enable his son's widow to divest an estate that had devolved by inheritance on heirs, who did not derive title through the son.

I can find no sanction in the cases for such a view; in the *Ramnad case*[1] it is the father-in-law, *if alive*, that is described as competent to give an effective assent to an adoption; while to treat his consent as operative after his death would be to extend to fresh conditions a widow's power of divesting contrary to "the general tendency of the Courts, from the Privy Council downwards, in favour of limiting the exercise of the power of adoption by women after the death of their husbands."—*Chandra* v. *Gojarabai*[2].

For these reasons, the decree of the lower appellate Court must be reversed and the suit dismissed with costs throughout.

G. B. R. *Decree reversed.*

(1) (1868) 12 M. I. A. 397 at p. 442. (2) (1890) 14 Bom. 463 at p. 472.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

RAJYA VALAD IMAM (ORIGINAL DEFENDANT), APPELLANT, *v.* BALKRISHNA GANGADHAR (ORIGINAL PLAINTIFF), RESPONDENT.*

1905. *March* 27.

Land Revenue Code (Bom. Act V of 1879), section 83[1]*—Inámdár—Grantee of Royal share of revenue or of soil—Mirási tenant—Enhancement of rent—Sheri lands—Contractual relation—Usage of the locality—Enhancement to be just and reasonable.*

A grant to an Inámdár may be either of the Royal share of revenue or of the soil; but ordinarily it is of the former description and the burden rests on the Inámdár to show that he is an alienee of the soil.

* Second Appeal No. 639 of 1904.

(1) Section 83 of the Land Revenue Code (Bom. Act V of 1879):—

83. A person placed, as tenant, in possession of land by another, or in that capacity, holding, taking or retaining possession of land permissively from or by sufferance of another, shall be regarded as holding the same at the rent, or for the services, agreed upon between them; or, in the absence of satisfactory evidence of such agreement, at the rent payable or services renderable by the usage of the locality, or, if

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Where an Inámdár is alienee only of the land revenue, then his relations towards those who hold land within the area of the Inám grant vary according to certain well recognized principles. If the holding was created prior to the grant of the Inám, then the Inámdár as such can only claim land revenue or assessment; for he has no interest in the soil in respect of which rent would be paid; but if the holding be later in its origin than the Inám grant, then the lands comprised in such holding would be the Sheri lands of the Inámdár and he would be entitled to place tenants in possession of them, even if only a grantee of revenue. With respect to the latter class of holding, direct contractual relations would be established between the Inámdár and the holder. If no such contract can be proved, recourse must be had to section 83 of the Land Revenue Code (Bom. Act V of 1879). In the absence of satisfactory evidence of agreement, the rent is that payable by the usage of the locality and failing that, such rent as, having regard to all the circumstances of the case, shall be just and reasonable.

In a suit by an Inámdár to enhance rent of Mirás land, it must be determined whether what was paid was rent and whether the Inámdár has a right to enhance as against one who holds on the same terms as the defendant does; the test is whether there has been any and what enhancement according to the usage of the locality in respect of land of the same description held on the same tenure.

SECOND APPEAL from the decision of T. Walker, District Judge of Belgaum, confirming the decree of V. V. Wagh, Second Class Subordinate Judge.

The plaintiff sued for a declaration that he was entitled to enhance the rent assessed on the land in suit from Rs. 7 to

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there be no such agreement or usage, shall be presumed to hold at such rent as, having regard to all the circumstances of the case, shall be just and reasonable.

And where, by reason of the antiquity of a tenancy, no satisfactory evidence of its commencement is forthcoming, and there is not any such evidence of the period of its intended duration, if any, agreed upon between the landlord and tenant, or those under whom they respectively claim title, or any usage of the locality as to duration of such tenancy, it shall, as against the immediate landlord of the tenant, be presumed to be co-extensive with the duration of the tenure of such landlord and of those who derive title under him.

