lower Court has made an order in that sense, and I do not think that any further order is necessary.

For the above reasons, therefore, I think the decision of the lower Court is correct. This appeal fails and the same will be dismissed with costs.

Appeal dismissed.

M. W. P.

1951

RAKHMABAI KACHU *v.* SITABAI KACHU

Dixit J.

APPELLATE CIVIL

Before Mr. Justice Bhagwati and Mr. Justice Vyas.

VISHWAMBHAR HARIHAR PANDIT, AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS *v.* PARASU KUSHAPPA DAREKAR, AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1951

July 20

Bombay Land Revenue Code (Act V of 1879), s. 83—Permanent tenancy—Whether commencement within a limited period of years can rebut presumption of antiquity of tenancy— Rent not remaining constant and execution of leases by tenants occasionally—Whether sufficient to rebut presumption of permanent tenancy.

Under Sec. 83 of the Bombay Land Revenue Code, 1879, when a tenant has established the antiquity of his tenancy, the presumption arising out of the principle of *presumitur retro* comes into operation and the presumption is not rebutted by the landlord showing that the origin of tenancy can be traced to some year within a margin of four to five years.

Shankarrao Dagadujirao v. *Shambhu Nathu Patil*[1] and *Nagappa Balappa* v. *Ramchandra*,[2] followed.

The mere fact that rent did not remain constant and that as many as four leases were executed by the tenants in favour of the landlords showing that they would remain in possession for definite durations of time are not sufficient to rebut the presumption arising under s. 83 of the Bombay Land Revenue Code, 1879 when the tenancy is antiquated and no evidence regarding the commencement of the tenancy in any particular year is forthcoming.

Rama v. *Abdul Rahim*,[3] *Dhondu* v. *Damodar*,[4] *Juvansingji* v. *Dola Chhala*,[5] followed.

Ejectment suit.

FIRST APPEAL from the decision of S. D. Phansalkar, First Class Sub-Judge, Kolhapur.

* First Appeal No. 220 of 1949 with First Appeal No. 219 of 1949.

(1) (1940) 43 Bom. L. R. 1, P. C.
(2) (1945) 48 Bom. L. R. 225.
(3) (1920) 22 Bom. L. R. 1214.
(4) (1934) 37 Bom. L. R. 209.
(5) (1924) 27 Bom. L. R. 890.

1951

VISHWAMBHAR HARIHAR v. PARASU KUSHAPPA

Vyas J.

The plaintiffs' ancestor was granted an Inam by one Vantmurikar Desai in the year 1818 and the suit-land formed part of the Inam grant. The defendants who were tenants on the land traced their ancestor's connection with the suit-land definitely to as far back as 1826. There was one document to show that one Balappa Sonar, who was not connected with the defendants, was on the suit land in the year 1821. In 1915, 1926, 1927 and 1928 the defendants had executed leases in favour of the plaintiffs for varying rents and definite durations, 11 years in one lease and 1 year in each of the three leases.

On January 9, 1933, the plaintiffs filed the present suit to recover possession of the suit land on the ground that the defendants were annual tenants on the suit land and that the tenancy was terminated by a valid notice. In the alternative, they asked for enhanced rent. The defendants contended that they were permanent tenants.

The trial Court held that the defendants were permanent tenants but the rent was liable to be enhanced.

The plaintiffs appealed to the High Court.

K. J. Abhyankar, for appellants Nos. 1 (*a*) and 2 to 4.

B. N. Gokhale and *N. S. Anikhindi*, for the respondents.

VYAS J. These two appeals arise out of a decision of the First Class Subordinate Judge of Kolhapur in Regular Suit No. 2/33 of 1938. That suit was filed by the plaintiffs for recovering possession of Revision Survey No. 208 of Sangav, Taluka Kagal, admeasuring 8½ bighas, from the defendants. The contention taken up by the defendants in resisting the suit was that they were permanent tenants. The learned trial Judge accepted that contention and dismissed the suit so far as the relief for possession was concerned and passed a decree in the following terms:—

"Plaintiffs should recover Rs. 372 for each of the three years preceding suit and Rs. 400 a year as rent from the year of suit from defendants Nos. 26 to 28 and 33 and 34, who are declared to be permanent tenants. The above sums with proportionate costs should be recovered by the plaintiffs from the above defendants and their estate. The remaining defendants are liable to contribute to the rent to the plaintiff, in proportion to their respective shares and should bear their own costs. The suit as regards other prayers is dismissed with costs."

It would thus be seen from the decree that enhanced rent, i.e., rent at the rate of Rs. 400 per year, was decreed in favour of the plaintiffs as against defendants Nos. 26 to 28, 33 and 34 with effect from the year of the suit.

1951

VISHWAMBHAR HARIHAR v. PARASU KUSHAPPA

Vyas J.

The defendants in the above mentioned suit could be grouped into three sets. Defendants Nos. 26, 27, 28, 33 and 34, who are the sons of deceased defendant No. 1, represent the *Darekar* family. Defendants Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12 represent the *Kerle* family. Defendant No. 2 originally belonged to the *Kerle* family but was adopted out in the Chavan family. Defendants Nos. 29 to 32 who are heirs of the deceased defendant No. 13, and defendants Nos. 14 to 25 represent the *Patil* family. The plaintiffs represent the branch of Vishwambhar Pandit *alias* Dada Maharaj who was one of the two sons of the original acquirer of this Inam, namely, Shree Vasudev Pandit *alias* Bhau Maharaj. Plaintiffs Nos. 1-A to 1-D are heirs of plaintiff No. 1 who died during the pendency of the suit. Plaintiffs Nos. 2, 3 and 4 are the sons of Shri Vishwambhar Pandit *alias* Nana Maharaj who was one of the grandsons of Vishwambhar Pandit *alias* Dada Maharaj. The deceased plaintiff No. 1 was a brother of plaintiffs Nos. 2, 3 and 4.

