

APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

VENIDAS NARANDAS AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, v.
BAI HARI AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1914.

June 18.

Bhagdari Act (Bombay Act V of 1862), section 3⁽¹⁾—Bhag—Permanent tenancy of lands in existence prior to the passing of the Bhagdari Act (Bombay Act V of 1862)—Alienation by permanent tenant—Death of the alienor—Intervention by Collector—Eviction of the alienee—Alienation by permanent tenant not null and void.

In a Bhag a person, who claimed to be a permanent tenant and who was found to be so prior to the passing of the Bhagdari Act (Bombay Act V of 1862), sold his permanent tenancy to the plaintiffs. After the death of the plaintiffs' vendor, the Collector intervened under section 3 of the Bhagdari Act (Bombay Act V of 1862), removed the plaintiffs and placed the Bhagdar in possession. The plaintiffs having brought a suit against the Bhagdar to recover possession,

* Second Appeal No. 147 of 1912.

(1) Section 3 of the Bhagdari Act (Bombay Act V of 1862) is as follows :—

3. It shall not be lawful to alienate, assign, mortgage, or otherwise charge or incur any portion of any Bhag or Share in any Bhagdari or Narwadari village other than a recognized sub-division of such Bhag or Share, or to alienate, assign, mortgage, or otherwise charge or incur any homestead, building-site (Gabhan), or premises appurtenant or appendant to any such Bhag or Share, or recognized sub-division, appurtenant or appendant thereto, apart or separately from any such Bhag 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 ; and it shall be lawful for the Collector or other Chief Revenue Officer of the District, whenever he shall, upon due inquiry, find that any person or persons is or are in possession of any portion of any Bhag or Share of any homestead, building-site (Gabhan), or premises appurtenant or appendant to such Bhag or Share in any Bhagdari or Narwadari village other than a recognized sub-division of such Bhag or Share, in violation of any of the provisions of this section, summarily to remove him or them from such possession, and to restore the possession to the person or persons whom the Collector shall deem to be entitled thereto ;

and any suit brought to try the validity of any order or orders which the Collector may make in such matter must be brought within three months after the execution of such order or orders.

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Held, that section 3 of the Bhagdari Act (Bombay Act V of 1862) was not applicable and the alienation to plaintiffs was not null and void, that where rights were found to have existed before the Bhagdari Act (Bombay Act V of 1862) in persons, not themselves Bhagdars or Narwadars, but the *locus* of whose rights fell within what were Bhags or shares in the Bhagdari and Narwadari village, those rights never had been "any portion of bhags or shares of Bhagdari or Narwadari village, etc.," within the meaning of section 3, and, therefore, the prohibitions against alienations contained in section 3 had no applicability to that class of cases.

SECOND appeal against the decision of B. C. Kennedy, District Judge of Ahmedabad, confirming the decree of J. N. Bhatt, Subordinate Judge of Borsad.

The plaintiffs sued to recover possession of the land in suit and future mesne profits. The plaint alleged that one Sakhidas Bechar was a permanent tenant of the land in suit and was in possession as such permanent tenant, that the plaintiffs purchased from the said Sakhidas his permanent tenancy right for Rs. 200 by a registered deed dated the 24th June 1907, that the land in suit formed part of the Narwa which stood in the name of defendant 1 in the revenue register, defendant 1 being the representative of the senior branch of the Narwadar family, that the plaintiffs used to pay Rs. 40 on account of the land in the said khata of the defendants, that after the aforesaid purchase by the plaintiffs the defendants applied to the Collector of Kaira to be placed in possession of the land on the ground that it constituted an unauthorized sub-division of Narwa in the hands of the plaintiffs by reason of their purchase, and that the Collector held on the 15th April 1909 the purchase by the plaintiffs to be null and void on the ground that the land formed an unrecognized sub-division of Narwa and placed the defendants in possession on the 8th May 1909.

The plaintiffs brought the present suit on the 19th July 1909 against members of the Narwadar family contending that the order of the Collector was illegal

as a permanent tenant was not a Narwadar and so the purchase of the permanent tenancy did not constitute an unrecognized sub-division of Narwa.

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The defendants answered that (1) the plaintiff-land had been leased to Sakhidas Bechar and Jijibhai Bechar, (2) the conditions of the lease were that the tenants were to cultivate only during their lifetime without power to alienate their rights as tenants in case they died without issue and both the tenants died without issue, and (3) the Collector was a necessary party.

