APPELLATE CIVIL.

Before Mr. Justice Russell, Acting Chief Justice, and Mr. Justice Beaman.

NAHANCHAND DEVCHAND (ORIGINAL PLAINTIFF), APPELLANT, *v.* MODI KEKHUSHRU EDALJI (ORIGINAL DEFENDANT), RESPONDENT.* 1906. *October* 15.

Bhágdari and Narwadari Act (Bom. Act V of 1862), section 3 (1)—Land Revenue Code (Bom. Act V of 1879), section 83(2)—Fruit-yielding trees

* Second Appeal No. 418 of 1905.

(1) Section 3 of the Bhágdari and Narwadari Act (Bom. Act V of 1862) runs as under:—

3. It shall not be lawful to alienate, assign, mortgage, or otherwise charge or incumber any portion of any bhág or share in any Bhágdari or Narwadari village other than a recognized sub-division of such bhág or share, or to alienate, assign, mortgage, or otherwise charge or incumber any home-stead, building-site (gabhan), or premises appurtenant or appendant to any such bhág or share, or recognized sub-division, appurtenant or appendant thereto, apart or separately from any such bhág or share, or recognized sub-division thereof. Any alienation, assignment, mortgage, charge or incumbrance, contrary to the provisions of this section, shall be null and void.

* * * * * *

(2) Section 83 of the Land Revenue Code (Bom. Act V of 1879) runs as under:—

83. A person placed, as tenant, in possession of land by another, or in that capacity, holding, taking or retaining possession of land permissively from or by sufferance of another, shall be regarded as holding the same at the rent, or for the services, agreed upon between them; or in the absence of satisfactory evidence of such agreement, at the rent payable or services renderable by the usage of the locality, or, if there be no such agreement or usage, shall be presumed to hold at such rent as, having regard to all the circumstances of the case, shall be just and reasonable.

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.

And where there is no satisfactory evidence of the capacity in which a person in possession of land in respect of which he renders service or pays rent to the landlord, received, holds or retains possession of the same, it shall be presumed that he is in possession as tenant.

Nothing contained in this section shall affect the right of the landlord, (if he have the same either by virtue of agreement, usage or otherwise) to enhance the rent payable, or services renderable, by the tenant, or to evict the tenant, for non-payment of the rent or non-rendition of the services, either respectively originally fixed or duly enhanced as aforesaid.

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standing on a portion of a Bhág—Permanent tenancy—Annual tenancy—Construction—Obstruction to tenant in the enjoyment of trees—Permanent injunction.

The plaintiff, who claimed to be a purchaser from a permanent occupant of certain land which formed portion of a Bhág, sued for a permanent injunction restraining the defendant from obstructing him from the enjoyment of certain fruit-yielding trees and preventing him from entering on the land in which the trees were situated and taking the produce of the trees and having the same watched every year.

The defendant denied the plaintiff's right as permanent occupant and the legality of his purchase, and relied on the provisions of the Bhágdari and Narwadari Act (Bom. Act V of 1862).

The first Court held that the plaintiff was a permanent tenant and that his purchase was valid.

On appeal, by the defendant, the Judge held that a permanent lease was inconsistent with the provisions of the Bhágdari and Narwadari Act (Bom. Act V of 1862), and (even though proved) could not be recognized, having regard solely to section 83 of the Land Revenue Code (Bom. Act V of 1879). He therefore found that the plaintiff was a tenant from year to year and modified the decree of the first Court by directing that the injunction should continue until the determination of the tenancy from year to year.

On second appeal by the plaintiff,

Held, reversing the decree of the Judge and restoring that of the first Court, that on a consideration of the circumstances of the case, and the revenue register, and having regard to section 83 of the Land Revenue Code (Bom. Act V of 1879), the plaintiff was a permanent tenant.

Held further that there was nothing in the Bhágdari and Narwadari Act (Bom. Act V of 1862) to prevent a permanent tenant of a Bhágdar from alienating the fruit of the trees growing on the land of which he is a tenant.

Per BEAMAN, *J.*:—Section 3 of the Bhagdari and Narwadari Act (Bom. Act V of 1862) does not prohibit a permanent tenant from disposing of trees on his land.

Section 83 of the Land Revenue Code (Bom. Act V of 1879) creates no new rights, it simply insists on the Courts adopting a better method of ascertaining whether in fact the right existed.

SECOND appeal from the decision of J. C. Gloster, District Judge of Broach, modifying the decree of P. J. Taliyarkhan, Second Class Subordinate Judge of Ankleshvar.

The plaintiff sued to obtain a permanent injunction restraining the defendant from obstructing him in the enjoyment of nineteen

mango trees and one jambul tree in suit and preventing him (plaintiff) from entering on the land in which the trees were situated and taking the produce of the trees and having them watched every year. The plaintiff sought to recover Rs. 30 also as compensation for loss of profits for the year 1903. The plaint alleged as follows:—