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

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

Rs. 60 per annum and to recover possession of the land if the defendant was not willing to pay the enhanced amount. The plaintiff alleged that the village of Hudli in which the land was situate belonged to Sayad Saboo Saheb *alias* Mahamad Saheb and others as Inámdárs who took from the plaintiff Rs. 19,000 on the mortgage of the land in September 1891, and allowed an award and a decree framed in the terms of the award to be passed in plaintiff's favour, that the plaintiff had, therefore, become the owner of the land in the terms of the decree, that the land was held by one Apaya valad Karia on the annual assessment of Rs. 7, that as other people began to offer higher assessment to the plaintiff, he gave to Apaya a notice to pay higher assessment or to quit the land and that on Apaya's failure to do either, the plaintiff having proceeded to take possession, he was obstructed by the defendant on the ground that he had taken the land from Apaya in mortgage and sale.

The defendant answered *inter alia* that the plaintiff was not the Inámdár of the land and had not acquired the rights of the Inámdár, that though the plaintiff might have acquired the right to the land from the Inámdár he could not enhance the assessment on the land, that under the survey settlement introduced in the village the *Máji ákár* (former rent or assessment) of Rs. 7 was fixed by the settlement, that the defendant had purchased the land from Apaya and the plaintiff had no right to claim it from him and that Apaya could not surrender the land in plaintiff's favour after selling the same to the defendant.

The Subordinate Judge found that the plaintiff was mortgagee with possession and as such stood in the Inámdár's position, that he had the right of enhancing the rent to a reasonable extent, that he was entitled to oust the defendant if the latter failed to pay the rent fixed by the Court and that the plaintiff was entitled to receive rent at the rate of Rs. 35 per year, and, on the defendant's failure to pay the same, to eject him from the land. With respect to the defendant's tenure he made the following observations :—

> The plaintiff has the right of holding the lands assigned to him by the award till he is redeemed. The award, in clause 8 of it, provides that the plaintiff is given the right of enhancing the rent of the lands assigned by the award.

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The defendant's learned Vakil contends that this power must have been given with respect to the Sheri lands conveyed by the award. But the award does not make any distinction between the Sheri and Kháta lands held by tenants. The power, therefore, must be held to apply to all lands of which the rent could be enhanced by the Inámdár.

We have, therefore, to consider the character of the defendant's holding. The land in question was the Kháta land of one Apaya bin Karia (witness 47). It appears that the land was enjoyed by Apaya's family from the time of his father or grandfather, as Khátedár holder, under the Inámdár. The Máji ákár or rent that was being paid was Rs. 7.

The defendant took the land in mortgage from Apaya on 22nd March 1901, for Rs. 300. The defendant later on obtained a deed of sale, Exhibit 26, on 29th April 1903 from Apaya for Rs. 500. Apaya says that he sold the land to the defendant for Rs. 500, out of which Rs. 300 was the mortgage debt and that Rs. 200 were agreed to be paid to Apaya by defendant after the dispute that arose regarding the tenure of the land was finally decided (*vide* Exhibit 47). The defendant claims to have acquired all the rights of Apaya in the land by reason of the mortgage and the sale. For the purposes of this suit it may be held that the defendant has come in place of Apaya so far as plaintiff's right to the enhancement and to ejectment are concerned.

The defendant contends that the survey settlement is introduced into the village. But the evidence of the Kulkarni of the village, witness 46, shows that it has not been introduced and there is no satisfactory evidence to show that it has been introduced. The fact, if it were true, could be proved by the defendant.

The defendant's position is, therefore, that of a Khátedár holder in Inám village not subject to survey settlement. In the case of *Vishvanath Bhikaji v. Dhondappa* (I. L. R. 17 Bom., p. 478), it has been laid down that Mirásdárs in an Inám village cannot always claim to hold at fixed rent. The rent could be enhanced within the limits of custom.

On appeal by the defendant the Judge fully agreed with the view of the Subordinate Judge and confirmed the decree.

The defendant preferred a second appeal.

K. H. Kelkar for the appellant (defendant) :—Both the Courts have found that the land is the Kháta land of Apaya and that he is a Mirásdár. He paid uniform assessment of Rs. 7. The Courts have not found whether Apaya's holding came into existence prior or subsequent to the grant of the Inám. It is also not found whether the Inámdár is the alienee of the soil or of the Royal share of revenue. If he is the alienee of the soil, he would be entitled to rent; if not, he would be entitled to assessment.

The assessment has been unduly enhanced from Rs. 7 to Rs. 35. Enhancement should be fair and equitable. The plaintiff is a mortgagee from the Inámdár and as the right to enhance the rent or assessment has not been mortgaged, plaintiff's suit for enhancement cannot lie. The plaintiff has waived his right, if any, by the acceptance of rent at the old rate after service of notice.