The suit land as stated above, is Revision Survey No. 208 of Sangav, Taluka Kagal, Kolhapur State. The said land admeasures 8½ bighas and forms a part of the original parcel of 29½ bighas of land which was granted as Inam to the plaintiffs' ancestor Vasudeo Pandit *alias* Bhau Maharaj in the year 1818 by one Vantmurikar Desai as Dharmadaya Inam. This land (suit land) is known by the name of Satva Mali's Kamat.

Now, Mr. Abhyankar for the appellants (original plaintiffs) in First Appeal No. 220 of 1949 has endeavoured his best to show that the defendants are not permanent tenants of the suit land by referring us to the various documents such as talebands receipts, etc. It is contended by him on the basis of these documents that they trace the connection of the defendants' ancestors with the suit land definitely to as far back as 1826, that there is no documentary evidence to show that they were in possession of the said land at any time before 1826, that there is one document to show that one Balappa Sonar was in possession of this land from 1821 to 1825 and that, therefore, the cumulative effect of the documentary evidence in the case would show that the defendants' ancestors must have gone into the occupation of the suit land in the year 1825-26. Now, in order to make these submissions before us Mr. Abhyankar has taken us through the various talebands, e.g. exhibits 148, 164, 165, 166, 168 to 172, dated 1829, 1838-39, 1840-41, 1841-42, 1842-43, 1848-49, 1849-50, 1850-51, 1852-53 and 1856-57 respectively. It is contended by Mr. Abhyankar that in the talebands, exhibit 148, of the

1951

VISHWAMBHAR HARIHAR v. PARASU KUSHAPPA

Vyas J.

year 1829 the name of Limbaji Darekar is to be found in reference to the suit land. The said Limbaji Darekar was the father of Bapu Darekar whose name occurs in several subsequent talebands. If we turn to the taleband exhibit 148, we find that a sum of Rs. 80 was received from Limbaji Darekar as rent. The said amount was given credit for and the balance due from Limbaji became nil. This taleband also shows that Limbaji Darekar was one of the tenants who were cultivating 29½ bighas of land in the year 1829. It further shows that the land which was being cultivated by Limbaji Darekar was situated in Mouje Saigaon. The next taleband to which our attention was drawn is exhibit 164 of the year 1838-39. It shows the name of Bapu Darekar in respect of a parcel of 8½ bighas of land (a portion of 29½ bighas) which is the suit land. It also shows that Rs. 80 were received from Bapu Darekar in respect of that land in that year. The next taleband exhibit 165 of 1840-41 shows again that Rs. 80 were paid by Bapu Darekar in respect of the same parcel of 8½ bighas of land. Taleband exhibit 166 shows similarly that Rs. 80 were paid by Bapu Darekar for the same parcel of 8½ bighas of the land in the year 1841-42 The same fact is shown by the talebands, exhibits 167, 168, 169, 170, 171 and 172. Thus, on the basis of these talebands which cover a period of nearly thirty years from 1829 to 1857, a submission is made by Mr. Abhyankar that during the said period the suit land was in the possession of Limbaji Darekar, and after him, his son Bapu Darekar, who used to pay annually a rent of Rs. 80.

After dealing with the talebands, Mr. Abhyankar for the appellants drew our attention to the various receipts which would show that the rent for the suit land was paid by Bapu Darekar to the plaintiffs' ancestors in the various years. These receipts are exhibits 238, 235, 237, 243, 233, 244, 229, 247, 230, 234, 239, 241, 232 and 236. They cover a period of nearly twenty years from 1826-27 to 1844-45. They also show that generally the rent for the suit land was paid in instalments of Rs. 20 each by Bapu Darekar to the plaintiffs' ancestor. Only on two or three occasions the rent was paid in instalments of Rs. 40 each. From these receipts a submission is made by Mr. Abhyankar for the original plaintiffs that the defendants' ancestors were in possession of the suit land as far back as the year 1826-27. There being no receipt on the record for the period before 1826-27, he has argued that that would be a

circumstance to suggest that the defendants' ancestors were not in possession of the suit land before 1826-27.

Having developed his case thus far that there is no documentary evidence to show the connection of defendants' ancestors with a parcel of 8½ bighas of land (suit land being 8½ bighas) at any time before the year 1826, Mr. Abhyankar has next drawn our attention to the document, exhibit 144, dated 1821-22 and has contended from it that one Balappa Sonar was in possession of the suit land on a four years' agreement commencing from the year 1821 onward. The particular entry in this document, exhibit 144, to which our attention is invited is:

"Rs. 86-0-0 Mouje Saigon-tenant Balappa Sonar. 20½ agreement for four years out of Rs. 110-0-0."

It is the submission of Mr. Abhyankar that the 20½ bighas referred to in this entry included 8½ bighas, namely, the suit land. On the basis of this entry, he has contended that the possession of the suit land was not with the defendants' ancestors, but it was with one Balappa Sonar, up to the year 1825, that is, up to the expiry of the four years' agreement which, says Mr. Abhyankar, must have commenced from the year 1821. It is suggested to us that Balappa Sonar must have been a tenant in possession of this land even before the acquisition of this Inam from Vantmurikar Desai and that he must have been continued in possession by the plaintiffs' ancestor even after the acquisition of the Inam from Vantmurikar Desai. Thus, relying on this document exhibit 144 on one hand and the above mentioned talebands and receipts on the other hand, Mr. Abhyankar has argued before us that the defendants' ancestor must have gone into the possession of the suit land in the year 1825-26, that, therefore, there is satisfactory evidence before us as to the commencement or origin of the tenancy of the defendants and that accordingly the defendants could not be considered permanent tenants of the land, in other words a presumption under s. 83 of the Bombay Land Revenue Code could not be drawn in favour of the defendants in this case.

