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APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

RAMCHANDRA NARAYAN MANTRI AND OTHERS (*Original Defendants*), *Appellants v.* ANANT AND OTHERS (*Original Plaintiffs, &c.*), *Respondents.** [8th August, 1893.]

Landlord and tenant—Permanent tenancy—Bombay Land Revenue Code (Bombay Act V of 1879), s. 83.

The mere fact that a tenancy has commenced subsequently to the commencement of the landlord's tenure, does not prevent the application of s. 83 (1) of the Bombay Land Revenue Code (Bombay Act V of 1879), in cases where by reason of the antiquity of the tenancy no satisfactory evidence of its commencement is forthcoming.

G. held certain lands as a tenant under M. an inamdar. The lands continued in G.'s family for nearly 80 years. It was found that owing to this antiquity of the tenancy, its commencement or duration could not be satisfactorily established by evidence.

Held that, in the absence of any local usage to the contrary, G.'s tenancy must be presumed to be permanent.

THESE were appeals from the decree of Rao Bahadur R. S. Tipnis, Acting Assistant Judge of Ratnagiri, in appeal No. 349 of 1889.

The plaintiffs sought to recover possession of the lands mentioned in the plaint, alleging that they belonged originally to a family named Mantri, who were jaghirdars in the district of [434] Satara; that they were let on a permanent lease to one Ganesh Savant; that Ganesh's rights were purchased by the plaintiffs at a Court sale; that plaintiffs were in possession until 1881, when they were wrongfully dispossessed by defendants Nos. 1 to 9.

Defendants Nos. 1 to 9 pleaded (*inter alia*) that Ganesh was only a yearly, and not a permanent, tenant, and that the plaintiffs' alleged purchase had given them nothing. Defendants Nos. 10 to 15 pleaded that they were tenants of defendants Nos. 1 to 9, and were not liable to the plaintiffs' suit.

The Court of first instance found that Ganesh's tenancy was yearly tenancy, although it had continued in his family for over fifty years, and the plaintiffs were not entitled to recover. It, therefore, rejected the claim with costs.

On appeal, the Assistant Judge found that Ganesh's tenancy "though it admittedly arose at the hands of the Mantris, was of a very ancient date—certainly not less than eighty years, and that by reason of this antiquity of the tenancy its commencement or duration could not be satisfactorily established by evidence." He further found that there was no evidence of local usage as to the duration of such tenancy. In the

* Second Appeals Nos. 682 and 758 of 1891.

(1) Section 83, Bombay Act V of 1879:—

And 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.

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absence of any local usage, he held that under s. 83 of the Bombay Land Revenue Code (Act V of 1879) Ganesh's tenure must be presumed to have been co-extensive with that of the landlord's, and that the permanent tenancy of the plaintiffs as assignees of Ganesh must be held proved. He, therefore, awarded the plaintiffs' claim.

Against this decision the defendants preferred these appeals to the High Court.

In appeal No. 682—

Ghanasham Nilkant, appeared for appellants (defendants Nos. 5, 6, 7, 9 and 17).

Manekshah Jehangirshah, for respondents (Nos. 1—3).

In appeal No. 758—

Messrs. *Chitnis*, *Motilal and Malvi*, for appellants (defendants Nos. 1 to 4).

Manekshah Jahangirshah, for respondents Nos. 1—3.

[435] *V. G. Bhandarkar*, for respondents Nos. 4, 5, 8 and 9.

Ghanasham Nilkant, for appellants (defendants).—The interest purchased by the plaintiffs was not a permanent tenancy. It is admitted that the original tenant (Ganesh) came in under the defendants' ancestors (the Mantris) subsequently to the commencement of their tenure. That being so, s. 83 of the Land Revenue Code does not apply. Mere length of possession at an invariable rent cannot establish a perpetual tenancy—*Narayanbhat* v. *Daulata* (1); *Gangabai* v. *Kalapa* (2) *Ramabai* v. *Babaji* (3); *Kalidas* v. *Bhaijai* (4); *Lakshman* v. *Vithu* (5).

Manekshah Jehangirshah, for respondents (plaintiffs);—It is found that the tenancy in question is ancient. It is also found that by reason of its antiquity the commencement and duration of the tenancy cannot be established by satisfactory evidence. The case, therefore, falls within s. 83 of Bombay Act V of 1872. *Daulata* v. *Sakharam* (6) is conclusive on the point.

JUDGMENT.