C. A. Rele for the respondent (plaintiff) :—The defendant's position is that of a Khátedár holder in an Inám village not subject to survey settlement, so rent can be enhanced within the limits of custom. Apaya had been hitherto paying uniform rent of Rs. 7. It was not necessary to find whether Apaya's holding was created prior or subsequent to the grant of the Inám, as this point was not raised in the pleadings. The question whether the Inámdár is the alienee of the soil or of the revenue, generally arises in contests between the Government and the Inámdár. It cannot arise between the Inámdár and the occupant. The decided cases do not make any distinction of this sort. This point also was not raised by the defendant in the lower Courts.

It cannot be said that the rent has been unduly enhanced from Rs. 7 to Rs. 35. The Commissioner's report shows that the land would yield rent of Rs. 60 per year. The enhancement is, therefore, fair and equitable.

Clause 8 in the award decree, Exhibit 30, gives to the plaintiff the right to enhance rent, therefore, the plaintiff is entitled to recover enhanced assessment. The plaintiff has not waived his right to enhancement. There is no evidence that he accepted rent at the old rate after the service of notice.

The following authorities were cited during arguments :—*Prataprav Gujar* v. *Bayaji Namaji*[1]; *Vishvanath Bhikaji* v. *Dhondappa*[2]; *Hari Joti* v. *Narayan Acharya*[3]; *Sadashiv* v. *Ramkrishna*[4].

JENKINS, C. J. :—The plaintiff seeks a declaration that he is entitled to enhance the rent of the plaint land; and he further prays for possession of that land in case the enhanced rent is not paid, and also for payment of the rent at the enhanced rate.

(1) (1878) 3 Bom. 141.
(2) (1892) 17 Bom. 475.
(3) (1869) 6 Bom. H. C. R. (A. C. J.) 23.
(4) (1901) 25 Bom. 556.

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The principal question is, whether the plaintiff has a right to enhance, and on this both Courts have pronounced in his favour.

The Courts have found that the plaintiff is an Inámdár, and both speak of the defendant as a Mirási tenant. They have failed, however, to investigate the precise character of the relations between the parties, and in this the judgments are wanting in a material particular.

A grant to an Inámdár may be either of the Royal share of revenue, or of the soil; but ordinarily it is of the former description—*Krishnarav Ganesh* v. *Rangrav*[1], *Ramchandra* v. *Venkatrao*[2].

The burden rests on the Inámdár to show that he is an alienee of the soil.

In this case the Sanad has not been produced, and unless and until this is done, it must be assumed that the grant is of the Royal share of revenue.

When an Inámdár is an alienee only of the land revenue, then his relations towards those, who hold land within the area of the Inám grant, vary according to certain well-recognized conditions.

If the holding was created prior to the grant of the Inám, then the Inámdár as such can only claim land revenue or assessment; for he has no interest in the soil in respect of which rent would be paid.

We say the Inámdár *as such*, because prior to the Inám grant he may have had occupancy rights and he may have created a tenancy thereout, which survived the Inám grant.

But the holding may be later in its origin than the Inám grant; thus the lands may have been unoccupied at the date of the Inám grant, or the occupation rights, that then existed in them, may have lapsed.

These would be Sheri lands, and the Inámdár, even if only a grantee of revenue, would be entitled to place tenants in possession of them, not by virtue of any interest in the soil—(*ex hypothesi* he has none),—but as being entitled to make the most he can out of them by way of revenue—*Ramchandra* v. *Venkatrao*[3], *Ganpatrav Trimbak Patwardhan* v. *Ganesh Baji Bhat*[4].

(1) (1867) 4 Bom. H. C. R., A. C. J. 1.
(2) (1882) 6 Bom. 598 at p. 602.
(3) (1882) 6 Bom. 598 at p. 608.
(4) (1885) 10 Bom. 112 at p. 117.

The difference between the two classes of holdings is obvious: in the last, direct contractual relations would be established between the Inámdár and the holder.

If these contractual relations are defined by an express contract, of which there is evidence, then the rights of the parties must be determined by that contract. If no such contract can be proved, then we must have recourse to the criteria prescribed by law for determining their rights.