Proceeding further, Mr. Abhyankar has argued that there is a substantial bulk of another type of documentary evidence in this case which would also rebut a presumption arising under s. 83 of the Bombay Land Revenue Code. It is argued that the very conduct of the defendants' ancestors and defendants themselves would show that they knew that they were not permanent tenants of the suit land. In this connection our

1951

VISHWAMBHAR HARIHAR v. PARASU KUSHAPPA

Vyas J.

attention is invited to the various kabulayats passed at various times by the defendants' ancestors and defendants themselves in favour of the plaintiffs and their ancestors. Those kabulayats are exhibits 95, 153, 10 and 152 dated 1915, 1926, 1927 and 1928 respectively. It is also brought to our notice that not only did the defendants' ancestors and defendants pass these kabulayats from time to time, i. e. between the years 1915 and 1928, in favour of the plaintiffs, but they also submitted themselves to the enhancement of the rent. The rent which was originally Rs. 80 per year according to the various talebands and receipts to which we have already referred was enhanced to Rs. 204 (*vide* exh. 95) and was still further increased to Rs. 372 (*vide* exhs. 153, 10 and 152). We are also told that the period of the lease exhibit 95 was eleven years, whereas the period of the remaining three leases exhibits 153, 10 and 152 was one year each. From these circumstances, namely, the execution of as many as four kabulayats by the defendants, the fixed duration of all the four leases (11 years in one case and 1 year in remaining cases) and the defendants submitting themselves to the enhancement of rent, Mr. Abhyankar has argued that these would constitute sufficient conduct evidence of the defendants themselves to show that they were not, and they also knew that they were not, permanent tenants of the suit land.

Having developed his case in this manner, Mr. Abhyankar invited our attention to certain authorities and the first case referred to by him was *Shankarrao Dagadujirao* v. *Shambhu Nathu Patil*[1]. It was a case in which the plaintiff Shankarrao was the Inamdar of a certain village of Khed Digar in Shahada taluka in the district of West Khandesh. The Inam was granted to him in the year 1798 by the Holkar who was the ruling power in those days. It was confirmed in the year 1843 by the British Government who had in the meantime assumed the rule of the territory concerned. A sanad was issued by the Government of Bombay to the plaintiff's father Dagadujirao in the year 1880. Dagadujirao had succeeded to the Inam in 1857 and held it until his death in 1904 at which time the plaintiff was a minor aged eight years. The plaintiff's estate including the Inam passed into the management of the Collector of West Khandesh who was appointed the guardian. The Collector's management lasted from 1909 to 1917, in which year the plaintiff attained majority. The village lands which were included in the plaintiff's Inam aggregated to 1,195 acres.

[1] (1940) 43 Bom. L. R. 1, P. C.

Out of these lands, a parcel admeasuring 770 acres 9 gunthas was in the occupation of the defendant as a tenant. In the suit which was brought by the plaintiff against the defendant for possession it was contended by the defendant that his family had been in possession of some of the lands in suit since ancient times and that they had purchased some other lands from occupants who had themselves been in possession for many years. The plaintiff's case was that the defendant had not been in possession of the lands prior to 1892-93 and that in that year for the first time his name appeared in the *lavani patrac.* In the *khatawanis* of the year 1856-57, 1865-66, and 1869-70 the name of the defendant's ancestor did not appear. The plaintiff accordingly contended that the tenancy of the defendant could be said to have begun from 1892 or at the most sometime between 1871 and 1892 since in the *khatawani* of the year 1869-70 the name of his (defendant's) ancestor did not appear. The substance of the plaintiff's contention was that in the above-stated circumstances there was satisfactory evidence of the commencement of the defendant's tenancy and, therefore, the defendant was not entitled to a presumption under s. 83 of the Bombay Land Revenue Code to be drawn in his favour. On the other hand, the position which the defendant took in the suit was that his tenancy had commenced at some indeterminate time between 1871 and 1892, and there being no evidence as to the precise point of time when it had commenced, he was entitled to a presumption under s. 83 of the Bombay Land Revenue Code.

In the course of the Privy Council judgment which was delivered by Sir George Rankin, his Lordship observed as under (p. 15):—

"Their Lordships think that for the purposes of the present case it is sufficient to note that the particular presumption mentioned in the clause" (herein his Lordship was referring to s. 83 of the Bombay Land Revenue Code) "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 Ramchandra* v. *Pandurang Balkrishna,*[1] fails in their Lordships' opinion to give effect to the ordinary meaning of the language of the clause. Again, by a tenancy's

[1] (1922) 47 Bom. 4, s. c. 24 Bom. L. R. 831.

1951

VISHWAMBHAR HARIHAR v. PARASU KUSHAPPA

Vyas J.

antiquity the section does not in their Lordships' opinion intend any reference to remote ages in the past or to 'time immemorial' in the sense of the English law. It is to be given the practical meaning appropriate to its context and afforded by the limits within which living testimony to past facts is necessarily restricted. As a number of the lands in suit are held under tenancies which are not proved to have been in existence before 1892, their Lordships do not think that the presumption can properly be applied to them notwithstanding that the evidence by no means excludes the possibility of an earlier origin."