The trees were standing on Survey No. 248 at Mandwa. The survey number stood in the names of Kesurdas Karsan, Haribhai Naran, Baji Bhikha and Bhaiji Ota who were Bhágdars. The land was, however, in the possession and enjoyment of one Khushal Bhikha as permanent tenant on condition of paying Government assessment, and after his death, it passed into the possession and enjoyment of his heirs. The said Khushal Bhikha planted mango and jambul trees in the land and was in possession and enjoyment of the same. In the year 1873 Khushal mortgaged twelve mango trees to plaintiff's deceased father under a registered San mortgage and in 1878 he mortgaged the same trees with possession to plaintiff's father and put him in possession thereof. In 1884 Khushal sold twenty-four mango trees (including the twelve mortgaged) and one jambul tree to plaintiff and his brother Lalchand under a registered sale-deed. The plaintiff and his brother were in possession of the twelve trees from the date of the possessory mortgage and of all the twenty-five trees from the date of the sale-deed by right of ownership. Subsequently in a partition between the plaintiff and his brother in the year 1896 the trees fell to the plaintiff's share and since then the plaintiff alone had been in possession and enjoyment. Khushal Bhikha and his brother had also mortgaged to plaintiff and his brother his permanent right of occupancy in the land, first in 1881 and again in 1892 and both the trees and the land were consequently in plaintiff's possession. On the 23rd April 1903 defendant took in mortgage from Kala Kesur his half share in the land, and on the strength of the mortgage he, in June 1903, drove out plaintiff's men who had been employed to watch the trees. The defendant thus obstructed the plaintiff in the enjoyment of his trees. Out of the twenty-four trees only nineteen were in existence at the date of the suit which was filed on the 16th November 1903.

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The defendant denied that Khushal Bhikha was permanent tenant of the land and had planted the trees and replied, *inter alia*, that he did not admit the documents on which the plaintiff relied for his title and possession, that the allegation in the plaint that his men obstructed the plaintiff in June 1903 was not correct, that assuming that the trees were planted by Khushal, still according to law and custom they would belong to the owners of the land and not to the tenant, that the land in question formed an unrecognized portion of a Bhág and the documents on which the plaintiff relied were void and ineffectual as having been passed in contravention of the provisions of the Bhágdari and Narwadari Act (Bom. Act V of 1862), that assuming that Khushal was permanent tenant of the land, still as he had executed a lease in favour of plaintiff's father and thus denied the Bhágdar's title, the permanent tenancy, if there was any, had come to an end, that Kala Kesurdas and others had mortgaged to the defendant their entire Bhág, including their share of Survey No. 248, with possession and he was in possession and enjoyment of all the mortgaged properties since the date of the mortgage, namely, the 23rd April 1903, that none of the acts of Khushal Bhikha were binding on the Bhágdárs or on their mortgagee, the defendant, and that the land and the trees standing thereon belonged to the Bhagdars and consequently to the defendant as mortgagee.

The Subordinate Judge found that the deceased Khushal Bhikha was a permanent tenant, and that most of the trees were planted by him and the rest by his ancestors, that he was entitled to the possession and enjoyment of the trees and also to convey such rights as he might have had in them to the plaintiff, that as alleged by the defendant Khushal Bhikha had executed a lease in favour of plaintiff's father, but that did not amount to a denial of Bhágdár's title and he had not ceased to be a permanent tenant, and the tenancy did not cease with his death, but was still subsisting, that the mortgage-bonds executed by Khushal in favour of plaintiff's father and the mortgage-bond and sale-deed, Exhibit 50, in favour of plaintiff and his brother were proved, that the sale-deed of the trees, Exhibit 50, was not void as having been passed in contravention of the provisions of the Bhágdari and

Narwadari Act (Bom. Act V of 1862), that Khushal was in possession and enjoyment of the trees and latterly the plaintiff alone had been in enjoyment and possession, that the defendant obstructed the plaintiff in his enjoyment and possession in June 1903, and that the plaintiff was entitled to the compensation of Rs. 20.

On the above findings the Subordinate Judge passed the following decretal order:—

An injunction should issue against the defendant restraining him from obstructing the plaintiff in the enjoyment of the produce of the trees specified in the plaint and from preventing the plaintiff from entering the land in which the trees stand for the purpose of such enjoyment, and from having the trees watched. The injunction will continue so long as the right of permanent tenancy in Survey No. 248, which Khushal Bhikha had and which is now vested in his sons, subsists. Plaintiff to recover Rs. 20 and his costs of this suit from the defendant.

While discussing the question of Khushal's permanent tenancy, the Subordinate Judge made the following among other observations:—

Even Kala Kesurdas (Exhibit 44), who is one of the owners of the land and is defendant's mortgagor, says that Khushal was cultivating the land since before his time, and that he had not seen any one except Khushal cultivate the land. * * Ramsang Bajibhai (Exhibit 98), who also is part owner of the field, gives evidence to the same effect. Both these witnesses further say that Khushal was paying them only the assessment on the land, and nothing more. Neither of them has ventured to assert that Khushal was not a permanent tenant. The defendant has not called any witness to say that any one except Khushal or Khushal's father was cultivating the land at any time. It must therefore be presumed that no one except Khushal or his father was cultivating the land within the memory of any person now living. In some of the documents passed by Khushal to plaintiff and his brother he has stated that the land has been in his family from the time of his forefathers by right of permanent tenancy. The statement appears to me to be admissible in evidence under section 32 (7) of the Evidence Act. In 1882, a register of the *Kayam Kheduts* (permanent tenants) of *bhágdari* lands in the village of Mandwa was prepared. In that register, Khushal Bhikha is entered as permanent tenant of Survey No. 248 (old No. 304). Columns 9, 10, 11 and 12 of the register are important. In column 9 is to be entered the amount that the tenant pays to the *bhágdár*. In column 10 are to be entered the particulars of the agreement, if any, that may have been made between the *bhágdár* and the tenant. In column 11 are to be taken the signatures of the *bhágdár* and the tenant in case they agree to

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the particulars furnished in columns 9 and 10; when they do not agree, the Mámlatdar is to make an inquiry and state the result thereof in column 12. In the present case, column 9 shows that Khushal was paying Rs. 36 annually to the *bhagdars*, that being the assessment on the land. Column 10 shows that he was not holding the land under any agreement. In column 11 appear his and the *bhágdár's* signatures. Both Kala Kesurdas and Ramsang Bajibhai admit their signatures.