And here section 83 of the Land Revenue Code (Bom. Act V of 1879) comes to our aid. It is thereby provided as follows:—

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

And where, by reason of the antiquity of a tenancy, no satisfactory evidence of its commencement is forthcoming, and there is not any such evidence of the period of its intended duration, if any, agreed upon between the landlord and tenant, or those under whom they respectively claim title, or any usage of the locality as to duration of such tenancy, it shall, as against the immediate landlord of the tenant, be presumed to be co-extensive with the duration of the tenure of such landlord and of those who derive title under him.

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

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

This section then shows us how to ascertain the rent payable and the duration of the tenancy. With the duration we have no concern, for, as we have said, the Courts have determined that the defendant is a Mirási tenant. We need only consider what is payable by him.

In the absence of satisfactory evidence of an agreement, the rent is that payable by the usage of the locality, and, failing

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that, such rent as, having regard to all the circumstances of the case, shall be just and reasonable. Then the section goes on to provide for enhancement; and this is permissible if the landlord has the right by virtue of agreement, usage or otherwise.

What has hitherto been payable we know; all that has to be determined is the right to enhance.

In the first place, it must be determined whether what was paid was rent, and then whether the Inámdár has the right to enhance as against one who holds on the same terms as the defendant does. Agreement is out of the case, but it is said that the enhancement sought is sanctioned by usage; this, therefore, should be proved.

It is not enough to see what may have been done in respect of holdings of a different class; the test is whether there has been any, and what, enhancement according to usage of the locality in respect of land of the same description held on the same tenure.

It was said by Melvill and Kemball JJ. in *Lakshman* v. *Ganpatrav*[1]—"the real question appears to us to be, whether the rent claimed by the plaintiff is a fair and equitable rent, and such as, according to the custom of the country, is leviable on *Mirás* land of the description held by the defendant".

This was not a decision on section 83 of the Land Revenue Code, but it enunciates a relevant principle.

These are some of the considerations by which a Court should be influenced in dealing with a claim to enhance; but, as far as we can see, they found no place in the discussion before the lower Courts in this case.

The issues appropriate to the question now in dispute are these:—

1. Was the Inám grant, of the soil, or of the Royal share of revenue?

2. Was the defendant, or any predecessor in title of his, in possession of the lands in suit at or before the date of the grant in Inám under which the plaintiff claims?

(1) (1878) 3 Bom. 145 *f. n.*

3. If so, was he in possession at that time as tenant of the person to whom the Inám grant was made, and had he Mirási rights?

4. Is it rent or assessment that is payable?

5. Has the plaintiff the right by virtue of usage or otherwise to enhance as against the defendant?

6. If there is a right to enhance, then to what extent can the enhancement be made having regard (*a*) to the usage of the locality in respect of land of the same description and tenure, and (*b*) to what is fair and equitable?

Return in two months.

Parties at liberty to adduce fresh evidence.

Issues sent down.

G. B. R.

CRIMINAL APPELLATE.

Before Mr. Justice Russell and Mr. Justice Batty.

EMPEROR *v.* RAMPRATAP MAGNIRAM.*

1905. *April* 10.

Indian Factories Act (XV of 1881), sections 12, 15 (1) (e)[1]*—Fencing Machinery—Manager—Occupier—Liability.*

The accused who was the manager of a ginning factory at Dhulia resided in a part of the premises on which the factory stood. He was charged under section

* Criminal Appeal No. 595 of 1904.

(1) The Indian Factories Act (XV of 1881), sections 12 and 15 (1) (*e*) run as follows:—

Section 12.—(*a*) Every fly-wheel directly connected with a steam-engine, water-wheel, or other mechanical power in any part of a factory, and every part of a steam-engine or water-wheel,

(*b*) every hoist or teagle near which any person is liable to pass or be employed, and

(*c*) every other part of the machinery or mill-gearing of a factory which may, in the opinion of the local Inspector, be dangerous if left unfenced, and which he may have ordered to be fenced,

shall, while the same is in motion, be kept by the occupier of such factory securely fenced.

Section 15.—Any person who, in breach of this Act or of any order or rule made thereunder,—

* * * * * *

(*e*) neglects to fence any machinery or mill-gearing in any factory

* * * * * *

shall be punished with fine which may extend to two hundred rupees.