

reason of the fact that a deed of sale was executed behind their back by their agent, the first defendant, in favour of a stranger, the second defendant. In spite of this deed of sale, there was no transfer of possession, but possession remained, as uptil then it had always been, with the first defendant who is the agent of the plaintiffs in that behalf. There was nothing in these circumstances to put the plaintiffs on notice that any change of possession had occurred, or that their title was in any way imperilled. As was said by Mr. Justice Batty in *Tarubai v. Venkatrao*⁽¹⁾ to constitute an adverse possession against the real owner possession must be in some way or other ostensibly adverse. In this case the possession remained ostensibly that which it had always been, with the result that the purchaser's possession was not adverse to the plaintiffs.

Decree reversed.

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(1) (1902) 27 Bom. 43 at p. 61.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Rao.

UMAR AMANJI MIAJI (ORIGINAL PLAINTIFF), APPELLANT, *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL (ORIGINAL DEFENDANT), RESPONDENT.*

1912.
August 5.

Bhagdari village—Lands forming part of road-ways in village—Ownership of Government—Bhagdar has no right to tether cattle on such lands.

The plaintiff, a *bhagdar*, owned a house in a village which was *bhagdari*. In front of his house lay a piece of open ground, which was part of a way or lane, leading directly from the main public road to the collection of houses situate round about the plaintiff's house. It was open to the villagers and used by them freely upon all occasions. The plaintiff claimed a right to tether his cattle upon the land in question :—

Held, that the land in question, forming a portion of a public road-way, was the property of Government.

APPEAL from the decision of M. B. Tyabji, District Judge of Broach.

Suit for declaration and injunction.

* First Appeal No. 152 of 1910.

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The plaintiff was one of the *bhagdars* in the *bhagdari* village of Kantharia. He owned a house in the village. In front of the house lay a *chauk* (open space) which was in the common enjoyment of himself and other villagers owning houses round about the *chauk*. The *chauk* led to a public road which ran through the village. The plaintiff claimed a right to tether his cattle in the piece of *chauk* that was in front of his house.

In 1904, the Assistant Collector ordered the plaintiff to remove pegs which he had driven into the land for tethering his cattle. The plaintiff appealed against the order unsuccessfully.

In 1903, the plaintiff filed this suit against the Secretary of State for India in Council to obtain a declaration that the defendant had no right to order the removal of the pegs and a permanent injunction restraining the defendant from causing obstruction to the plaintiff's tethering his cattle to the pegs. The plaintiff urged that the land in dispute formed a portion of village sites, which belonged by custom to *bhagdars* in *bhagdari* villages.

The District Judge held that such village sites belonged not to *bhagdars* but to Government, on the following grounds:—

“On a consideration of all the authorities, I hold that *bhagdars* are not owners of the village site. The land in question has not been proved to be a portion of a *bhag*, and the *chauk* appertaining to the *bhag*. It is part of the village site and used as a way by the inhabitants of the houses standing on three sides of it, and by other persons having occasion to go to any of the houses. . . The land in question is, under section 37 of the Land Revenue Code, property of Government.”

The learned Judge therefore dismissed the suit.

The plaintiff appealed to the High Court.

D. A. Khare, for the appellant.

L. A. Shah, Acting Government Pleader, for the respondent.

BACHELOR, J. :—In the suit out of which this appeal arises, the plaintiff, who is a *bhagdari* resident of the *bhagdari* village of Kantharia in Broach, sued for a declaration that the defendant had no title or interest in a certain piece of land in the village site, on which land the plaintiff had fixed pegs for the tethering of his cattle. He sought also a permanent injunction

restraining defendant from interfering with his tethering his cattle on the piece of land in suit which was situated just outside his house. The learned District Judge dismissed the suit, being of opinion, that the *bhagdars* were not, as the plaintiff contended that they were, owners of the village site; that the land in suit was part of a public way used by certain inhabitants of the village, and consequently, under section 37 of the Land Revenue Code, was the property of Government.

In appealing from this decree, the plaintiff, through his pleader, has taken as his main ground the proposition that land in the village sites of *bhagdari* villages is the property of the *bhagdars* and not of the Government. It seems to us that that proposition is not established. On the contrary we agree with the learned Judge in thinking that in such villages the land forming the road-ways through the village site is the property of the Government. The particular strip of land, here in suit, is part of a gully or lane which leads directly from the main public road to the collection of houses situate round about the plaintiff's house. It appears from the map, and it is proved by the village Talati, who upon this point was not cross-examined, that this strip of land in suit is part of a way or lane open to the villagers, and used by them freely upon all occasions. We are of opinion, therefore, that it is established that the somewhat indefinite parcel of land in dispute is a portion of a public road-way.

