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one witness at the least." In its strict grammatical sense this would mean that the memorandum of association shall be attested by one witness at the least, not that the signature of each subscriber shall be attested by one witness at the least. Form A in Schedule II of the Act contemplates one witness attesting at the foot of the memorandum the signatures of all the subscribers. However that may be, and whatever weight the consideration of the question might have before the registration of the memorandum, we think that when the memorandum has been registered, a subscriber cannot divest himself of his liability. The transaction may have been irregular, but it is not void. Under these circumstances we confirm the decree with costs.

Decree confirmed.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Chief Justice (Acting), and Mr. Justice Candy.

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VISHVANÁTH BHIKÁJI (ORIGINAL PLAINTIFF), APPELLANT, v. DHONDÁPPA' AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Landlord and tenant—Inámdár—Enhancement of rent—Landlord's right of enhancement—Ejectment for non-payment of enhanced rent—Plea of permanent tenancy—Decision of Judge not based on evidence given in the case—Practice—Second appeal—Finding of fact when binding in second appeal—Sheri and khata lands—Rights of khata tenants not holding under express contract, how proved—Evidence as to similar tenants in similar villages admissible.

In a suit for ejectment for non-payment of enhanced rent the defendants pleaded (1) that they were permanent tenants, (2) that the plaintiff had no power to enhance, (3) that the enhancement by the plaintiff was unreasonable. The lower Courts held that the defendants were permanent tenants, but were bound to pay a reasonable rent. Their decision was not based on evidence given in the case, but on what was termed a "well known distinction between the *sheri* or private lands of an inámdár and the *khata* or *rayatwar* lands held by recognised tenants." The exercise of certain rights of transfer or inheritance, &c., were regarded as evidence of fixity of tenure at a reasonable rent. On second appeal by the plaintiff to the High Court it was argued that the District Court having found, as a fact, that the defendants were permanent tenants bound to pay a reasonable rent, the High Court in second appeal was bound by that finding.

* Second Appeal, No. 279 of 1891.

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Held, that the case should be remanded for proper enquiry. No doubt, if the appeal in the District Court were conducted as if all the facts recorded by the Subordinate Judge were admitted, the plaintiff could not in second appeal question these facts. But it did not appear that it was admitted that the distinction drawn between *sheri* and *khata* tenants was correct, or that every *khata* tenant, as such, exercised the rights described by the Subordinate Judge. Under the circumstances it was clear that the decision of the District Judge was based neither on evidence nor admissions, and was, therefore, not binding in second appeal.

In determining the rights of *khata* tenants who held under no express contract, the best evidence no doubt, if possible, would be the evidence of custom in the particular village in question, but evidence of similar tenants in similar villages would not be excluded.

Mirasdárs in an inám village cannot always claim to hold at a fixed rent. An inámdár can enhance their rents within the limits of custom.

SECOND appeal from the decision of Dr. A. D. Pollen, District Judge of Belgaum.

Suit to recover possession of fields.

The plaintiff sued to recover possession of two fields (Survey No. 12 and a specified portion of Survey No. 175) situate in the village of Zunzurvad, alleging that they belonged to him as his inám; that they had been in the possession of the defendants as yearly tenants at a rent of Rs. 38, but that he had given them notice; that he called upon them to pay an enhanced rent of Rs. 130 and to execute a rent-note to that effect. The defendants had refused the notice, and the plaintiff, therefore, brought this suit.

The defendants denied that they were yearly tenants, and contended that they were not liable to enhancement of rent; that their family had held field No. 12 since 1820, in which year the village had been granted as saranjám to the family of Chinchnikars; that field No. 175 had been given to them by one of that family on a perpetual lease in or about the year 1844; that the original rent of Survey No. 12 was Rs. 16, which was subsequently enhanced to Rs. 26; that the rent of the other field was fixed at rupees twelve, and was never enhanced; that the plaintiff's demand was extortionate, and was made with a view to deprive them of their holdings; that they were willing to pay such proper and equitable rent as might be fixed by the Court; and

that the plaintiff was not entitled to eject them so long as the rent was paid.