On appeal by the defendant the Judge found that the sale-deed of the trees (Exhibit 50) was not void under the Bhágdari and Narwadari Act (Bom. Act V of 1862), and that a permanent lease being inconsistent with the provisions of that Act, Khushal's tenancy was a tenancy from year to year and as his tenancy was subsisting when he executed the sale-deed (Exhibit 50), the injunction should continue until the determination of the annual tenancy. He, therefore, modified the decree of the Subordinate Judge in the following terms:—

For the reasons set forth above I modify the decree of the lower Court by striking out the clause which directs that the injunction shall continue as long as the *permanent tenancy* of Khushal Bhikha and his sons continues, and substituting therefor an order that the injunction shall continue until the determination of the tenancy from year to year under which Khushal Bhikha held and, after him, his sons hold Survey No. 248 as tenants of the *bhágdárs*. In other respects the decree stands unaltered.

In his Judgment the Judge observed as follows:—

The important question therefore in the present case is whether plaintiff's vendors have still a subsisting title as lessees of the land on which the trees stand. If the answer to that question is in the affirmative I think it must follow that plaintiff is *prima facie* entitled to the enjoyment of the produce of the trees, for even though it be assumed that Exhibit 50 does not avail to transfer the property in the trees, it must in my opinion be still regarded as transferring to the plaintiff all the rights of the alienors, and that, in the absence of a contract to the contrary, they would be entitled to the enjoyment of the trees during the continuance of their tenancy is a proposition which cannot be questioned. This aspect of the case has not been correctly dealt with by the Subordinate Judge and need not be further enlarged upon. The plaintiff's claim is based on the allegation that his vendors were permanent tenants of the survey number in which the trees stand. The evidence bearing on this question has been carefully reviewed by the Subordinate Judge and I agree in the conclusions of fact at which he has arrived. The oral evidence with which he has dealt all points to the fact that Khushal and, before him, his ancestors have been in occupation of the field for a very long period. The admissions of the

bhágdárs themselves in this connection are of special significance. It is not as though they had parted with all their rights in favour of defendant and might therefore be unconcerned in the matter. They have only mortgaged the property (under Exhibit 46) and the statements which they have made as regards duration and character of Khushal's tenancy are clearly against their proprietary interests and on that account of high value. Of even greater importance than their present statements is the entry in the register of 1882 (Exhibit 17) made long before their alienation of the land to defendant and at a period when there can be no question but that they were personally and directly interested in maintaining their existing rights. This compilation (of 1882) is a register of permanent tenants. It is urged, however, that a closer scrutiny of the entries which it contains will show that all are not on the same footing. For instance, in column 10 of the first entry it is recited that the tenant is of more than twenty years standing; then follow a series of entries in which the word "ditto" (or rather its vernacular equivalent) is found in column 10. Further on, against Survey No. 289 the entry in column 10 is to the effect that the tenancy dates from before Samvat 1920, namely, some 18 or 19 years prior to 1882; then follow many other entries containing in column 10, the word "ditto." Finally comes Survey No. 192, and in column 10 of this entry it is stated that the tenant pays such and such a sum yearly, and that there is no other agreement. The subsequent entries show "ditto" in column 10, among them is Survey No. 304, the identity of which with present Survey No. 248 does not seem to be questioned. From this it is argued that the tenancy must have commenced after 1920 as otherwise the entry would have fallen under the second series dealt with above, namely, that commencing with Survey No. 289.

The fact, however, remains that the register is a register of *permanent tenants*, and it is only reasonable to suppose that the *bhágdárs*, when they gave their signatures in column 11 in token of approval, must have been aware of the character of the document. They do not even now put forward the suggestion that they were deceived or misled. The argument contained in paragraph 4 of the appeal memorandum[1] has not been pressed. The document seems to me to be clearly relevant as containing admissions by the *bhágdárs*, as well as under section 13 of the Indian Evidence Act, relating as it does to a transaction in which the right was claimed and, it seems, recognized. The authenticity of the register has not been questioned in the arguments put forward in this Court, and I see no reasonable grounds for supposing that it is other than it purports to be, namely, a register compiled by order of competent authority.

Even were this register left out of consideration the oral testimony already referred to coupled with the admissions of some of the *bhágdars* would, I think,

(1) Paragraph 4 of the memorandum of appeal ran as follows :—

4. The views expressed by the lower Court with respect to the Register of Kayam Kheduts are erroneous, the Register being inadmissible in evidence.

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suffice to show the existence of such conditions as would ordinarily render applicable the presumption referred to in section 83 of the Land Revenue Code.

