## ORIGINAL CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Davar.*

1914.
*August* 14.

YESHWANT VISHNU NENE, APPELLANT AND PLAINTIFF, *v.* KESHAVRAO BHAIJI AND OTHERS, RESPONDENTS AND DEFENDANTS.*

*Fazendari tenure—Sub-lease by a Fazendar.*

The plaintiff, claiming under the original Fazendar, sublet certain land to the defendants' predecessor. The agreement, after reciting (*inter alia*) that the sub-tenant took the land on Fazendari tenure, continued :—

"I shall live there till the Wadi remains in your possession. If the Wadi ceases to be in your possession, and if the land be required, you are to pay me the valuation of the said house whatever the same may come to."

*Held*, on the facts, that, on the true construction of the lease, the plaintiff was not entitled to eject the defendants.

The meaning of the word 'Fazendari,' when it occurs in a written document embodying the contract between the parties, considered, and the remarks of Farran J. in *Parmanandas Jivandas* v. *Ardeshir Framji*(1), approved.

THIS suit was filed by the plaintiff for the recovery of the possession of certain land occupied by the defendants. The lower Court (Beaman J.) dismissed the suit, one of the grounds of dismissal being that the original lessor (under whom the plaintiff claimed), having held the land in relation to Government as a Fazendar and therefore in perpetuity had himself leased it in perpetuity to the defendants' predecessor-in-title by leasing it on 'Fazendari tenure.' The plaintiff appealed.

The terms of the agreement under which the parties claimed and the facts of the case appear sufficiently set out in the judgment of the Appeal Court.

*Setalvad*, with him *Desai*, appeared for the appellant.

*Kanga*, with him *Jardine* (acting Advocate-General), appeared for the respondents.

SCOTT, C. J. :—This is an ejectment suit in which the plaintiff represents the landlord under two agreements

* Original Suit No. 74 of 1913, Appeal No. 9 of 1914.

(1) (1886) Suit No. 263 of 1883. *See* note on p. 320.

of 1859 and 1860 and the defendants represent the tenant under those agreements.

The question is whether the plaintiff is entitled at any time to determine the tenancy which has been subsisting since the date of those agreements.

Now, the first of them, Ex. A, is dated the 5th of March 1859, and the tenant there agrees as follows :—

"There is your Wadi by name Charni situate on the sea-shore. I have taken the land Fazendari (or on Fazendari or as Fazendar) being a portion of this Wadi on the southern side for building a Cadjan house..... On this land I shall build a house at my cost within Rs. 50. The ground rent in respect of the same is fixed at Rs. 6 per annum which I will continue to pay from year to year. I will pay the bill of assessment, and, if at any time you be in need of the ground appertaining to this house, I am to give the said ground to you and you are to pay me Rs. 50 being the valuation thereof agreeably to what is written above."

At that time the intention was to build a Cadjan house of the value of only Rs. 50 and the tenant agreed to give up ground whenever it was required by the landlord.

In the following year, an agreement, somewhat different in terms, was entered into. It recites that the tenant has taken on Fazendari land in the Wadi for the purpose of building a Cadjan house thereon. The agreement then continues :—

"I shall build a house in the said Wadi at my own cost. The Fazendari rent in respect thereof is fixed at Rs. 9 per annum which I will continue to pay to you from year to year..... Should assessment be required to be paid in respect of the said house I will pay it whatever the same may come to. I shall build a house on this land and live in it peacefully. I shall live there till the Wadi remains in your possession. If the Wadi ceases to be in your possession and if the land be required, you are to pay me the valuation of the said house whatever the same may come to. Otherwise I shall pull down my house and remove it."

It is to be observed that the value of the house is not stated in that agreement, but the rent is raised fifty per cent. from Rs. 6 to 9 and the condition as to

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surrender is worded quite differently. The tenant is to live in the Wadi so long as it remains in the possession of the landlord. He is to be paid the valuation of the house when the Wadi ceases to be in the landlord's possession and the land is required. Therefore his possession will not cease merely upon the wish of the landlord. For instance, if the landlord remains in possession and wishes him to vacate, he would not have to vacate according to the condition in the second agreement.