The ratio of this decision is that it is not sufficient for the plaintiff, who contends that the defendant is not his permanent tenant, to show merely that the possession of the defendant's ancestor must have commenced within a certain margin of 10, 15 or 20 years. It is not enough for the plaintiff to show that up to a certain point of time, say X, the possession was definitely *not* of the defendant's ancestor, that the said possession was traced by evidence earliest to a particular year say Y, that between X and Y there was an interregnum of 15, 20 or 30 years during which there was no data as to who was in possession and that, therefore, the defendant's ancestor's possession must have begun sometime during the interregnum. In the opinion of their Lordships of the Privy Council that was no satisfactory evidence of the origin of the tenancy and would not be sufficient to rebut the presumption under s. 83 of the Bombay Land Revenue Code which would arise in favour of the defendant by reason of the antiquity of his tenancy. But, says Mr. Abhyankar, there is evidence in this case in the shape of exhibit 144 to show that it was definitely in the year 1825-26 that the defendant's ancestor had gone into occupation of the suit land and, therefore, this is not a case in which the defendants could argue successfully that their ancestor's tenancy had commenced at some indeterminate point of time in a span of 10, 15 or 20 years, that, therefore, it was not possible to say when precisely the tenancy had commenced and that, therefore, a presumption would arise in their favour under s. 83 of the Bombay Land Revenue Code. It is argued by Mr. Abhyankar that in this case there is definite evidence to show that the defendant's ancestors had gone into possession of the suit land at a definite time, in other words there is sufficient material to show that the commencement of the tenancy had taken place at a particular time and, therefore, a presumption under s. 83 of the Bombay Land Revenue Code would not arise in favour of the defendants.

Mr. Abhyankar has next invited our attention to certain observations of Mr. Justice Wadia in *Shankarrao Dagadujirao*

v. *Shambhu Nathu Patil*[1] in support of his argument that in cases in which permanent tenancy is set up by one party and denied by the other party, evidence of conduct of the parties is relevant. In the above mentioned case Mr. Justice Wadia observed as follows (pp. 7, 8):—

"Even however if it were held that the commencement of the tenancies in all these cases had been satisfactorily proved, and that the defendants were not entitled to the benefit of the presumption under s. 83 of the Bombay Land Revenue Code, it is in my opinion open to the defendants to show that from the conduct of the parties subsequent to 1892 a presumption of permanent tenancy arises."

Relying on these observations and adverting to the leases, exhibits 95, 153, 10 and 152 executed by the defendants in favour of the plaintiffs, it is contended by Mr. Abhyankar that these leases constitute evidence of the conduct of the defendants themselves, which would show that the defendants knew that they were not permanent tenants.

The next case to which our attention was drawn by Mr. Abhyankar was the case of *Nagappa Balappa* v. *Ramchandra*[2], in which it was held that if the landlord wanted to rebut the presumption of permanent tenancy arising under s. 83 of the Bombay Land Revenue Code, he must prove the commencement of the tenancy, i. e., the year, if not the date and month, in which the tenancy had commenced, and that it would not do merely to show that the tenancy might have commenced within a margin of 5, 10 or 20 years. Mr. Abhyankar says that in order to contend that the defendants are not permanent tenants of the suit land, he is not merely relying on showing that their tenancy had commenced within a certain span of 5, 10 or 20 years, but submits that he is in a position to contend on the basis of the credit and debit Yadi, exhibit 144, and the rent note, exhibit 238, that the tenancy of the defendants' ancestor must have commenced in the year 1825-26, i. e., at a definite point of time, and that, therefore, the defendants are not entitled to a presumption under s. 83 of the Land Revenue Code in their favour. The case of *Nagappa Balappa* v. *Ramchandra*[2] was a case in which Ramchandra and another person had filed a suit against the defendants to recover possession of certain lands situated in Mouje Jabapur in the Belgaum District. The defendants' contention was that they were in possession of the lands not as annual tenants but as permanent tenants. The trial Court found that the provisions of s. 83 of

[1] (1940) 43 Bom. L. R. 1, P. C. [2] (1945) 48 Bom. L. R. 225.

1951

VISHWAMBHAR HARIHAR v. PARASU KUSHAPPA

Vyas J.

the Bombay Land Revenue Code, 1879, applied and that the defendants were parmanent tenants in respect of two out of the four lands in suit. The plaintiffs succeeded with respect to one of the two remaining lands and gave up their claim with respect to the fourth land. On appeal by the plaintiffs to the District Court the decree of the trial Court was confirmed. The plaintiffs appealed to the High Court. In appeal Mr. Justice Sen whose attention was invited to the case of *Shankarrao Dagadujirao* v. *Shambhu Nathu Patil*[1] took a view which was apparently not in consonance with the view of the Privy Council and declined to draw a presumption under s. 83 of the Bombay Land Revenue Code in favour of the defendants (tenants) although on the facts (plaintiffs having only been able to show that the defendants' tenancy may have commenced between 1860 and 1865) such a presumption ought to have been drawn if conformity with the spirit of the observations of their Lordships of the Privy Council was desired. Mr. Justice Sen observed in the course of his judgment (p. 229):—

> ".....It seems to me that the test should be whether the ordinary meaning of the language used is given effect to. If the tenancy be old and if, for instance, a document regarding the commencement of the tenancy shows that it began in the year '1820', the last digit being torn away or destroyed, it is difficult to see why that should not be regarded as satisfactory evidence of the commencement of the tenancy in the third decade of the 19th century.....It does not appear to me that their Lordships of the Privy Council intended that the tenancy must be proved to have commenced, in every case, in a particular year in order to exclude the presumption under s. 83.....
>
> In the present case, it seems to me clear that the tenancy has been traced to 1860. Exhibit 189 states that the tenancy has existed 'for the previous 20 or 25 years.' That would make 1861 the year of its commencement at the earliest."