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I may state that in the first instance my view was in favour of respondent's contention that the permanent tenancy remained unaffected. Further consideration has forced me to the contrary conclusion for the following reasons:

In the first place, there is not, I think, any very clear evidence that the tenancy necessarily commenced prior to 1862. That it is of long standing is shown, but the only documentary evidence tending to fix the period is the register of 1882 (Exhibit 17) above referred to, and as pointed out in discussing that evidence there is room for the view that though the tenancy was then recognized as "permanent" it had not been in force for twenty years, in which case its commencement would have to be referred to a date subsequent to 1862. Even however if it be assumed that the tenancy of Khushal's ancestors commenced prior to 1862 I do not think that the matter is affected. There is nothing in the shape of a written lease and, as the register of 1882 indicates, the tenancy was continued yearly without any more formal agreement. The ordinary presumption in such a case would be that the tenancy was from year to year, and it is only by virtue of the provisions of section 83 of the Land Revenue Code that the presumption of permanency arises. That Act was passed in 1879; and unless there is a clear indication to the contrary, its provisions which are of a general character must, in my opinion, be read as subject to modification, in reference to *bhágdári* villages, by the special provisions of Act V of 1862. Now the authority above referred to *Pranjivan* v. *Jaishankar*(1) goes to show that a permanent lease is inconsistent with the provisions of the Bhágdári Act, and it is not, therefore, in my opinion, open to a Court to have regard solely to section 83 of the Land Revenue Code and on that basis recognize a tenure forbidden by the Act of 1862.

If it were shown that by long possession in the avowed capacity of a permanent tenant Khushal, or his predecessors, had prior to 1862 acquired an indefeasible title to that status, then, no doubt, it might be successfully argued that the provisions of Act V of 1862 would not affect them. But there is no evidence to show that any claim to hold as permanent tenants was set up prior to 1862 or till long after that year, and indeed it is clearly stated in arguments that the claim rests on the provision contained in section 83, Land Revenue Code. I am therefore of opinion for the above reasons that, at the date when Exhibit 50 was executed in favour of plaintiff, Khushal must be held to have been only a yearly tenant. Still, as such, he would, as shown above, have the right of enjoying the produce of the trees during the continuance of his tenancy, and the next question is whether the tenancy is still subsisting.

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(1) (1867) 4 Bom. H. C. R. (A. C. J.) 46.

In my opinion, therefore, it must be held that the tenancy under which Khushal held Survey No. 248 from the *bhágdárs* on the date when he executed Exhibit 50 in favour of plaintiff is still subsisting and with it plaintiff's title to the enjoyment of the trees. As soon as that tenancy is determined plaintiff's right to the fruit of the trees will also cease.

Plaintiff preferred a second appeal and the defendant filed a cross-objection under section 561 of the Civil Procedure Code (Act XIV of 1882).

L. A. Shah for the appellant (plaintiff):—The Judge recorded findings of fact in our favour and accepted the view of the first Court as to Khushal being a permanent tenant of the Bhágdárs. The Judge was under a misapprehension in saying that the tenancy must have commenced after 1862. The *Káyam Khedut patrak*, Exhibit 17, was misread by him. If the *patrak* be read as a whole the misreading becomes quite obvious. We contend that the observations made on the basis of the misreading should be left out of consideration. The Judge was of opinion that ordinarily the presumption in favour of permanent tenancy would arise under section 83 of the Land Revenue Code, but at the same time he was of opinion that the said section should be read subject to the prohibitions contained in the Bhágdári Act. He, therefore, declined to raise the presumption. This was an error. Section 83 of the Land Revenue Code lays down a rule of law which Courts are bound to give effect to. If we succeed in showing that the facts which give rise to the presumption under section 83 of the Land Revenue Code exist in the present case, then Khushal must be deemed to be a permanent tenant from the beginning. It is not disputed that his tenancy commenced long before 1862 while the Bhágdári Act came into force during that year. It has been held that the Act has no retrospective effect: *Ranchoddas Dayaldas* v. *Ranchoddas Nanabhai*[1]. Thus even assuming that a permanent tenancy is an alienation within the meaning of section 3 of the Bhágdári Act, Khushal's tenancy remained unaffected by that prohibition and continued to be perfectly valid and legal. There is no principle or precedent in support of the position taken by the Judge, and the rule of construction adopted by him is wrong. If the view of

(1) (1877) 1 Bom. 581.

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the Judge be accepted, it would mean that no tenant of any Bhágdári land would be entitled to the benefit of the rule contained in section 83 of the Land Revenue Code. A permanent tenant is the owner of trees: *Vasudevan Nambudripad* v. *Valia Chathu Achan*(1), *Harbans Lal* v. *The Maháraja of Benares*(2). In the present case there is no point with respect to the ownership of the trees. But under the sale-deed, Exhibit 50, the plaintiff has become the owner and hence he has the right to enjoy the fruits of the trees.

M.P. Modi (with *H. C. Coyaji*) for the respondent (defendant):— The burden of proving permanent tenancy lay on the plaintiff: *Rajah Saheb Perhlad Sein* v. *Baboo Budhoo Singh*(3), *Nilmani Maitra* v. *Mathura Nath Joardar*(4). The question is whether that burden was discharged. The Judge finds that there is no clear evidence to show that the tenancy necessarily commenced prior to 1862. This is a finding of fact and it shows that the burden was not discharged by the plaintiff. It is admitted that there is no proof of any agreement written or oral under which Khushal held the land. Both the lower Courts say that for the plaintiff to succeed, he should point out circumstances to which section 83 of the Land Revenue Code applied. That section does not enunciate the law as established by a series of decisions, but it merely enacts a new law as to permanent tenancy: *Ramchandra Narayan Mantri* v. *Anant*(5). If the permanent tenancy was not established before the Bhagdari Act came into force in 1862, then after that year no such tenancy could be established by the act of the parties or by application of section 83 of the Land Revenue Code.