CANDY, J.—The preliminary and main argument in these appeals relates to the applicability of s. 83 of the Land Revenue Code. The Subordinate Judge found as a fact that the *thikan* had continued in the family of Ganesh Savant for nearly three generations for a period of over fifty years, but that the tenancy was simply an annual tenancy, and such tenancy by any lapse of time could not be converted into a permanent tenancy. On appeal the Assistant Judge found as follows :—" The tenancy, though it admittedly arose at the hands of some Mantri " (the *thikan* is the inam property of the Mantris, who are jaghirdars in the Satara Collectorate) " is of a very ancient date, certainly not less than eighty years. It is on account of this antiquity that the commencement or period of duration of the tenant (tenancy ?) cannot be satisfactorily established by evidence. . . . On the whole, then, it seems to me that by reason of the antiquity of the tenancy its commencement or duration cannot be satisfactorily established by evidence . . . . When this case was decided by the [436] Subordinate Judge he had not before him the rulings in *Daulata* v. *Sakharam* (6) and *Jaikrishna* v. *Lakshmanrav* (7). These cases were decided with reference to s. 83 of the Bombay Act V

(1) 15 B. 647. (2) 9 B. 419.
(3) P. J. for (1891), p. 97 ; 15 B. 704. (4) 16 B. 646.
(5) P. J. for (1893), p. 111 ; see 18 B. 221.
(6) 14 B. 392. (7) P. J. for (1890), p. 179.

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of 1879, and they govern the present case. It must be presumed that the duration of Ganesh's tenancy is co-extensive with the duration of the tenure of the Mantris."

Thus the question arises whether the Assistant Judge was right in applying s. 83 of the Land Revenue Code, he having taken it as admitted that the tenancy of Ganesh Savant arose at the hands of the landlord (Mantri). If the Assistant Judge was right, then I concur in holding that the finding of the Assistant Judge as to the tenancy being at least eighty years old is a finding of fact with which this Court cannot interfere, and that the decree of the District Court on the main point must be confirmed.

It is to be noted that neither before the Subordinate Judge nor before the Assistant Judge does the applicability of s. 83 appear to have been raised. It is possible that, apart from that section, the plaintiffs may be able to establish the permanent tenancy of Ganesh, whose rights they have purchased. But the Assistant Judge evidently considered the case to be governed by s. 83: hence the importance of the question whether that section can be applied.

Taking the words of the section in their plain grammatical sense, I am of opinion that the fact taken as admitted in the present case, that the tenancy commenced subsequent to the origin of the landlord's tenure, does not prevent s. 83 of the Land Revenue Code being applied. The following are the conditions which must exist before the presumption can be drawn under the section:—

(1) By reason of the antiquity of the tenancy, no satisfactory evidence of its commencement is forthcoming.

(2) There is nosatisfactory evidence of the period of its intended duration.

(3) There is no usage of the locality as to duration of such tenancy.

[437] When all these three conditions exist, it shall be presumed that the tenancy (or the duration of the tenancy. I take it that there is no practical difference, whether we refer "it" to "tenancy" or "duration of such tenancy,") shall be presumed to be co-extensive with the duration of the tenure of the landlord.

In the present case there is no dispute about the second and third conditions. We are concerned solely with the first. The question is, when we are satisfied that the tenancy commenced subsequently to the tenure of the landlord, can it be said that there is no satisfactory evidence of the commencement of the tenancy? In my opinion it can. If the Legislature had intended to say 'where by reason of the antiquity of a tenancy there is no satisfactory evidence that it commenced subsequent to the landlord's tenure," it would have used plain words to that effect. The words simply mean, there is nothing to show satisfactorily the origin of the tenancy, *i. e.*, the terms under which the tenant commenced to hold.

When the Bill was introduced, which afterwards became Bombay Act V of 1879, it was not asserted that the section now under consideration (s. 134 in the Bill) merely enunciated the law as established by a series of decisions. On the contrary it seems to have been understood that a new tenant law was being enacted. In the Statement of Objects and Reasons it was remarked:—

"In s. 134 some provisions have been introduced with a view of facilitating the determination of the status of tenants and their liability to the payment of rent. The principles therein laid down will, it is believed,

tend to the settlement upon an equitable basis of all questions arising between landlords and tenants when, owing to the antiquity of the tenancy, no satisfactory evidence can be produced with regard to its origin."

It is of no use, therefore, to refer to decisions passed before Bombay Act V of 1879 became law, such as the case of *Kalu* v. *Hari* (1) where the tenancy must have commenced subsequent to the origin of the landlord's tenure, and this was taken to be one of the reasons (not the sole reason) why the tenancy was not perpetual. [438] So, too, in the case of *Daulata* v. *Sakharam* (2), which was quoted by the Assistant Judge. No doubt in the judgment of this Court it was remarked that if the defendants could prove that their tenancy was in existence previously to the grant of the *sanad* under which the plaintiff claimed, then undoubtedly that tenancy would be of the nature claimed by defendants. But that was apart from the statute. After showing, that in the absence of evidence to the contrary, defendants' possession could be referred back to a time not later than the date on which the plaintiff's tenure commenced, the judgment proceeds (p. 394) :—

"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."