The Subordinate Judge framed four issues which were as follows :—

1. Whether the plaintiffs are purchasers from a permanent tenant of the land in suit?
2. If so, whether the permanent tenancy commenced before the passing of Bombay Act V of 1862?
3. Whether the Collector's order declaring the alienation in plaintiffs' favour null and void and removing them from possession is illegal?
4. What order should be passed?

The Subordinate Judge found on issue No. 3 in the negative and dismissed the suit, he being of opinion that the findings on issues Nos. 1 and 2 were unnecessary, the finding on issue No. 3 being sufficient to decide the suit.

On appeal by the plaintiffs, the District Judge put the question involved in the appeal thus :—

A is a permanent tenant of a piece of land forming part of a bhag within the meaning of the Bombay Act V of 1862, such permanent tenancy was created previous to the passing of the said Act. A sells his rights as permanent tenant to B. Can the Collector set aside such sale under section 3 of the Act?

The facts have not been decided on. It is assumed but not proved for the present that the tenancy is a permanent tenancy and was created before 1862. No new permanent tenancy can be created it would appear in bhagdari lands.

The District Judge, however, held that the finding of the lower Court was correct and dismissed the appeal.

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The plaintiffs preferred a second appeal and it was argued before the Bench composed of Scott, C. J., and Chandavarkar, J., on the 30th September 1912 when the following interlocutory judgment was delivered :—

SCOTT, C. J. :—Assuming that leases to permanent cultivators were recognized by custom at the time of the introduction of the Bhagdari Act in 1862, there would be a presumption that the words prohibiting alienation, assignment, mortgage or other charge or incumbrance were not intended to deprive Bhagdars of a customary mode of providing for cultivation, namely by the creation of permanent tenancies. (See *Raiji Narottam v. Purushottam Girdhar*⁽¹⁾ and Government Publication 278, New Series, p. 10, para. 43.) If permanent leases are not prohibited by section 3, I do not think the section can cover alienations of the leasehold interest. That may be forbidden by custom or by express provision but the existence of the custom or provision is a matter of evidence. The question was raised by issue 2 in the Sub-Judge's Court but no evidence has been recorded. I think the case should be remanded for a finding on the following issues :—

1. Is it customary in Bhagdari villages to cultivate by means of permanent tenants ?
2. If so, is there any custom limiting the power of the tenant to alienate his holding ?
3. Has the Collector by custom any right of interference in the event of such alienation ?

* Findings to be returned in three months.

Parties will be at liberty to adduce evidence on these issues.

CHANDAVARKAR, J. :—I concur.

On the remitted issues the District Judge found as follows :—

It is customary, that is, common, in Bhagdari villages to cultivate by means of permanent tenants, that is, by hereditary tenants ; (2) There was no custom limiting the power of the tenant to alienate his holding ; and (3) The Collector had no right by custom of interference in the event of such alienation.

The District Judge having certified the said findings to the High Court, the second appeal was heard by Scott, C. J., and Batchelor, J., on the 13th August 1913,

⁽¹⁾ (1864) 2 Bom. H. C. R. 231 at p. 235 (2nd Edn.).

and the following interlocutory judgment was delivered by—

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SCOTT, C. J. :—From the evidence taken upon the remand and discussed by Mr. Kindersley in his judgment, we can see that the question disposed of by the lower Courts without the discussion of any evidence, namely, as to the exact scope of section 3 of the Bhagdari Act, having regard to the system of cultivation in Bhagdari Villages, is one of considerable difficulty. The case has been tried on the assumption that the plaintiffs' transferor is a permanent tenant, although evidence was led both by the plaintiffs and the defendants, and the status of the plaintiffs' transferor is not admitted. The defendants are not willing that the case should be disposed of in appeal upon that assumption. We think that in the interests of justice the case should be remanded for trial upon the first two issues raised by Mr. Bhatt in the Court of first instance on the evidence already recorded. Findings should be returned within 3 months.

On the remand the District Judge found on the said issues that—

1. The plaintiffs were purchasers from a permanent tenant.
2. The permanent tenancy commenced before the passing of Bombay Act V of 1862.

After the said findings were certified to the Court the second appeal was finally argued.

G. K. Parekh for the plaintiff-appellants.

G. N. Thakore for defendant-respondents 1—3.

BEAMAN, J. :—One Sakhidas, claiming to be a permanent tenant of lands in a Bhag, sold his permanent tenancy right to the plaintiffs. The Collector, after the death of Sakhidas, intervened under section 3 of Bombay Act V of 1862, removed the plaintiffs, and placed the Bhagdar, now defendant, in possession. The plaintiffs then brought this suit and the Courts below decided against them.