It has been held that a grant of permanent tenancy is an alienation forbidden by the Bhagdari Act: *Pranjivan Govan* v. *Jaishankar Bhagvan*(6). Section 83 of the Land Revenue Code cannot be made use of in cases in which its application would have the effect of allowing that to be done which is forbidden by the Bhagdari Act.

(1) (1900) 24 Mad. 47.
(2) (1900) 23 All. 126.
(3) (1869) 12 W. R., P. C. 6.
(4) (1900) 4 C. W. N. clix (159).
(5) (1893) 18 Bom. 433.
(6) (1867) 4 Bom. H. C. R. (A. C. J.) 46.

The next question is whether before the Bhágdári Act was passed in 1862 there did not exist a permanent tenancy as a thing accomplished which could not be affected by the provisions of the Act. The Judge is of opinion that it did not and we submit that his conclusion is correct. The plaintiff did not depend on any written lease nor did he set forth any terms under which he lays claim to the lands. What was relied on by him was long possession at a fixed rent not exceeding the amount of the assessment. These two elements cannot constitute permanent tenancy: *Gangabai* v. *Kalapa Dari Mukrya*[1], *Narayanbhat* v. *Davlata*[2].

Prior to the passing of the Bhágdári Act there was no law corresponding to the provisions laid down in section 83 of the Land Revenue Code of 1879. It is by the help of this section that any long tenancy can be construed into permanent tenancy. On the contrary it is expressly laid down in *Prosunno Coomaree Debea* v. *Sheikh Rutton Bepary*[3] that when no custom is suggested and there is no express agreement of tenancy and no evidence as to its origin, the tenant must be held as holding from year to year and liable to be ejected by proper notice to quit. Such being the law before 1879, the circumstances of the present case are such that when the Bhágdári Act was passed there was nothing to prevent its application to the land in question, and section 83 of the Land Revenue Code could not help the plaintiff after the Bhágdári Act had once applied to the land.

After the passing of the Bhágdári Act the sale, Exhibit 50, of the mango trees standing on Bhágdári land for the purpose of enjoying their fruits permanently constituted such alienation as is forbidden by the Act because a tree standing on land is immoveable property: *Sakharam Mulshet* v. *Vishram*[4]. Section 3 of the Transfer of Property Act read with clause 25 of section 3 of the General Clauses Act would lead to the same conclusion. Selling the right to cut down trees once for all and to take away the timber is a different right. Selling the right to enjoy fruits permanently involves the right of entering on the land whenever

(1) (1885) 9 Bom. 419.
(2) (1891) 15 Bom. 647.
(3) (1878) 3 Cal. 696 at p. 699.
(4) (1894) 19 Bom. 207.

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necessary for the purpose of watching the trees and taking their fruits. Such an alienation of immoveable property is forbidden by the Bhágdári Act.

Shah in reply:—The cases relied on were decided before the passing of the Land Revenue Code. In fact owing to the said rulings that the Legislature laid down the distinct rule contained in section 83 of the Land Revenue Code.

With respect to the contention that the sale of trees was void we submit that trees are distinct from land. Bhág must necessarily mean or include some land and a portion of a Bhág must refer to some land. Trees do not and cannot form a portion of a Bhág.

RUSSELL, Ag. C. J.:—In this case the plaintiff sued for a permanent injunction restraining the defendant from obstructing him in the enjoyment of the nineteen mango trees and one jambul tree specified in the plaint and preventing him from entering the land in which the trees are situated and taking the produce of the trees and having the same watched every year; also to recover Rs. 30 as compensation for the loss of profits for the year 1903.

The facts shortly stated are as follows:—

Survey No. 248 at Mandwa stands in the names of Kesurdas Karsan, Haribhai Naran, Baji Bhikha and Bhaiji Ota, who were Bhágdárs; but it had been in the possession and enjoyment of one Khushal Bhikha as permanent tenant, paying the Government assessment, and since his death is in the possession and enjoyment of his heirs. Khushal Bhikha had planted mango and jambul trees in the land, and was in possession and enjoyment of them. In 1873 Khushal mortgaged twelve of the mango trees to the plaintiff's deceased father under a registered *sán* mortgage. In 1878 he mortgaged the same trees with possession to the plaintiff's father, whom he put in possession thereof. In 1881 he sold twenty-four mango trees, including the twelve mortgaged and one jambul tree to the plaintiff and his brother under a registered sale-deed. The plaintiff and his brother had been in possession and in enjoyment of the twelve trees from the day of the possessory mortgage and all the twenty-five trees

from the date of the sale-deed by right of ownership. In a partition between the plaintiff and his brother in 1896 all the said trees had fallen to the plaintiff's share and the plaintiff had been in possession and enjoyment thereof. In 1891 and again in 1892 Khushal Bhikha had mortgaged to the plaintiff and his brother his permanent right of occupancy in the land, and both the land and the trees are in the plaintiff's possession. The defendant has recently taken in mortgage Kala Kesurdas' half share in the land from him, and on the strength thereof in June 1903 he drove away the plaintiff's men who were watching the trees, and thus obstructed the plaintiff in the enjoyment thereof. The plaintiff has suffered a loss of thirty rupees. The defendant continues his obstruction and to do damage to the trees, and only nineteen out of twenty-four mango trees are now extant.