That being so, upon what ground can the plaintiff claim that he is entitled to the relief which he here seeks. We were referred to the report made by Mr. Peddar in 1862, on the subject of this *narwa* and *bhagdari* tenure. And certain passages in that report were quoted as authority for the view that all the land forming the village site in a *bhagdari* village was the property of the *bhagdars*. It appears to us, however, that no part of the report authorizes any such proposition. Indeed the report itself seems to us to show that the *bhagdari* tenure is nothing more than a particular system of collecting the revebues for the Government. In paragraph 28 of the report, Mr. Peddar says :—“ I have shown, I hope, that

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the *narwadars* and *bhagdars* are merely the old proprietary cultivators, and the system only a mode of sharing the Government demands." A similar view of the meaning of the system was expressed by Lieutenant-Colonel Monier Williams in his "Memoir on the Zilla of Baroochi," and also in Baden Powell's "Land Systems of British India." The result of these historical references is, we think, to show that the tenure is merely one mode of collecting the revenue demands of the Government. But we find no authority for the view that the legal position of Government is altered in reference to the demands of any particular *bhagdar*. The *bhagdar*, it seems to us, is entitled only to those village fields which are assigned to him, and to that portion of the village site which is assigned to him for residence. Those two portions taken together form his *bhag*, which he is not entitled to alienate otherwise than as a whole. What part of the village site is assigned to particular *bhagdars* is shown by the Gabhan-Patrak, which in this case is Exhibit 75, a document prepared in 1866, or within a few years of the passing of the Bhagdari Act. This record shows that the particular piece of land, now in dispute, forms no part either of the plot assigned to the plaintiff's *bhag* or of the plot assigned to any other resident of the village. The inference derivable from this circumstance is strengthened by reference to the Vahivat-patra, Exhibit 64, paragraph 14 of which recites that: "In this village public roads having been made on *bhag* land, such land has been included in Government land." The meaning of that seems to be clear, namely, that public road-ways even when made through lands, which would otherwise be *bhag* land, are included in Government land.

It appears to us, moreover, that so far as the *bhagdari* tenure is concerned, it cannot give the plaintiff any higher title to his assigned land in the village site than he has to his assigned land in the village fields. And in regard to these latter lands he is indisputably liable to pay rent or assessment to the Government. He cannot, therefore, make any claim to the proprietorship of such lands.

In this case, apart from the general considerations to which we have alluded, there is particular evidence strongly in favour of the respondent. The oral evidence, which comes largely from parties interested on the other side, favours the defendant's case rather than the plaintiff's. And the record contains two distinct admissions, and one implied admission, made by the present plaintiff and wholly irreconcilable with the case which he now puts forward in this suit.

Upon the whole, therefore, we agree with the learned District Judge in thinking that the plaintiff has failed to make out the case for which he was contending and that this appeal should be dismissed with costs.

Decree confirmed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Rao.

DWARKANATH AMRIT DESHPANDE AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, v. MAHADEO BALKRISHNA DESHPANDE AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1912.
August 12.

Pensions Act (XXIII of 1871), section 4—Collector—Certificate of Collector—Civil Court—Jurisdiction—Suit for declaration for share in cash allowance—Deshpande Kulkarni Vatan.

The plaintiffs sued for a declaration that they were owners of a share in the Deshpande Kulkarni Vatan which consisted of a cash allowance paid annually from the Government Treasury. They did not produce a certificate from the Collector as required by section 4 of the Pensions Act (XXIII of 1871).

Held, that the suit in the absence of a certificate from the Collector could not be entertained in a Civil Court owing to the provisions of section 4 of the Pensions Act, 1871, inasmuch as the suit was clearly one relating to a pension or grant of money conferred by the British Government.

Babaji Hari v. Rajaram Ballal(1), followed.

Govind Sitaram v. Bapuji Mahadeo(2), distinguished.

*Second Appeal No. 714 of 1911.

(1) (1875) 1 Bom. 75.

(2) (1893) 18 Bom. 516.