The Subordinate Judge found that the plaintiff was not entitled to enhance at his pleasure, but that he might demand a reasonable rent. As there was no satisfactory evidence on the point he ordered that the questions whether the rent now claimed by the plaintiff was excessive, and, if so, what would be the proper amount, should be determined in execution. He made a decree accordingly. In his judgment he made the following observations:—

"We should bear in mind that the fields are situate in an inám village; the defendants have been in possession for forty years and upwards, paying practically an unchanged amount of rent. Plaintiff wants to treat them as mere annual tenants liable to be evicted after due notice, but they appear to me to possess some superior rights. It is a notorious fact that the lands of an inám village are divided into *sheri* ones, which stand under the inámdár's name, and *khata* ones under the names of separate holders. Regular heirship proceedings take place in respect of the latter, but the former are not dealt with in this way. The rents of the former are collected directly by the inámdár, while there is a legal prohibition against such direct collection of those of the latter. The transfer of the *khata* of the second class requires the passing of the *kabuláyat* and *rázináma*, while such is not the case of the other class. The Registry Office bears abundant testimony that the *khata* fields are often mortgaged, sold, purchased, sub-let and otherwise disposed of by their holders, and this exercise of those legal rights has never been challenged or interfered with by the inámdár. An annual tenant cannot exercise any such rights for the simple reason that he has no interest in his holding at the expiry of the year. These considerations sufficiently differentiate a registered tenancy from an annual one, and must give more security to it than what can be claimed by the latter.

* * * *

"In disposing of the question of limit of enhancement, I forgot to state an important point favourable to defendants. It will be seen that these fields were taken up at a time when the holder had a life interest in them, and they were liable to be resumed

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by Government after the demise of the holder. So defendants' ancestors might reasonably be presumed to have entered into possession under a belief that their eventual landlord, *viz.*, Government, would extend to them the same rights as would be given to its other tenants, and that a liberal margin of profit would be allowed to them at the time of enhancement. The subsequent summary settlement could not affect this understanding to which the present inámdár is, therefore, bound to give effect."

The plaintiff appealed. The District Judge confirmed the decree with slight variations which it is not necessary to state for the purpose of this report.

The plaintiff then preferred a second appeal.

Vásudeo Gopál Bhandárkar for the appellant (plaintiff):—The defendants have been the plaintiff's tenants from the year 1844. He has been an inámdár for a much longer time. The lower Courts have held that because the defendants have held possession for a long time, and have been paying a fixed rent, they are permanent tenants. But this does not prove permanent tenancy—*Náráyanbhat* v. *Davlata*[1]; *Gangábái* v. *Kalapá*[2]. The lower Courts have based their decisions on alleged facts, of which no evidence was given, and on inferences from those facts. There is no evidence of permanent tenancy. The lands in dispute are *rayatwar* lands. The plaintiff gave notice to the defendants to pay enhanced rent, or to vacate the lands, and they having failed to do either the plaintiff is entitled to eject them. *Endar Lála* v. *Lallu Hari*[3] is in point.

Mánekshá J. Taleyarkhán for the respondents:—The lower Courts have found as a fact that the lands in dispute are *khata*, and not *sheri*, lands, and this finding cannot be upset in second appeal. In *khata* lands in inám villages the tenants have, all over the country, the same hereditary rights which the tenants in Government *khata* land possess. The Subordinate Judge has in his judgment given in detail the rights of such tenants. The conduct of the plaintiff estops him from raising any contention with respect to our rights. In his appeal to the District Court

(1) I. L. R., 15 Bom., 647. (2) I. L. R., 9 Bom., 419.
(3) 7 Bom. H. C. Rep., 111, A. C. J.

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he did not object that the Subordinate Judge had, in the absence of evidence, relied upon his own knowledge, and held that defendants are permanent tenants. As the point was not raised in the lower Court, it cannot now be taken for the first time in second appeal—*Mohima Chunder Roy* v. *Rám Kishore Acharjee*(1); *Devji Goyaji* v. *Godabhái*(2). The facts found by the Subordinate Judge were not disputed in appeal to the District Court, and consequently the inferences drawn by the lower Courts on those facts cannot now be interfered with.

