

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Telang.

DAULATA BIN BAHIRJI AND OTHERS (*Original Defendants*), Appellants
v. SAKHARAM GANGADHAR (*Original Plaintiff*), Respondent.*
[19th December, 1889.]

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14 B. 392.

Landlord and tenant—Perpetual tenancy—Long possession—Presumption arising from such possession—Bombay Act V of 1879, s. 83—Burden of proof.

The plaintiff's predecessor in title acquired the lands in dispute in A.D. 1870. The defendants were in possession as tenants. They proved their possession so far back as 1812. But it did not appear that they were put in possession first in that year. There was no evidence either of the commencement or of the duration of their tenancy.

Held, that under s. 83 of the Bombay Land Revenue Code (Bombay Act V of 1879) the defendant's tenancy should be presumed to be perpetual and that it lay on the plaintiff to prove the contrary.

[R., 18 B. 433 (439); 5 Bom. L.R. 186.]

[393] SECOND appeal from the decree of J. Fitzmaurice, Acting Assistant Judge of Satara, reversing the decree of Rav Saheb Kashinath B. Marathe, Second Class Subordinate Judge at Satara, in suit No. 431 of 1885.

The plaintiff sued to eject the defendants, who were alleged to be in possession of the lands in dispute as tenants from year to year.

The defendants pleaded (*inter alia*) that they held the lands in suit on *mirasi* (or perpetual) tenure, and that they were not liable to eviction so long as they paid the rent due to the *inamdar*.

The Subordinate Judge found that the defendants had been in possession for more than eighty years as *mirasdars*, and that the plaintiff had no right to eject them. He, therefore, dismissed the suit.

On appeal, the Assistant Judge found that the lands in dispute had been granted in *inam* to the plaintiff's predecessor in title by the Raja of Satara in 1780 A. D.; that the defendants failed to prove that they had been in possession before the grant in *inam*; and that their possession could not be traced further back than 1812 A. D. He held that this long possession alone could not create the right to a perpetual tenancy, and was not of itself sufficient evidence of such tenancy.

He, therefore, reversed the decision of the Subordinate Judge, and awarded the plaintiff's claim.

Against this decision the defendants appealed to the High Court.

Ganesh R. Kirloskar, for appellants.

Daji Abaji Khare, for respondent.

JUDGMENT.

PARSONS, J.—We think that the Assistant Judge has erred, in law, in that he has not applied to this case the presumption that arises from the antiquity and duration of the tenancy of the defendants. He has correctly thrown upon the defendants the burden of proving, in the first

* Second Appeal No. 566 of 1888.

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instance, their right to a perpetual or *mirasi* tenancy, and he has cited cases which show that [394] he did not overlook the fact that long possession is a strong element in such proof. In holding, however, that long possession is not of itself in any case sufficient evidence, he is wrong. In the present case, if the defendants can prove that their tenancy was in existence previously to the grant of the *sanad* under which the plaintiff claims, then undoubtedly that tenancy would be of the nature they contend it is. It is only because the defendants cannot trace their possession back earlier than 1812, or possibly 1808, whereas the *sanad* is dated 1779-80, that the Assistant Judge comes to the conclusion that the defendants have not satisfied the *onus probandi* required of them. He has found, as a fact, that the defendants were in possession in 1808 or 1812, and it does not appear that they were put in possession first at that time. Under these circumstances the Assistant Judge should have borne in mind the presumption that arises from the proof that the defendants were in possession in 1808 or 1812. "When the state of possession for a long period of years has been satisfactorily proved, in the absence of evidence to the contrary, *presumitur retro*"—*Anangamanjari Chowdhurani v. Tripura Sundari* (1). It is not, however, necessary to cite cases on this point. The second clause of s. 83 of the Bombay Land Revenue Code lays down the law on the subject, and distinctly applies to the present case. No satisfactory evidence of the commencement of this tenancy appears on the record, and there can be no doubt that this is by reason of the antiquity of that tenancy. There is no such other evidence as is referred to in the section. In such a state of things the Assistant Judge ought to have presumed the defendants' tenancy to be, as against the plaintiff, co-extensive with the duration of the tenure of the plaintiff, and thrown upon the plaintiff the burden of proving the reverse. This he has not done. We, therefore, reverse the decree, and remand the appeal for a re-hearing with reference to the above remarks. Costs to abide the result.

Decree reversed and case remanded.

14 B. 395.

[395] APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Candy.

SARDARSINGJI (*Original Plaintiff*), *Appellant v. GANPATSINGJI*
(*Original Defendant*), *Respondent*.* [20th December, 1889.]

Declaratory decree—Suit for a mere declaration of title without consequential relief—Specific Relief Act (I of 1877), s. 42—Injunction—Civil Procedure Code (Act XIV of 1887), s. 424—Notice—Practice—Amendment of plaint.

The plaintiff sued for a declaration that he was entitled to succeed, on his father's death, to a *talukdari* estate, to the exclusion of defendant No. 1, who, he alleged, was a supposititious child set up by his step-mother to defeat the plaintiff's right of inheritance. It appeared that the defendant No. 1 had obtained a decree against the plaintiff's father, establishing his legitimacy, and declaring him entitled to receive maintenance out of the estate in question. In accordance with this decree the Talukdari Settlement Officer, (defendant No. 2), who was in management of the estate under Bombay Act XXI of 1891, paid defendant No. 1

* Appeal No. 93 of 1888.

(1) 14 C. 740 (748) = 14 I. A. 101 (110).