It would thus seem that in the opinion of Mr. Justice Sen the words "for the previous 20 or 25 years" were definite enough and would amount to satisfactory evidence as to the commencement of the tenancy concerned. In other words in Mr. Justice Sen's view it was not necessary that the landlord should be able to prove that the tenancy had commenced in a particular year in order to contend that the tenants are not entitled to a presumption to be drawn in their favour under s. 83 of the Bombay Land Revenue Code on account of the antiquity of the tenancy. In the Letters Patent appeal by the defendants against the judgment of Sen J. the view of Sen J. was not

[1] (1940) 43 Bom. L.R. 1, P.C.

accepted by the division bench consisting of Sir Harilal Kania, Chief Justice, and Mr. Justice Gajendragadkar and it was observed by Mr. Justice Gajendragadkar in his judgment as follows (p. 234):—

".....the question which often arises in such cases is: If the tenant proves the antiquity of his tenancy, is the landlord required to prove the commencement of the tenancy by date, month and year, or, would it be enough if he shows that the tenancy may have commenced within a reasonably short period? On a strict construction of the terms of the section itself, it seems to me that the landlord is expected to prove *the commencement of* the tenancy, and since such commencement must necessarily mean the year, if not the date and month, in which the tenancy commenced, he is not entitled to say that he has led satisfactory evidence of such commencement merely by showing that the tenancy may have commenced within a margin of any five, ten or twenty years. Prima facie, the object of the section seems to be to protect the possession of tenants who show the antiquity of their tenancy and who are able to claim that it is by reason of such antiquity that the commencement of their tenancy cannot be proved."

Proceeding further in his judgment and referring to the Privy Council decision of *Shankarrao Dagadujirao* v. *Shambhu Nathu Patil* Mr. Justice Gajendragadkar said (p. 237):—

"Their Lordships have clearly indicated that the satisfactory evidence which the landlord is expected to lead to rebut the presumption of permanent tenancy arising in favour of the tenant must relate to the commencement of the tenancy, and as the word 'Commencement' clearly indicates the said evidence must have reference to the year, if not the month and date, of such commencement. I think, therefore, that even on the alternative finding recorded by Mr. Justice Sen that the tenancy in this case may have commenced between 1860 to 1865, it cannot be held that that is satisfactory evidence of the commencement of the tenancy within the meaning of s. 83 of the Land Revenue Code. That being so, the Court is entitled to draw the presumption of permanent tenancy in favour of the tenants in this case."

Relying on this authority, it is contended by Mr. Abhyankar that since in this case there is satisfactory evidence, namely, the credit and debit Yadi, exhibit 144, read with the rent note, exhibit 238, to show that the tenancy of the defendants had commenced in a particular year, namely, 1825-26, on the termination of the four year agreement of Balappa Sonar with the original holder Vantmurikar Desai, the presumption under s. 83 of the Land Revenue Code should not be drawn in favour of the defendants.

The next case to which we were referred by Mr. Abhyankar was the case of *Rama* v. *Abdul Rahim*[1], and the particular

[1] (1920) 22 Bom. L. R. 1214.

1951

VISHWAMBHAR HARIHAR v. PARASU KUSHAPPA

Vyas J.

observations in the judgment of Mr. Justice Fawcett to which our attention was invited were as under (p. 1221):

> ".....In the present case the facts that the defendant has continued to hold the land on the same rent and that he pays the Government assessment, lend strong support to his contention that he is a permanent tenant; and it would, I think, be very unsafe in these circumstances to hold that this document, Exhibit 18, was a deliberate admission by the defendant that he was not entitled to continue to hold the land in the way it had been held from the time of his ancestors. It frequently happens that a document of this kind is signed without any real comprehension of its exact legal effect, and in fact it may never have been read by or to the defendant. I think, therefore, that the two lower Courts gave excessive weight to this particular admission, and that the presumption arising in the defendant's favour under s. 83 is not displaced by it."

At first sight, says Mr. Abhyankar, this decision appears to go in favour of the defendants. But he submits that there is a distinction between the present case and the above case on the ground that in the present case as many as four leases as against only one lease in *Rama* v. *Abdul Rahim*[1] were executed by the defendants in favour of the plaintiffs and further that this is a case in which the rent has not remained constant as it did in *Rama* v. *Abdul Rahim.*[1] In other words, relying on the changes in the rent from Rs. 80 to Rs. 204 per year and then again from Rs. 204 to Rs. 372 per year and also relying on the number of leases executed by the defendants in favour of the plaintiffs, Mr. Abhyankar has distinguished the case of *Rama* v. *Abdul Rahim*[1] from the present case and has submitted a contention before us that the defendants in this case are not permanent tenants.

In short, Mr. Abhyankar's contentions may be very briefly summarized as under:

1. The documentary evidence, more particularly the credit and debit Yadi and the rent note, exhibits 144 and 238, respectively, having shown that the tenancy of the defendant's ancestor Limbaji Darekar had commenced in 1825-26, there is satisfactory evidence of the commencement of the tenancy, that the origin of the tenancy is not lost in antiquity and that, therefore, the presumption of permanent tenancy should not be drawn in favour of the defendants in this case under s. 83 of the Bombay Land Revenue Code.

2. Four leases, exhibits 95, 153, 10 and 152 passed by the defendants in favour of the plaintiffs showing changes of rent and definite durations of tenancy are an admission by the

[1] (1920) 22 Bom. L.R. 1214.

defendants that they are not permanent tenants. Evidence of leases would constitute conduct evidence against the defendants, and conduct evidence was taken into consideration by their Lordships of the Privy Council in *Shankarrao Dagadujirao* v. *Shambhu Nathu Patil.*[1]

On these contentions Mr. Abhyankar has argued before us that the defendants are not entitled to be held as permanent tenants of the suit land.