CANDY, J. :—Defendants in this and the companion cases being sued in ejectment set up a right as permanent tenants. The plaintiff, the inámdár, alleged that they were yearly tenants to whom he had given due notice of enhancement of rent. Defendants pleaded that they were not liable to enhancement of rent, and that in any case they could not be made to pay more than the proper and equitable amount as fixed by the Court.

In Suit No. 102, defendants pleaded that field No. 12 had been in their possession for many years, the rent having been raised in 1853 A.D. with their consent from Rs. 16 to 26; that field No. 175 had been leased to them in A.D. 1844 by the then inámdár under a permanent lease, the rent having remained unchanged. Defendants also pleaded that they had spent large sums in improving the fields; and the enhancement of rent claimed by the plaintiff was excessive.

The Subordinate Judge found in Suit No. 102 that neither of the fields (Nos. 12, 175) was *mirási*, and that the lease of No. 175 was certainly not a permanent lease; that both fields appear to have been taken up by defendants when they were mere waste land, and turned into good cultivable land by them. He expressed no opinion as to the amount said to have been expended on improvements. His chief ground for holding that there was a limit to the inámdár's power of enhancement was that the defendants' holdings were *khata* holdings, as distinguished from *sheri* lands, *i.e.*, lands in which tenant-rights have lapsed, and which are cultivated by the inámdár by his farm servants. The Subordinate Judge took it to be "a notorious fact" that there

(1) 15 Beng. L. R., 142 at 155. (2) 2 Bom. H. C. Rep., 27.

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is such a division of the lands of an inám village, and that the holders of *khata* lands possess and exercise the rights of mortgaging, transferring, and alienating their lands to other people, their holdings being hereditary, and the inámdár never challenging or interfering with those rights. On the above grounds the Subordinate Judge held that the plaintiff could not enhance at his pleasure, but might demand a reasonable rent. The question whether the present enhancement was reasonable, and if not what is the proper amount, he left to be determined at execution.

Plaintiff appealed to the District Judge on the grounds, *inter alia*, that the distinction drawn between *sheri* lands and *khata* holdings was wrong, and that the Subordinate Judge had based his judgment on materials not supplied by the evidence. The District Judge held that the 2nd clause of section 83 of the Land Revenue Code (Act V of 1879, Bombay), did not apply, "that is to say, it cannot be presumed in the absence of evidence that defendants' tenancy is a permanent one, because there is evidence in this case as to its commencement." The District Judge did not give any distinct finding as to whether the defendants were mirásdárs (defendants apparently accepting the finding of the Subordinate Judge in the negative on that point, as also the finding that the lease of No. 175 was not a permanent lease), nor whether they had taken up the lands when waste and brought the same under cultivation, nor as to what sums (if any) had been spent on improvements; but (he went on to say) "as the Subordinate Judge remarks, there is a well known distinction between the *sheri* or private lands of an inámdár and the *khata* or *rayatawar* lands held by recognized rayats. If we find that the rayats in an inám village have been cultivating the same lands for generations at a practically uniform rate, that the lands are heritable and transferable, that on the death of a tenant a *varsa* or heirship enquiry is held (as in Government villages) and the name of the heir invariably entered; if the holdings are the subjects of sale and mortgage without let or hindrance on the part of the inámdár; if instances of arbitrary eviction or enhancement are unknown; if the tenants' names are recorded as khátedárs as in Government villages; if the lands were taken up in order to bring them into a state of cultivation; if the tenants

have spent capital and labour on improvements,—it may generally speaking be inferred that the tenants of such lands are not mere tenants at will or even yearly tenants, but that they enjoy a virtual tenant right and that they have a permanent interest in their holdings subject to the payment of rent. This interest is in accordance with the ancient customs of the country, and it may be also said to rest on an implied contract. From the facts recorded in the lower Court's judgment it would appear that the tenants, who are the defendants in this and in the companion suits, belong to the class of tenants described above, and there does not seem to be any real dispute about this point, though the evidence does not appear to have been specially directed to elucidate it."