The defendant in his written statement, *inter alia*, said that Khushal Bhikha was not permanent tenant of the land and the trees were not planted by him. He does not admit the plaintiff's possession and enjoyment; he knows nothing about the partition between the plaintiff and his brother; he denies that he obstructed plaintiff's men in June 1903; assuming that the trees were planted by Khushal, still according to the law and custom of the country they would belong to the owner of the land and not to the tenant; the land in question formed an unrecognized portion of a Bhág; the documents on which the plaintiff relies are void and of no effect, having been passed in contravention of the provisions of Bombay Act V of 1862; assuming Khushal was permanent tenant he had executed a lease in favour of the plaintiff's father and thus denied the Bhágdár's title, and the permanent tenancy had come to an end; Kala Kesurdás and others had mortgaged to him their entire Bhág, including their share of Survey No. 248, with possession on the 23rd April 1903, and all their rights had vested in him by virtue of the mortgage; none of the acts of Khushal was binding on the Bhágdárs or their mortgagee the defendant; the land and the trees standing thereon belonged to the Bhágdárs and now belong to the defendant as mortgagee.

The first Court held, *inter alia*, that Khushal was a permanent tenant and the trees were planted by him and his ancestors, that

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he was entitled to the possession and enjoyment of the trees and to convey such rights as he may have over them to the plaintiff; that Khushal executed a lease in favour of the plaintiff's father, but that did not amount to a denial to the Bhágdár's title; he had not ceased to be a permanent tenant and the tenancy did nor cease with his death but is still subsisting; that the mortgage-bonds to the plaintiff's father and the mortgage-bond and sale-deed to the plaintiff and his brother are proved; that the sale-deed of the trees was not void; that the plaintiff was obstructed by the defendant in June 1903; and then an injunction was issued against the defendant restraining him from obstructing the plaintiff in the enjoyment of the produce of the trees, etc., and the injunction is to continue so long as the right of permanent tenancy in Survey No. 248 which Khushal had and which is vested in his sons subsists; plaintiff is to recover Rs. 20 and costs from the defendant.

The lower appellate Court modified the decree of the lower Court by substituting an order that the injunction should continue until the determination of the tenancy from year to year under which Khushal Bhikha held, and, after him, his sons hold Survey No. 248 as tenants of the Bhágdárs.

The first question, therefore, that arises is whether Khushal had a permanent right of occupancy in the land. It appears to us that he had. Both the Courts have agreed in this conclusion of fact; but the lower appellate Court held that Khushal must be held to have been only a yearly tenant and would have had the right to the produce of the trees during the continuance of his tenancy which was from year to year and was still subsisting. In our opinion, however, this conclusion of the lower appellate Court was based upon a wrong construction of the register of 1882, Exhibit No. 17. That register refers to three classes of permanent tenants. The first class appear to have been tenants more than 20 years on the land. The second class were on the land from before Samvat 1920 (1864). The third class are entered as follows:—First the survey number; then: "Pays Rs. 22 every year: there is no other condition." The same entry appears against Survey No. 248: "Pays Rs. 99: no other condition (or literally) term."

From this it appears to us that paragraph 2 of section 83 of the Land Revenue Act applies.

This, therefore, creates a permanant tenancy some years before Act V of 1862, the Bhágdári Act, was passed.

The next question that arises is whether the sale-deed to the plaintiff (Exhibit No. 50) is void under Act V of 1862. It seems to us impossible to hold that it is. The preamble to Act V of 1862 shows, we think, that the sale of the produce of fruit trees could not possibly come within the purview of the Act which was directed to prevent the alienation, etc., of any portion of any Bhág or a share in any Bhágdári village other than a recognized sub-division of such Bhág or the alienation, etc., of any homestead, etc., appendant to such Bhág or recognized sub-division, etc. There is nothing to show that these mango trees are by custom used or likely to be used or fit for use for building purposes, and they are, therefore, primarily at all events fruit trees and would not come in this case within the definition of "standing timber" in section 3 of the Indian Registration Act III of 1877. See *Krishnarao* v. *Babaji*[1].

In fact there does not appear to us to be anything in Act V of 1862 to prevent a permanent tenant of a Bhágdár from alienating the fruit of the trees on the land, of which he is a tenant, in the same way as he could alienate the crops or grass upon such land.

It is important to observe that no question arises in this case as to in whom the absolute ownership of the trees vests nor does any question arise as to any cutting down of the trees. Any questions of that kind remain to be determined, if necessary, between the plaintiff and the Bhágdárs, as it is not suggested that the defendant by his mortgage-deed (Exhibit No. 46) can have acquired any right of ownership in the trees, and even then it could not be intended that a Bhágdár is by Act V of 1862 precluded from cutting down and disposing of trees standing in his own land.

We, therefore, think that the finding of the first Court that Khushal had at any rate the right of possession and enjoyment

(1) (1899) 24 Bom. 31.