Mr. Gokhale for the defendants, on the other hand, has strenuously contended that all the documentary evidence—the talebands, the receipts and even the credit and debit Yadi, exhibit 144—would not amount to satisfactory evidence of the commencement of the defendants' tenancy, and that in the circumstances of this case we should hold that the tenancy being ancient or very old, its origin cannot be traced. Adopting the observations of Mr. Justice Gajendragadkar in *Nagappa Balappa* v. *Ramchandra*[2], Mr. Gokhale has submitted before us that under s. 83 of the Bombay Land Revenue Code, which deals with agricultural leases, the landlord starts with a presumption in his favour that the tenancy is annual. If a tenant sets up a plea of permanent tenancy, he has got to rebut this initial presumption by showing the antiquity of his tenancy, as a result of which satisfactory evidence about its commencement is not forthcoming. He has also got to show that there is no evidence of the period of the intended duration of his tenancy. If these facts are proved, the initial presumption in favour of the landlord is displaced by a presumption in favour of the tenant that the duration of his tenancy is co-extensive with the duration of the tenure of his landlord and of those who derive title under him. At this stage the onus shifts to the landlord, and if he resists the inference of permanent tenancy being raised in favour of the tenant he has got to lead satisfactory evidence of the commencement of his tenancy. Thus, in the application of s. 83, the onus of proof shifts from stage to stage. Having made these submissions, Mr. Gokhale has proceeded to argue that the tenancy of the defendants being antiquated and dating back very nearly to the first quarter of the last century, we should apply the principle of *presumitur retro* and draw a presumption in favour of the tenants that because of the antiquated tenancy its commencement could not be proved. In this context Mr. Gokhale has referred us to

[1] (1940) 43 Bom. L. R. 1, P. C. [2] (1945) 48 Bom. L. R. 225.

1951

VISHWAMBHAR HARIHAR v. PARASU KUSHAPPA

Vyas J.

the following observations of Mr. Justice Gajendragadkar in *Nagappa Balappa* v. *Ramchandra* (p. 240):—

> The doctrine of *presumitur retro* is one of general application.....As held by the Privy Council in *Anangmanjari* v. *Tripura Soondari Chowdhrani*,[1] 'when the state of possession for a long period of years nas been satisfactorily proved, in the absence of evidence to the contrary, *presumitur retro*'. Under s. 83 when the defendant seeks to rebut the initial presumption of annual tenancy arising in favour of the landlord, he leads evidence to show that he has been in possession of the land as a tenant of the plaintiff or his predecessor for a very long time. If and when he proves the antiquity of his tenancy, he invites the Court to draw an inference in his favour that it is because of that antiquity that the commencement of his tenancy cannot be proved and that the period of his tenancy should, therefore, be regarded as co-extensive with that of the landlord. At this stage the landlord has got to meet that evidence by showing that the tenancy had commenced in a particular year."

Mr. Gokhale has contended that the defendants have abundantly established the antiquity of their tenancy by showing that it dates as far back as 1826 and are, therefore, entitled to invite the Court to draw an inference in their favour, that because of that antiquity the origin of their tenancy cannot be proved and further that the period of their tenancy should be regarded as co-extensive with the tenure of the plaintiffs. Mr. Gokhale's further submission is that the above inferences which arise in favour of the tenants by the application of the principle of *presumitur retro* are not rebutted by the plaintiffs by proving that the tenancy of the defendants had commenced in a particular year.

On the other hand, Mr. Abhyankar's submission is that his clients the plaintiffs-landlords have proved that the tenancy of the defendants had commenced in the year 1825-26. On this point the only document—and be it noted that there is none other on which Mr. Abhyankar has relied—is exhibit 144, the credit and debit Yadi of the year 1821. The recital in this Yadi to which our attention is particularly invited is in the following words:—

> "Rs. 86-0-0 Mouje Saigaon-tenant Balappa Sonar. 20½ agreement for four years out of Rs. 110."

From this recital Mr. Abhyankar has advanced an argument before us that the four year agreement of Balappa Sonar with the original holder of the suit land namely Vantamurikar Desai, must have begun in the year 1821 and ended in the year 1825, in which year the tenancy of Limbaji, the ancestor of the

[1] (1887) L. R. 14 I. A. 101.

defendants, must have commenced. Mr. Gokhale's rejoinder on this point, with which we agree, is that there is nothing in the document, exhibit 144, to show or suggest that the agreement of Balappa Sonar with the original holder Vantamurikar Desai had commenced in the year 1821. It is argued by Mr. Gokhale, and we accept that argument, that there is nothing in the document, exhibit 144, to show that the period of Balappa's agreement with Vantamurikar Desai did not expire in the year 1821 or that 1821 was not the last year of the four year agreement between Balappa and Vantamurikar. As the document stands, the agreement of Balappa with the original holder might have begun in the year 1818 and ended in the year 1821, or it might have commenced in the year 1819 and expired in the year 1822 and so on. We are dealing in this case with very old times going back to hundred and twenty-five years ago, and we cannot overlook the probability that the agreement of Balappa with the original holder might have even expired in the year 1821. In that case, there would be a margin of four to five years between the expiry of the agreement of Balappa with the original holder and the date of the earliest document, namely, the rent note, exhibit 238, tracing the connection of the defendants' ancestor with the suit land. As soon as there arises a margin of five years or so during which on account of antiquity we are not in a position to determine who was in possession, the principle laid down by the Privy Council in *Shankarrao Dagadujirao* v. *Shambhu Nathu Patil*[1] would come into operation and the Court would hold that there is no satisfactory evidence to show that the tenancy of the defendants had commenced in a particular year, let alone the month and the date. Such being the position emerging from a consideration of credit and debit Yadi, exhibit 144, the only document on which Mr. Abhyankar relies for submitting that the plaintiffs have shown the commencement of the defendants' tenancy and have thereby rebutted the presumption arising out of the principle of *presumitur retro*, it is clear that the said presumption is not rebutted and a presumption in favour of the defendants must be drawn under s. 83 of the Bombay Land Revenue Code.