The above enunciation of the law is applicable to the present case, and there is no suggestion in the judgment just quoted that the applicability of s. 83 depends upon whether the landlord is unable to show that the tenant's tenancy commenced subsequent to the time when his own tenure began.

For these reasons I would confirm the decree of the Assistant Judge with costs.

FULTON, J.—Whether antiquity of tenancy has been proved, and whether it is by reason of such antiquity that no satisfactory evidence of the commencement of such tenancy is forthcoming, are questions of fact which it was within the competency of the Assistant Judge to decide; and looking to the evidence of Ganesh Baba Savant, I am unable to say that it was not open to him to draw the inference that the tenancy is of a very ancient date [439] certainly not less than eighty years. Though the Judge rejected the witnesses' statement as to the existence of a lease, he was entitled, if he thought proper, to rely on other parts of his deposition relating to the reputed antiquity of tenure. He noted that there was no evidence to show how rent was paid by Ganesh, whether at an uniform rent or otherwise; and if notwithstanding this circumstance he still considered that the present tenancy was of very ancient date, there was nothing illegal in his doing so. Mr. Ghanasham referred us to the decision of this Court in Special Appeal No. 242 of 1871, *Bechar Nathu* v. *Bai Hari* (3) and those in *Narayanbhat* v. *Davlata* (4), *Ramabai* v. *Babaji* (5), *Kalidas* v. *Bhaiji* (6) and *Lakshman Vithu* (7), and further quoted the case of *Gangabai* v. *Kalapa* (8) in which

(1) P. J. (1874), p. 191.
(2) 14 B. 392.
(3) P. J. (1871), p. 194.
(4) 15 B. 647.
(5) P. J. (1891), p. 97.
(6) 16 B. 646.
(7) P. J. (1893), p. 111; *ante* 18 B. 221.
(8) 9 B. 419.

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a tenant was held not to be a mirasdar though he and his predecessors had held for over a century. But this last-named case is really inapplicable, as the tenancy commenced with a lease on the construction of which the decision depended; and looking to the other decisions above referred to, as also to those in *Babaji* and *Nanaji* v. *Narayan* (1) and *Daulata* v. *Sakharam* (2), I think that, finding as the Assistant Judge did that the tenancy had lasted for at least eighty years and that its commencement could not be ascertained, he was entitled to hold that it was by reason of antiquity that no satisfactory evidence of the origin of the tenancy was forthcoming and to apply s. 83 of the Land Revenue Code.

As regards the mesne profits, it was contended that allowance should have been made for the plaintiff's rents for two years. But I think the Assistant Judge was right in holding that as the Mantris had not proved what rent they were entitled to, no deduction could be made on account of it. It was their duty to give evidence as to the amount of rent due, and as they failed to do so, such rent could not be taken into account.

The point taken in the memorandum of appeal, that the Court should have considered whether the purchase by the plaintiffs, **[440]** who were agents of the inamdars, was or was not for the inamdars, was not pressed in argument.

Under these circumstances, I think we must confirm the decree of the lower Court and direct the appellan s in appeals Nos. 682 and 758 respectively to pay all costs of such appeals.

Decree confirmed.

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18 B. 440.

CRIMINAL REVISION.

Before Mr. Justice Candy and Mr. Justice Fulton.

QUEEN-EMPRESS *v.* KUTRAPA.* [14th August, 1893.]

Railway Act (IX of 1890), s. 113—Excess charge and fare recoverable as a fine—Magistrate not competent to impose imprisonment in default—Fine—Imprisonment.

Section 113, sub-s. (4) (3) of the Indian Railway Act (IX of 1890), which directs that on failure to pay on demand excess charge and fare when due, the amount shall on application be recovered by a Magistrate as if it were a fine, does not authorize the Magistrate to impose imprisonment in default. The excess charge and fare referred to in the section is not a fine, though it may be recovered as such.

[F., 20 M. 385 (386); 1 Bom. L.R. 126; 4 Ind. Cas. 236=5 N.L.R. 151 (152); **R.**, 21 C. 979 (985); 11 Cr. L.J. 577=8 Ind. Cas. 190=35 P.W.R. 1910 (Cr).**]**

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* Criminal Review No. 179 of 1893.

(1) 3 B. 340. (2) 14 B. 392.

(3) Section 113, sub-s. (4) of Act IX of 1890, provides as follows:—"If a passenger liable to pay the excess charge and fare mentioned in sub-s. (1) or the excess charge and any difference of fare mentioned in sub-s. (2) fails or refuses to pay the same on demand being made therefor under one or other of those sub-sections, as the case may be, the sum payable by him shall, on application made to any Magistrate by any railway servant appointed by the railway administration in this behalf, be recovered by the Magistrate from the passenger as if it were a fine imposed on the passenger by the Magistrate, and shall, as it is recovered, be paid to the railway administration.