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of the trees during the continuance of his tenancy, and that the sale-deed passed by him to the plaintiff has continued that right to the latter and the plaintiff is entitled to take the produce of the trees as long as the tenancy lasts is correct.

In our opinion, therefore, the decree of the lower appellate Court should be reversed and the order passed by the first Court restored, and the defendant must pay the costs of the suit throughout.

We cannot part with this case without expressing our appreciation of the very careful and clear judgment of the Subordinate Judge.

BEAMAN, J.:—The question is whether the plaintiff's vendor was a permanent tenant? The property sold was trees standing in an unrecognized portion of a Bhág, within the meaning of the Bhágdári and Narwardari Act No. V of 1862. The defendant-respondent is the mortgagee of a recognized share of a Bhág and some at least of the trees which were sold by the tenant to the plaintiff appear to stand on that share. The first Court held in a very clear and to my mind convincing judgment that the plaintiff's vendor (for brevity it will be convenient hereinafter to call him simply the plaintiff) was a permanent tenant, and that he had a perfect right to sell the trees and to the injunction prayed for against the defendant. Upon the question whether a tenant has the right to sell standing trees, there was some argument at the end of the case. But by that time the respondent's case had definitely taken this shape that the plaintiff never could have acquired the status of a permanent tenant; if he had done so it must have been before the passing of the Bhágdári Act, and therefore he, by the passing of that Act, became to the limit of his tenancy a Bhágdár, and subject to the restrictions which the Act imposed on alienations. Amongst those would be restriction on the right of selling away standing timber, which is part of the estate, and cannot, any more than any other part of an unascertained and unrecognized share of a Bhág be alienated. The answer to that however is that Bhágdárs do appear to enjoy unfettered rights of cutting using and selling their timber. And if the respondent's plea that plaintiff,

although a permanent tenant, and since the passing of the Bhágdári Act virtually a Bhágdár, is yet prohibited by the provisions of section 3 of the Act from disposing of the trees on his land, I think that it is altogether unfounded and must fail. But I am not inclined to go a step further in the way of generalization than I am obliged, and it is to be noted, that the Courts below find that in this case there is no question of cutting or removing the trees; the plaintiff only asks to be allowed free and unimpeded access to and enjoyment of their fruits. It cannot of course be disputed by any one that a tenant has the right to use the fruits of his trees, and as the present claim goes no further I shall content myself with holding that the special plea raised by the respondent against any right in a tenant to alienate the trees on his holding fails for the purposes of this suit. The First Court found that the tenancy was permanent, and therefore that the plaintiff was entitled to a permanent injunction. The Court of first appeal held that the tenancy was from year to year and cut down the injunction accordingly. This then is the chief contention. Plaintiff contends that he is a permanent tenant entitled to a permanent injunction, the defendant that he is a yearly tenant, and entitled to no more than an injunction up to the end of his tenancy. I think it may be taken that the tenancy commenced long before the passing of the Bhágdári Act. The lower Court found so, and speaking for myself I have no hesitation in saying that in my opinion all the evidence points that way and that is the right conclusion. In the lower appellate Court however the learned Judge throws some doubt on that finding. It cannot be said that he finds to the contrary, or indeed that he has found definitely either way. In his view it was unnecessary to do so. He thought that whether the tenancy began after 1862, or whether the origin of it was lost by reason of its antiquity made no difference. That too in effect is the defendant's position in this appeal. But to strengthen it, he added that the Court below had found as a fact that the tenancy did commence some time after 1862. If that were so there would be an end of the matter. Because I admit at once that no permanent lease could be given out by Bhágdárs after the passing of the Act, nor even

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had time enough elapsed could a right of that kind be acquired by prescription against the terms of the Act. Last, at the present day it would be absurd on the face of it to say that the origin of a tenancy, which is proved to have commenced since 1862 is lost by reason of its antiquity. The only words in the judgment of the learned Judge of first appeal which give any support to the contention that he found as a fact that the tenancy did not begin before 1862 are:— "The facts that no claim is shown to have been made does not prove that the tenancy was not in existence." Indeed it is extremely difficult to understand in what way or for what purpose a 'claim' of the kind would have been made. It is certain that the landlord did not raise any dispute or interfere with the tenant's long enjoyment. What was there, then, for the tenant to 'claim'? Was he likely in those days to go into a Court for a declaration? In another part of the judgment the learned Judge analyses a single document in such a way as to suggest rather than draw a hesitating conclusion that the tenancy must have commenced after 1862. But there is certainly no positive finding to that effect, and as to the material on which the Judge rests his suggested conclusion, the Revenue register, we think it at least as capable of supporting the opposite conclusion by a stronger process of reasoning. But whatever the learned Judge of the Court below may have felt, if indeed beyond academic doubts he did feel any, as to the correctness of the finding of the first Court that the origin of the tenancy was lost in antiquity, and therefore of course long anterior to the Bhagdari Act, it is certain that he attached no importance to them. For he expressly states that for the purpose of his finding upon the point of law which substantially disposed of the case before him, he was quite willing to assume that the tenancy was ancient, and had commenced before the Bhagdari Act came into force. His reasoning, which has been adopted without any material or useful addition by the defendant before us, amounts briefly to this. In the state of the case law before the passing of the Bombay Land Revenue Code, 1879, no permanent tenancy could be proved in the Courts except (1) by express terms in the lease itself; (2) by proof of a special local usage showing that where a tenancy was