Mr. Gokhale has next proceeded to deal with the leases exhibits 95, 153, 10 and 152 which, according to Mr. Abhyankar, amount to conduct evidence against the defendants and are tantamount to admissions by the defendants that they are not permanent tenants. Mr. Abhyankar has advanced a threefold argument on the basis of these leases:

[1] (1940) 43 Bom. L. R. 1, P. C.

1951

VISHWAMBHAR HARIHAR v. PARASU KUSHAPPA

Vyas J.

1. That the rent which was payable by the tenants, i. e., the defendants, to the plaintiffs, i.e., the landlords, did not remain constant but changed from time to time. It changed at least on two occasions, i.e., it changed from Rs. 80 per year to Rs. 204 per year and then again to Rs. 372 per year. The want of constancy in the rent, says Mr. Abhyankar, is a circumstance against the alleged permanent tenancy of the defendants and would lead to an inference that they are not permanent tenants.

2. That on each occasion, i.e., in 1915, 1926, 1927 and 1928, the defendants agreed to remain in possession for a definite duration, 11 years in one case and only 1 year in each of the remaining three cases.

And

3. That each time the defendants agreed to vacate possession of the land on termination of the duration of the lease.

From these circumstances an argument is advanced by Mr. Abhyankar that the defendants themselves knew that they were not permanent tenants of the suit land.

While commenting on this argument of Mr. Abhyankar, Mr. Gokhale has first dealt with the point of want of constancy in the rent. It is argued by Mr. Gokhale that the essential feature of permanent tenancy is the fixity of tenure, and not the fixity of rent. It is argued that this would appear from the very expression 'permanent tenancy'. Decision in *Shankarrao Dagadujirao* v. *Shambhu Nathu Patil* is referred to, in which it was held that from s. 83 of the Bombay Land Revenue Code, 1879, it appeared that a right on the part of the landlord to enhance a rent payable was not unknown in the Province of Bombay. It is contended that even in the case of a permanent tenancy rent is liable to change according as the assessment changes. If the landlord has to pay more to Government by way of assessment, it is only natural, says Mr. Gokhale, that the rent payable even by a permanent tenant to him may be increased. In our opinion, this submission of Mr. Gokhale gains support, firstly, from the decision in *Shankarrao Dagadujirao* v. *Shambhu Nathu Patil*, and, secondly, from exhibit 181 from which it would appear that when the assessment was Rs. 69 which the plaintiffs were liable to pay to Government, the annual rent was Rs. 204, and that when the assessment went up to Rs. 93, the rent which was charged by the plaintiffs was enhanced from Rs. 204 to Rs. 372 per year. It is to be remembered that the document, exhibit 181, dates back to the year 1912, in other

words it is a fairly old document which would support the contention of Mr. Gokhale that the rent would vary with the assessment which the landlord was liable to pay to Government. Accordingly we accept the submission of Mr. Gokhale that simply because the rent payable by the defendants to the plaintiffs was increased from Rs. 80 to Rs. 204 and then again from Rs. 204 to 372, it would not be a circumstance to show that the defendants were not permanent tenants of the suit land.

The other argument which Mr. Abhyankar advanced on the basis of the leases, exhibits 95, 153, 10 and 152 was that they were for definite durations. The first lease was for a period of eleven years and the remaining three leases were for a period of one year each, and, says Mr. Abhyankar, this would not have been the conduct of the defendants, had they been permanent tenants of the suit land. A permanent tenant, we are told, would not be required to execute an agreement limiting the duration of his tenancy only to a particular period. We have considered this argument of Mr. Abhyankar very carefully, but are of the opinion that in view of the fact that the tenancy in this particular case is very old—the earliest document dating back to very nearly the end of the first quarter of the last century—we attach no importance to the face value of these leases. It has been judicially recognised, as we shall presently point out from the authorities, that the landlord very often takes advantage of the illiteracy of his tenant and takes rent-note or rent-notes from him for creating evidence against the permanent tenancy rights of the tenant and the tenant executes the rent notes or leases, very often not knowing the contents thereof and not suspecting that his permanent tenancy rights would be jeopardized or prejudiced thereby. In this connection we may, with advantage, refer to the very authority to which our attention was invited by Mr. Abhyankar himself, namely, the case of *Rama* v. *Abdul Rahim*[1], in which it was observed by Mr. Justice Fawcett (p. 1221):

> "It frequently happens that a document of this kind (his Lordship was referring to a lease) is signed without any real comprehension of its exact legal effect, and in fact it may never have been read by or to the defendant."

The other authority relevant in this context to which our attention is invited by Mr. Gokhale, is the case of *Dhondu* v.

[1] (1920) 22 Bom. L. R. 1214.

1951

VISHWAMBHAR HARIHAR v. PARASU KUSHAPPA

Vyas J.

Damodar.[1] It was a case in which as many as four leases were passed in favour of the plaintiffs-landlords and yet it was held that no face value could be attached to those leases or kabulayats in view of the fact that the tenancy of the tenants was very old. The pertinent observations of Mr. Justice Broomfield in this case were to the following effect (p. 214):

"They (his Lordship was referring to the plaintiffs who were the landlords) had control of all the village records. They are Brahmins and probably persons of education and intelligence. On the other hand, the tenants are quite illiterate people. It would probably be easy enough to induce them to sign anything as long as there was no palpable attempt to interfere with the actual enjoyment of their land. I think under the circumstances it would not be reasonable to attach any importance to these recitals in exhibits 43, 44 and 69 (these exhibits were the leases)."

