and B, they were in possession since four or five years. Therefore, on this documentary evidence, it would appear that the antiquity of the tenancy having been proved by the tenants, the landlord has not sufficiently and satisfactorily proved that the tenancy commenced at any particular period. At the most it can be said that the tenancy might have commenced between 1815, from which year the landlord''s tenure began, and 1851. But that is - too long and indefinite a period within which it can be said that the tenancy must have commenced at a certain date. Although according to some decisions of this Court the period of twenty years is regarded as one from which it can be shown that the commencement of a tenancy is satisfactorily begun, I think each case must depend upon the evidence produced in it, and I am satisfied that with regard to the evidence produced for the A land, the landlord has not proved that the tenancy with regard to that land commenced at any particular time. The result, therefore, will be that the tenants will be presumed to be permanent tenants, even though there has been some increase in the rent. That is so, because the rent that has been paid by the tenants to the landlord is not simply a rent for the A land, but for the aggregate of the A and B lands, i.e. Rs, 127.

7. Then coming to the B land, it is conceded that the tenants'' occupation of this land began at a definite time, viz., 1851, and therefore the appellants cannot invoke the aid of Section 83 for the purpose of proving permanent tenancy. But it has been strongly urged on behalf of the appellants that although they did not get rights of permanent tenancy either by their grant or u/s 83, they acquired them by adverse possession, and for that reliance has been placed upon a deposition of one of the ancestors of the present appellants, Abaji, who deposed in previous revenue proceedings that they were holding the lands as permanent tenants by virtue of the grant of 1851; It is urged that since that assertion the tenants have been holding the land claiming to be permanent tenants, and that the landlord has accepted the rent, and has not disputed their status as permanent tenants. Now in order that a person

can acquire rights by adverse possession, he must intend to do so in a manner which must be clear , and unambiguous. Here, we are not concerned with the acquisition of rights as absolute owner, but acquisition of rights as a limited owner. In fact it appears that between 1851, in which, according to the appellants, their possession began, and 1855, when the first assertion was made, they have given rent to the landlord for which there are receipts. That would show that they were in possession of the land as tenants. So we have not here the case of entire strangers or trespassers entering on the land for the first time and claiming to hold it adversely as permanent tenants. It is a case of a person who entered on the land as a tenant and paid rent, and subsequently made an assertion of permanent tenancy. But even then it cannot be said that the mere assertion as a permanent tenant would clothe him with the status of a permanent tenant by adverse possession. It must be noted that the plaintiffs'' own case in the plaint was that they were permanent tenants at a fixed rent, and the evidence shows conclusively that the rent was changed from Rs. 103 to Rs. 175 even after the assertion of permanent tenancy was made. Very strong reliance-has been placed on behalf of the appellants on a decision of the Privy Council,, AIR 1928 146 (Privy Council) , but I agree that that decision, which turns on the special facts of that case, does not apply to the facts of the present case at alt In fact that decision was given on the basis that in that case the relationship of landlord and tenant had ceased between the parties after the assertion of permanent tenancy, and that the rent was taken by the landlord in the name of the original mukarraridars and receipts were also given in their names only, and when the tenants demanded receipts in their own names, the landlord refused to give such receipts, and thereafter no rent was paid. On that, the Privy Council made a finding that the landlord did not admit any tenancy on the part of the defendants, and did not in fact allow them or their predecessors to be in possession as tenants. Therefore it is stated that on the special facts of that case, the parties were at. arm''s length, the heirs of the lessees were asserting their permanent interest with a liability to pay rent, and they continued to assert it consistently from 1883. Here, however, the facts are entirely different. As I have observed, not only did the tenants pay the rent between 1851 and 1855, but ever since then also they have been paying rent, which the landlord has been accepting, and the rent is also increased. So the relationship of landlord and tenant has subsisted between them after the assertion of permanent tenancy. The present case, therefore, falls within the principle of the decisions in Mohammad Mumtaz Ali Khan v. Mohan Singh (1923) L.R. 50 IndAp 202, AIR 1924 65 (Privy Council) , and also of the decision of our Court in Datto v. Babasaheb (1933) 36 Bom. L.R. 359; and not within the principle of the decision in Kamakhya Narayan Singh v. Ram Raksha Singh. That being the only principal argument with regard to this land, I agree, that the appellants ale not permanent tenants thereof, and the decision of the lower Court on that point should be affirmed.

8. With regard to the notice, I agree that the notice as given was not properly served, as it is clear that the registered document was refused. But I agree that the second set of plaintiffs, viz. the Hebbalkars, were joint among themselves, and held the land jointly, and it is proved in this case that defendants Nos. 5 and 6 did receive the notice, and therefore, they being joint tenants along with defendants Nos. 3 and 4, the latter should also be deemed to have received it. Therefore the suit is not bad on that ground. It is true that the landlord has relied on the notice of 1921 in the plaint, but that is clearly wrong, and I agree that the interests of justice require that the plaintiff should be allowed to amend the plaint.

9. Appeal No. 477 : Allowed as regards property A and dismissed as regards property B. Parties to get their proportionate costs throughout.

10. Appeal No. 471 : Allowed as regards property A. As to property B liberty to amend by pleading the notice of September 1925. Judgment for possession and for mesne profits of property B from three years before this date till delivery of possession. Inquiry, as regards mesne profits of property B and as to the amount of rent to be attributed to property A to be made in execution. Respondent to pay costs throughout in suit No. 243 and Appeal No. 471, but costs of evidence common to both suits to be allowed only in suit No. 132 of 1926.