of the kind then in suit, the conditions were understood by the countryside to imply a permanent tenancy. The plaintiff here could not prove the terms of a lease, because admittedly there was none. Nor had he been before the Courts in 1861 would his already long possession at a fixed rent have availed him anything as proof of permanent tenancy. Therefore when the Bhagdari Act came into force in 1862, whether he was or was not a permanent tenant, he could not have proved it. And thereafter he could not have acquired this specially advantageous form of tenancy by efflux of time. Consequently he cannot now use section 83 of the Land Revenue Code of 1879 under the provisions of which it is plain that, but for this rather subtle and technical difficulty, he must succeed. That process of reasoning seems to me to involve a glaring fallacy. Even assuming for a moment that the cases on which it rests were all correct, and accurately represented the almost universal Indian conceptions of tenant right, not one of them I think goes the length of saying that in the circumstances in which they held the facts proved did not support the conclusion that the tenancy was permanent, that conclusion might not nevertheless have been proved in another way, and might not have been the actual fact. Put at the highest this was only case law, judge-made law, indicating what in the mind of certain very eminent Judges, but Judges for the most part imbued deeply with the principles of English law, and the correlated English ideas, was the only proper proof of a permanent tenancy in India. It is not necessary here to analyse the contents of all the implied notions, and thus to show how widely the resultant conception differs from that which, I believe, prevails throughout the mass of the landlord and tenant classes of India. However it may be in England, permanency is quite a familiar and valued feature of tenancy in India. It would, I think, strike any large body of tenants, as a singular and incomprehensible proposition, that where a tenant was able to show that he had enjoyed his holding for a time so long that the memory of man runneth not to the contrary, and at a fixed rent, our Courts should still cast on him the burden of proving that there was local usage in his neighbourhood by which in the circumstances permanency was implied. He would rather expect

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the Courts to ask his landlord to prove a local usage by which it was not. And that notwithstanding the case-law to the contrary, this was the view of Government guided and advised by officers intimately acquainted with land tenures throughout the presidency, and equally familiar with the sentiments and prejudices, the habits and the opinions of the people, is clear from the terms in which in 1879 section 83 of the Bombay Land Revenue Code was enacted. It distinctly and we must believe advisedly lays down a rule not only different from, but the precise opposite, of the rule of the cases. No one who knows anything at all about land tenures, can doubt that the legislative rule is much better adapted to arrive at the real conditions and true facts of ancient tenancies, than the highly artificial rule of the Courts. And it seems to me clear, that after 1879, when the question before the Courts was whether a tenancy was or was not permanent, the Court had to answer it by the rule laid down in section 83 of the Land Revenue Code, if there were no other direct and still more convincing proof. The defendant does not deny, indeed he could not deny, that prior to the Bhagdari Act of 1862 Bhagdars might give out the land of their Bhags on permanent tenacy. Whether they can do so still is a question upon which as far as I know there has been only one, and that a more or less indirect, judicial decision. But we may assume for the sake of this argument in the defendant's favour that they cannot. The question, and the only question between the parties still, is: Did the Bhagdar in fact give the plaintiff a permanent tenancy? The plaintiff alleges that he did; he proves to the complete satisfaction of the first Court that his tenancy is very old, going back near 100 years. I agree that that is proved. I agree too with the Court of first instance that the origin of the tenancy is by reason of its antiquity lost. Thus all the conditions imposed by section 83 of the Land Revenue Code are fulfilled, and it appears to me that the Courts have no option but to give effect to the remainder of its provisions. I cannot for a moment accede to the contention that if this suit had been brought any time before 1879, because of the narrow view taken by the Courts the plaintiff might have found it difficult, if not impossible, to prove that his tenancy was permanent, it was not as a matter of fact

permanent. The kernel of the defendant's case is that plaintiff's alleged permanent tenancy did not exist and could not have existed before 1879 because he is not able to produce a lease, or prove a local usage. Now the latter part of the proposition is on the face of it questionable, and makes a very large assumption. We cannot say whether, even under the extremely fettering conditions imposed by the cases, the plaintiff might not have satisfied the Courts of his permanent tenancy, had the litigation originated before the Land Revenue Code was passed into law. And the first part of the proposition is manifestly untrue. No one would venture to say that an ancient permanent tenancy could not have been created and gone on existing in virtue of an oral agreement even, much more by a lease lost long since, although the Courts refused to acknowledge it. The Court rule indeed did not touch the fact, but merely the method of proving it; and that method did not commend itself to the Legislature and was superseded in 1879. If it were true or even arguable that a permanent tenancy could not have existed before 1879 because it could not have been proved otherwise than in the manner then provided, there would be some room for the dependent proposition, that it was actually created not by agreement between the parties in the remote past, but by the Legislative enactment of 1879 and therefore was prohibited by the provisions of the earlier Act of 1862. But that dependent proposition seems to me when nakedly stated to carry its refutation on its face. Section 83 creates no new right, it simply insists on the Courts adopting a better method of ascertaining whether in fact the right existed. Here by applying that method we find that the right did exist long before creating it was prohibited by the Act of 1862. It is conceded that, that Act has no retrospective effect. The conclusion necessarily follows that the first Court was right in holding that the plaintiff's permanent tenancy was made out, and granting the injunction asked for. I would allow the appeal with all costs and dismiss the cross-objections with all costs.

Decree reversed.

G. B. R.