It is to be remembered that just as the landlords in that case were influential people, in the present case also the plaintiffs are the descendants of Vantamurikar Desai, a very influential landlord. Just as in that case the tenants were illiterate people, so also in the case before us the defendants are illiterate people, and we are told by Mr. Gokhale, and we think that his submission has a considerable amount of force in it, that the first lease, exhibit 95, was passed by the defendants in favour of the plaintiffs because the plaintiffs had represented to the defendants that they would never be disturbed from their possession in case they passed such a lease.

The next case on this point to which our attention is invited by Mr. Gokhale is the case of *Juvansingji* v. *Dola Chhala.*[2] In that case also as many as three leases were executed by the tenants in favour of the landlords and yet it was held by Mr. Justice Marten and Mr. Justice Fawcett that they were not sufficient to negative the presumption which would arise in favour of the antiquity of the tenancy under s. 83 of the Bombay Land Revenue Code.

The net result of the examination of the arguments advanced before us by the learned advocates of both parties in the matter of these leases is that the mere fact that the rent did not remain constant and that as many as four leases were executed by the tenants in favour of the landlords showing that they would remain in possession for definite durations of time are not sufficient to rebut the presumption arising under

[1] (1934) 37 Bom. L. R. 209. [2] (1924) 27 Bom. L. R. 890.

s. 83 of the Bombay Land Revenue Code in view of the antiquated tenancy and absence of evidence regarding the commencement of the tenancy in any particular year.

In the above mentioned circumstances, the plaintiffs' appeal No. 220 of 1949 must fail and be dismissed with costs.

Mr. Abhyankar has submitted before us that in the event of the Court holding that the defendants are permanent tenants of the suit land, the plaintiffs should be granted a declaration to the effect that the Kerles and the Patils are only sub-sharers in the permanent tenancy rights of the Darekars in respect of the suit land to the extent of 4 annas each, the Darekars' share being to the extent of 8 annas. We are of the opinion that this is a perfectly reasonable relief to ask for and we must grant that relief to the plaintiffs in view of the fact that we have got on record a document, exhibit 181, from which it would appear that as far back as the year 1912 Babaji Nathaji Patil, a representative of the Patil family, and Subhana Kerle, a representative of the Kerle family, had 4 annas share each and had paid rent to the extent of Rs. 50-12-9 each as against Rs. 101-9-8 paid by Parsu Darekar, a representative of the Darekar family, for his 8 annas share in the permanent tenancy rights over the suit land. In the circumstances, while dismissing appeal No. 220 of 1949 of the plaintiffs, we grant them the declaration that the Kerles and the Patils are only sub-sharers in the permanent tenancy rights of the Darekars in respect of the suit land, their shares being to the extent of 4 annas each, whereas the Darekars' share is to the extent of 8 annas.

As far as appeal No. 219 of 1949 is concerned, Mr. Gokhale has submitted before us that in the last three lines of the decretal order which read "The remaining defendants are liable to contribute to the rent to the plaintiff, in proportion to their respective shares and should bear their own cost" we should substitute the word "Darekars" in place of the word "plaintiff". In our opinion, the Court could not have intended to say that the remaining defendants, i.e., Kerles and Patils, should contribute to the rent to the plaintiff. There was no question of the plaintiff having to pay any rent. The rent was to be paid by the tenants, and if the Darekars paid the entire amount of the rent, the Court must doubtless have intended to say that the Kerles and Patils should pay their contributions to the Darekars. In the circumstances, we allow this appeal and direct that for the word "Plaintiff" in the last but two lines

1951

VISHWAMBHAR HARIHAR v. PARASU KUSHAPPA

Vyas J.

of the order of the First Class Subordinate Judge, Kolhapur, the word "Darekars" should be substituted. There will be no order as to costs of this appeal.

Order accordingly.

K. B. S.

APPELLATE CIVIL

Before Mr. M. C. Chagla, Chief Justice, and Mr. Justice Gajendragadkar.

1951

July 24

BHAICHAND TARACHAND GANDHI AND OTHERS, APPLICANTS *v.* STATE OF BOMBAY.*

The Bombay Harijan Temple Entry Act (XXXV of 1947) ss. 2, 3—Object of—Entry in Jain temples—Right of Harijans under the Act.

Though it is true that according to judicial decisions, in the absence of proof of custom or usage to the contrary, Hindu law applies to the Jains, even so, their distinct and separate entity as a class by themselves governed by their own religious tenets and beliefs cannot be disputed.

Bhagwandas Tejmal v. *Rajmal*,[1] referred to.

The Bombay Harijan Temple Entry Act, 1947 has a limited objective viz. to raise the Harijans in status and to bring them up to the same position as high class Hindus in respect of temple entry. The object of the said legislation is not to do away with distinction between Hindus and Jains or the distinction between Hindu and Jain temples.

The position in law is that in a Jain temple the Hindus are only allowed to worship provided they have acquired that right by law or custom or usage. It is only where Hindus have such a right to worship in a Jain temple that the Harijans have been conferred a similar right under the aforesaid Act.

Application under Art. 226 of the Constitution.

On November 27, 1950 some members of the public accompanied by Harijans wanted to effect an entry into a Digambar Jain temple at Akluj, in Sholapur District. Some members of the Digambar Jain community who blocked their entrance were arrested by the police for an offence under s. 4 of the

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* Civil Application No. 91 of 1951.

[1] (1873) 10 B. H. C. R. 241.