On second appeal a Bench of this Court consisting of Scott, C. J., and Chandavarkar, J., remanded three issues to the lower appellate Court. The first two are interesting because they indicate clearly enough that at that

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time the learned Judges were disposed to think that if permanent tenants existed in these Bhagdari and Narwadari tenures their rights of alienation could only be restricted by custom. It might be difficult to reconcile that opinion with another decision given by Scott, C. J., and Batchelor, J., in *Jijibhai v. Nagji*⁽¹⁾, but for the purposes of this judgment it will be sufficient, I think, to confine that case to its own facts, bearing in mind particularly the course of this litigation.

These three issues having been found upon by the lower appellate Court, the first two virtually in favour of the present plaintiffs-appellants, the case came on a second time before Scott, C. J., and Batchelor, J. Those learned Judges again remanded two issues to the lower appellate Court because in the then state of the record it did not appear that it had either been found on the evidence or admitted that the plaintiffs' vendor was a permanent tenant. The lower appellate Court has found on the two issues so remanded that the plaintiffs' vendor was a permanent tenant, and that the permanent tenancy dated back to a time prior to the passing of the Bhagdari Act of 1862. This is clearly a finding of fact, and the decision of the case must be based upon the vendor of the plaintiffs having been a permanent tenant of the land within a Bhag before the enactment of 1862. Having regard to the policy of that Act expressed in the preamble, and to the general reason of its provisions in respect of alienations, we think that it is not necessary to give an absolutely literal and verbal interpretation to the very sweeping language of section 3. But even were that necessary, we should still with some confidence hold that on the facts found a permanent tenancy precedent to the passing of the Act of 1862 was a right in the permanent

(1) (1909) 11 Bom. L. R. 693.

tenant not described in section 3 by the words "any portion of a bhag or share, etc." As we understand that section, its intention was to preserve a certain tenure, called the Bhagdari or Narwadari tenure, and the status of persons enjoying that tenure, and the means devised by the Legislature were clearly intended to prevent the dismemberment of lands belonging to such privileged classes under that tenure. But we think that it cannot be said that the mere geographical position of the lands held in permanent tenancy before the passing of that Act necessarily prevents alienations of such tenancies within either the verbal definition or the spirit of section 3. If the learned Judges who first remanded this case were right in contemplating at least the possibility of an existing permanent tenancy, should such be found, being alienable, unless restricted by custom notwithstanding the provisions of section 3, then there would be no difficulty whatever in holding after the findings of fact on the second remand that the plaintiffs' vendor was such a permanent tenant before 1862, and that no custom has been proved restricting his right of alienation. The principle to which we seek to give effect, although it may be difficult to reconcile with the single decision I have referred to in *Jijibhai v. Nagji*⁽¹⁾, is at least intelligible, simple and capable of uniform application, and that is, that where rights are found to have existed before the Bhagdari Act in persons, not themselves Bhagdars or Narwadars, but the *locus* of whose rights fell within what are called the Bhags or shares in the Bhagdari and Narwadari village, those rights never were "any portion of such Bhags or shares of Bhagdari or Narwadari village, etc.," within the meaning of section 3 and, therefore, it will follow naturally that the prohibitions against alienations contained in section 3 would have

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no applicability to the class of cases we are describing. It appears to us that this is clearly such a case and, therefore, that the alienation by the permanent tenant to the present plaintiffs was not prohibited under section 3, was not null and void, and, therefore, the Collector was wrong in removing the plaintiffs.

For these reasons we think that the plaintiffs' claim, including mesne profits to be determined in execution, must be decreed with all costs.

HAYWARD, J.:—I entirely concur. It appears to me that the permanent tenancy was a good alienation inasmuch as it took effect before the passing of the Bhagdari Act (Bom. Act V of 1862). The permanent tenancy so created thereupon ceased to be any portion of the Bhag. It became independent property carved out of what was previously the Bhag. The only rights left were the rights to receive rent from the permanent tenant. That was the only interest left in the Bhag. No custom has been shown limiting in any way the right of alienation of a permanent tenant and there would ordinarily be nothing to prevent a permanent tenant giving full rights to his alienee, notwithstanding the fact that on failure of his own heirs there might, in default of alienation, have been a reversion to the Bhagdar. The only property rendered inalienable was the right already referred to of receiving rent from the permanent tenant which remained vested in the Bhagdar. That and that alone could properly be held to come within the definition of "portion of a Bhag" and to have been rendered inalienable by the subsequent passing of the Bhagdari Act of 1862.

Decree reversed and claim decreed.

G. B. R.