It has been contended before us that as the District Judge has found as a fact that the defendants are permanent tenants bound to pay a reasonable rent, this Court is bound by that finding. This might be so, if the finding were based on evidence. In the present case it is admitted that "the facts recorded" by the Subordinate Judge regarding *sheri* and *khata* lands generally are not based on any evidence. He regarded the division between *sheri* and *khata* lands and the rights exercised by the holders of the latter as *notorious*. Plaintiff disputed and still disputes that notoriety. But it was argued before us for the respondent-defendants, that in the appeal in the District Court there was no real dispute,—in fact, it was admitted that there was a well-known distinction between *sheri* and *khata* lands, and that the holders of the latter exercised the rights described by the District Judge, which exercise is good evidence of fixity of tenure at a reasonable rent. No doubt, if the appeal was conducted in the District Court as if all the facts recorded by the Subordinate Judge were admitted, the plaintiff cannot in second appeal question those facts. But the language used by the District Judge will not bear this construction. No doubt the plaintiff or his pleader may have admitted that the defendants did belong to the class of tenants described generally as *khata* tenants; but it would be difficult, in the face of the grounds of appeal as recorded by the District Judge, to hold that it was admitted that the distinction drawn between *sheri* and *khata*

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tenants was correct, or that every *khata* tenant, as such, exercises the rights described by the Subordinate Judge. There may not to the District Judge have seemed to be any real dispute as to the inclusion of defendants in the class of tenants described as *khata* tenants, but that can hardly be taken as an admission that all the details of the description are correct. Whatever may have been the "point", to the elucidation of which (the District Judge says) the evidence did not appear to have been specially directed, it can hardly have been the exercise by *khata* tenants generally of certain rights, for it is admitted before us that there was no evidence at all on this point. Under these circumstances it is clear that the decision of the District Judge must be taken as based neither on evidence nor admission, and, therefore, not binding in second appeal; and the case must accordingly be remanded for proper enquiry.

It may be remarked that the distinction drawn by the District Judge between *sheri* and *khata* lands, and the rights and privileges assigned by him to the latter, were intended by him to apply solely to those *khata* tenancies in which there is no express contract between landlord and tenant. Under section 85 of the Land Revenue Code (Bombay Act V of 1879), it is incumbent on every superior holder of an alienated village in which there exists an hereditary pátel and village accountant to receive his dues on account of rent or land revenue from the inferior holders through the said village officers. By section 3 'inferior holder' signifies a holder liable to pay the rent or land revenue to a superior holder, and 'tenant' signifies a person who holds by a right derived from a superior holder called his landlord. Thus a tenant is an inferior holder, whose superior holder is his landlord. Now it is easy to conceive a case of land of which tenant-rights have lapsed to the inámdár, but which he does not wish to cultivate by his farm servants; accordingly he leases it, say, on a lease for five years to a tenant, with power of re-entry at the expiration of the term. It would be absurd to say that this tenant is a permanent tenant whose rent could never be enhanced beyond a reasonable rate. And yet the land would be "*khata* or *ryatwar* land held by a recognized tenant"; "the tenant's name is recorded as khátedár as in Government villages"; it is

a "registered tenancy"; the landlord is prohibited from collecting the rent otherwise than through the village officers. In the same way the landlord may, by a permanent lease, have expressly bound himself never to enhance the rent. Therefore when it is said that the holders of *khata* lands as such have rights of alienation, transfer and inheritance, the reference must be solely to those *khata* tenants who do not hold under express contracts. There is nothing to show that in the village in which are situated the lands now in dispute, there are any *sheri* lands properly so called. All the lands may be *khata* holdings. The plaintiff inámdár deposed in Suit No. 383 that there were no *sheri* lands. It is possible that the tenants of some of these lands, though they are not mirasdárs, have by local usage in virtue of their length of possession and uniformity of payment of rent or otherwise acquired a right to hold in perpetuity their lands on payment of rent ascertainable by local usage. The District Judge in the cases now before the Court has not arrived at any specific finding as to how many years the defendants and their predecessors in title have held their lands, and as to whether any of the lands were taken up when mere waste, and brought under cultivation at great expense. These are important elements in the consideration of the question whether there is any limit to the landlord's right of enhancement. It is not enough to say "if the lands were taken up, &c.", "if the tenants have spent capital, &c."; and "it would appear to be admitted that defendants did take up the lands and did spend capital." Clear definite admissions or findings are required on important allegations made by defendants in support of their pleas. The Subordinate Judge held that there had been enhancement in respect to some of these lands; so a clearer finding by the District Court is necessary than the general statement "if we find that the rayats in an inám village have been cultivating the same lands for generations at a practically uniform rate, &c."

