

**Rama Appa Jadhav Vs. Tippaya Appaya Mathapati**

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**Court :** Mumbai

**Decided On :** Jul-27-1942

**Reported in :** AIR1943Bom95; (1943)45BOMLR186

**Judge :** Divatia, J.

**Appeal No. :** Second Appeal No. 622 of 1939 and S.A. No. 623 of 1939

**Appellant :** Rama Appa Jadhav

**Respondent :** Tippaya Appaya Mathapati

**Judgement :**

Divatia, J.

1. The question in these two appeals is whether the defendant is a permanent tenant of the lands in dispute. The plaintiff is a purchaser from the family of the original landlord. His suit was to recover possession of the lands on the basis that the defendant was an annual tenant. According to the defendant he was a permanent tenant and his family was in possession for more than three quarters of a century on payment of the same rent. He also contended that he was a mirasi tenant under a patta and that therefore he could not be evicted. The material questions, therefore, were whether the defendant was proved to be a mirasi tenant or in any case a permanent tenant under Section 83 of the Bombay Land Revenue Code.

2. So far as the mirasi nature of the holding is concerned, both the Courts have found on the evidence that there was no grant or patta, and that therefore the defendant cannot be regarded as a mirasi tenant. That finding is not assailed before me.

3. The lower Courts have held that although the defendant was an ancient tenant on payment of the same rent at least from 1859, he was not a permanent tenant under Section 83 of the Bombay Land Revenue Code because his tenancy appears to have begun at some time between 1852 and 1859. According to the plaintiff's case the tenancy began in 1859, the year of the earliest receipts which he had produced. According to the defendant his family was in possession as tenant even before that year, but the lower Courts have held that the defendant had failed to prove it. The finding of the lower Court that the tenancy began at some time between 1852 and 1859 is based on an entry in the pahanisud, exhibit 52, from which it appears that the suit lands were in possession of one Bapubhat as a tenant, and as Bapubhat had no connection with the defendant's ancestors, the latter must have come into possession at a period subsequent to 1852. The defendant had relied upon several entries from the E Register, exhibits 56, 57 and 58, in which he was, mentioned as a permanent tenant without any patta. With regard to the entries in exhibits 56 and 57 the lower

Courts were of the opinion that they did not mean that the tenancy was permanent without there being a patta, but that there was no grant of permanent tenancy. In the extract exhibit 87 the defendant was simply mentioned as a permanent tenant, but according to the lower Courts this description was made on account of an erroneous interpretation of the earlier extracts, and did not necessarily prove that the defendant was a permanent tenant. It was held that the presumption created by them had been rebutted by the evidence of the origin of the tenancy between 1852 and 1859, even though the entries had presumptive value under Section 135J of the Bombay Land Revenue Code. In holding that the defendant was not a permanent tenant because the origin of the tenancy had been proved' at some time during the period of seven years, the lower Courts relied upon several decisions of this Court in which it was held that if the evidence showed that the tenancy arose at some time within a period which can be regarded as a reasonably short one, it must be inferred that its commencement could be ascertained. The latest decision referred to by the lower Court is in *Mansukh v. Trikambhai* : AIR1930Bom39 . The suit was, therefore, dismissed by both the lower Courts.

4. The defendant has now come in second appeal and his main contentions are, firstly, that even accepting the finding of the lower Courts that the tenancy commenced at some time between 1852 and 1859, it cannot be said that the landlord had proved the date of the commencement of the tenancy under Section 83 of the Bombay Land Revenue Code, and as the defendant had discharged the burden, which lay on him, of proving the antiquity of the tenancy, it was on the plaintiff to prove its commencement, which had not been proved merely by showing that the tenancy began at some time between those two years. Secondly, it is contended that even assuming that exhibit 52 meant that some person other than a member of the defendant's family was in possession of the lands in 1852, the entries in the extracts, exhibits Nos. 86, 56, 57 and 87 should have been regarded as of presumptive value under Section 135J of the Bombay Land Revenue Code, and the presumption had not been rebutted merely because of another extract from a revenue record, exhibit 52, which showed that somebody else was on the land. The later entries must be deemed to have been made after due enquiry, and therefore, effect should be given to them. For both the arguments the defendant relies upon the recent decision of the Privy Council in *Shankarrao Dagadujirao v. Shambhu Nathu Patil* (1940) 43 Bom. L.R. 1. It is contended by Mr. Desai that the effect of this decision is to overrule the view held by our Court in a number of cases that even though the tenancy was not proved to have commenced in a particular year but if it was established that it must have commenced at some time during a reasonably short period of time, the commencement of the tenancy could be regarded as proved. The decisions on this point are *Chikko v. Shidnath* (1921) 24 Bom. L.R. 226 *Narayan v. Pandurang* : (1922)24BOMLR831 , *Ramchandra v. Dattu* : AIR1926Bom55 , *Shripadbhat v. Rama* (1926) 29 Bom. L.R. 274 *Mansukh v. Trikambhai* : AIR1930Bom39 , *Dhondu v. Damodar* (1934) 37 Bom. L.R. 209, and *Krishna v. Laxmibai* (1937) 40 Bom. L.R. 439. In the case before their Lordships of the Privy Council there were several tenancies. Some of them had originated at some time between 1856 and 1892. It was held by this Court that that was no satisfactory evidence of the commencement of the tenancy. The case of *Narayan v. Pandurang* in which the tenancy was proved to have originated at some time within a period of twenty years was distinguished on the ground that that was a reasonably short period, while in the case under consideration the period was thirty six years. It was held from that and other circumstances that the defendants were permanent tenants. Before their Lordships the questions were whether the tenancy was proved to be ancient, and whether its commencement was