Then comes the important question whether *khata* tenants who hold under no express contract reserving or limiting the right of the landlord, have possessed and exercised the rights of mortgaging, transferring and alienating their lands to other people, the holdings being hereditary, and the inámdár never

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challenging those rights or interfering with their exercise. The best evidence, no doubt, if procurable, would be evidence of custom in this particular village; but evidence as to similar tenants in similar villages must not be excluded. As was said in *Pratápráv Gujar* v. *Bayáji*(1), does the tenure by which the lands are held impose, *according to the customary law of the district*, any and what limits upon the power of a grantee from the Government in inám to enhance the rent or assessment payable on account of the said lands? In *Bába* v. *Vishvanáth*(2) the plaintiff was the same plaintiff as in the present cases; but the defendant pleaded that he was not bound ever to pay anything beyond the fixed rent of Rs. 11. He did not plead (as here) that he was willing to pay a reasonable rent, and the important question of local usage was not raised.

We may remark here that we do not agree with the Subordinate Judge that, if the lands were leased to the tenants at a time before the inámdár had accepted the provisions of the summary settlement, the tenants must necessarily be presumed to have entered on their tenancy under a belief that should the inám lapse to Government, their rent would not be enhanced beyond a reasonable rate, and, therefore, the present inámdár is bound to give effect to that understanding. The defendants raised no such plea, nor apparently was it accepted by the District Judge. Nor do we agree with the Subordinate Judge that mirasdárs in an inám village can always claim to hold at a fixed rent. As stated in *Lakshman* v. *Ganpatráv*(3), an inámdár can enhance the rents of mirasdárs within the limits of custom. In the present cases the tenants, though found not to be mirasdárs, claim the same right.

Lastly, it must be noted that in these cases a distinct issue was raised as to what should be the limit of the rent, if the inámdár's power of enhancement is limited. We do not think that this should be left to be determined in execution proceedings. As the cases must go down, we think that the question should be decided in the trial, if the inámdár's right of enhancement is found to be limited.

(1) I. L. R., 3 Bom., 141 at p. 144. (2) I. L. R., 8 Bom., 228.
(3) I. L. R., 3 Bom., 145, note.

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In order that the various questions above indicated may be duly investigated, we reverse the decree of the District Judge and remand the case for a further investigation with reference to the above remarks, with power to take such fresh evidence as may be necessary and legally admissible. Costs throughout should be disposed of on the further trial in such manner as may be just.

Decree reversed and case remanded.

APPELLATE CRIMINAL.

Before Mr. Justice Jardine and Mr. Justice Telang.

QUEEN-EMPRESS *v.* BHIMA.*

1892. *August* 3.

Evidence Act (I of 1872), *Secs.* 25 *and* 26—*Confession—Confession made to a police pátel, admissibility of—Evidence—Police officer.*

A police pátel is a police officer within the meaning of sections 25 and 26 of the Indian Evidence Act (I of 1872). A confession made to a police pátel is inadmissible in evidence.

APPEAL against the conviction and sentences passed by Ráo Sáheb Venkatráo R. Inámdár, Joint Sessions Judge of Bijápur, in the case of *Queen-Empress* v. *Bhima bin Hanmapa.*

The accused was charged under section 457 of the Indian Penal Code with house-breaking by night with intent to commit rape, and under section 354 with assaulting the complainant with intent to outrage her modesty.

At the trial the prosecution tendered in evidence a confession made by the accused to the police pátel in the presence of the *panch.*

The Sessions Judge admitted this confession on the ground that the police pátel was not a police officer within the meaning of sections 25 and 26 of the Indian Evidence Act.

On this confession as well as on other evidence in the case the accused was convicted under sections 457 and 354 of the Indian Penal Code respectively, and sentenced to rigorous imprisonment for one year for the first offence, and for six months for the second.

* Criminal Appeal, No. 130 of 1892.