ascertained. With regard to the antiquity of the tenancy their Lordships held that it was not necessary to prove a tenancy which could be referred to remote ages in the past and to time immemorial, and that it was sufficient if it could be referred to a point of time within which living testimony of past acts was necessarily restricted. Then with regard to its commencement, their Lordships observed as follows (p. 15) :-

Some cases have been cited to their Lordships to show the interpretation put upon this provision of Section 83 by the High Court of Bombay (Maneklal Vamanrao v. Bai Amba, Sidhanath v. Cheko, Narayan Ramchandra v. Pandurang Balkrishna, Ramchandra v. Dattu, and Shripadbhat v. Rama). Their Lordships think that for the purposes of the present case it is sufficient to note that the particular presumption mentioned in the clause is not directed to be made save upon these two conditions (among others) : first, that there is no satisfactory evidence of the date of the commencement of the tenancy, and, secondly, that this lack is due to the antiquity of the tenancy... They cannot agree that the first condition is excluded by showing that the tenancy had its origin at some date within a period of twenty years which cannot be more precisely ascertained. This is not satisfactory evidence of the date of its commencement, and the view taken in Narayan's case [i.e. 24 Bom. L.R. 831] fails in their Lordships' opinion to give effect to the ordinary meaning of the language of the clause.

5. Mr. Desai contends that their Lordships intended to hold that satisfactory evidence of commencement did not mean commencement at some unknown date within a period of time however short but commencement at a definite time. Their Lordships disapproved of the decision in Narayan's case where twenty years were regarded as a reasonably short period from which origin could be inferred, and the observation that that view failed to give effect to the ordinary meaning of the language of the clause would show that in their Lordships' opinion what was required to be proved was the date of the commencement and not merely a period between two dates or years. Narayan's case, which was regarded as a leading case on this point, has been referred to expressly by their Lordships and the view taken in that case has been dissented from. At two places their Lordships observe that by commencement of tenancy was meant the date of its commencement. I think there is force in this contention and it seems to me that their Lordships meant to settle this point by holding that a definite date or year must be proved for the purpose of proving commencement. I do not think that their Lordships meant by date the exact day of the origin of the tenancy but at least the year of its origin, because in absence of any evidence to the contrary, the date could be presumed under the first paragraph of Section 84 of the Bombay Land Revenue-Code.

6. It is contended by Mr. Coyajee that their Lordships say that what was required was satisfactory evidence of the date of the commencement, and by 'satisfactory evidence' was meant some evidence which satisfactorily showed the commencement which may not be the exact year but of some approximate period of time. I do not think, however, that by using the word 'satisfactory' their Lordships meant that a period of time could be proved. That word is used because it occurs in the section itself, and what they really meant was that in order to prove the origin of the tenancy there must be satisfactory evidence, i.e. evidence to the satisfaction of the Court, about the year in which the tenancy originated. It is no doubt true that those observations of their Lordships are obiter because they expressly say that they did not base their decision upon the presumption authorised by Section 83, and it rested upon the presumption under Section 135J of the Bombay Land Revenue Code. But it is well known, the

obiter dicta of their Lordships are binding on this Court if they are definite opinions expressed by them (*Shrinivas Sarjerav v. Balwant Venkatesh*. I.L.R. (1913) 37 Bom. 513. It seems to me that the opinion expressed by their Lordships was a definite and considered opinion on the authorities quoted before them, and is, therefore, binding on this Court.

7. That being my view, it is not necessary to go into the other question as to whether the extracts, exhibits 86, 56, 57 and 87, create a presumption under Section 135J of the Bombay Land Revenue Code in the defendant's favour. Even if they do not, the plaintiff would not be entitled to succeed if he did not prove the year in which the tenancy began. Mr. Coyajee however points out that according to the plaintiff the tenancy began in 1859 and that the lower appellate Court has held that the defendant had failed in proving his case that it began at an earlier date. The lower Courts did not think it necessary to decide the question of the exact year of origin because on the authorities as they were at that time, it was sufficient to prove a reasonably short period from which it can be inferred that the tenancy had commenced within the meaning of that term in Section 83. It is contended that if it is now necessary that the plaintiff must prove the year of the origin of the tenancy, the evidence must be looked at from that standpoint, and an opportunity should be given to the plaintiff to prove that the tenancy must have originated in a particular year. I think there is force in that argument in view of the nature of the evidence in this case. Before finally disposing of this appeal, therefore, I refer the following issue to the trial Court in both the appeals :-

Whether the plaintiff proves the year of the commencement of the defendant's tenancy

8. The finding should be made by the trial Court on the evidence already recorded and should be sent through the District Court which should certify the finding. The finding should be returned to this Court within three months from the date of the receipt of the record by the trial Court.

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