Now, we think that the landlord whose possession is contemplated there must include both the landlord and his assigns and in the same way the tenant would include his assigns. Here we have a suit in which the landlord sues to eject according to the terms of the agreement while he remains in possession of the Wadi and the land is not required by any one else. It appears to us that under the terms of the agreement he has no right in such circumstances to eject the tenant. That disposes of the suit and the decree of the lower Court dismissing the suit must be affirmed.

It must not be supposed, however, that we accept the view of the lower Court with regard to the meaning of Fazendari when it occurs in a written document embodying the contract between the parties. On that point, we entirely agree with the remarks of Mr. Justice Farran in *Parmanandas Jivandas* v. *Ardeshir Framji*[a].

We also do not agree with the learned Judge in holding that the plaintiff's suit is barred by limitation. In the letter of the 7th of July 1871, the tenants, who were then Atmaram Bhikaji and Bhai Lakshmanji, predecessors-in-title of the present defendants, instructed their

(1) (1886) Suit No. 263 of 1883. *See* note on p. 320

attorneys to say that they did not recognize Ramnath Dadaji, predecessor of the present plaintiff, as the Fazendar of the premises and could not see what right he had to interfere. Unless, therefore, Ramnath showed them that he was the Fazendar, they would complete purchase without regard to the threats contained in his letter. Then on the 19th of July, after having been informed of the title of Ramnath Dadaji, the attorneys of Atmaram Bhikaji and Bhai Lakshmanji stated that they were ready and willing to pay rent at the rate of Rs. 9 per annum if Ramnath removed the foundation of the wall which he had laid in front of their clients' house and allowed the use of the old privy.

There is, therefore, no denial of the title of Ramnath Dadaji as the landlord of this ground, and, although there is no evidence that rent was paid between 1871 and 1901, the mere non-payment of rent by a tenant, if the tenancy is not determined, does not give him a right to the property as against his landlord. Then it appears that in 1901 the plaintiff sued the defendants for rent according to the terms of the agreement of 1860, and, after evidence had been given by the plaintiff, the defendants agreed to a decree for the amount of rent prayed, on condition that the summons in the suit was amended by the insertion of the word "Fazendari" as indicating the nature of the rent. We are of opinion that that word, even though agreed upon as indicating the nature of the rent, does not decide the terms upon which the defendant held and still holds for his tenure must depend upon the terms of the agreement of 1860. Upon the terms of that agreement, we are of opinion, for the reasons already stated, that in the circumstances which have been established in this case, the plaintiff has no right of ejectment.

We, therefore, affirm the decree of the lower Court and dismiss the appeal with costs

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Attorneys for the appellant: Messrs. *Dikshit and Purushottamrai.*

Attorneys for the respondents: Messrs. *Judah and Solomon.*

*Appeal dismissed.*

K. McI. K.

NOTE.—The following is the material portion of the judgment delivered by Farran J. in *Parmanandas Jivandas* v. *Ardeshir Framji*, on the 2nd December 1886.

FARRAN, J.—The plaintiff in this suit claims to eject the defendant from, and to recover possession of, a piece of land at Bhundarwara Hill in the Island of Bombay admeasuring 675 square yards. He also claims damages from the defendant on account of his wrongful occupation of the land.

The defendant as to about 575 square yards of the land claimed by the plaintiff denies the right of the plaintiff to eject him therefrom, and claims to hold the same from the plaintiff upon a Fazendari tenure which gives him the right to remain in possession of the land upon payment of a fixed annual rental of annas two per square yard so long as the plaintiff's title to the Bhundarwara Hill continues. As to the residue of the 675 square yards the defendant lays no claim thereto, and says that he is not in actual occupation thereof.

It is not denied that the plaintiff is the holder under Government of the Bhundarwara Hill of which the pieces of land, the subject-matter of this suit, form part. By indenture of lease bearing date the 1st October A.D. 1794, the East India Company demised the Bhundarwara Hill to one W. H. Blachford for ninty-nine years from the date of the lease at an annual rental of Rs. 324-4-0 and a premium or fine of one *phara* of *bhat* at the expiration of every twenty-one years of the term. The lease also contained a covenant by the East India Company that they would, upon the expiration of the term, and upon the application of the heirs, executors, administrators of the lessee, regrant and renew the said lease on the same terms and conditions upon their paying to the lessor an additional fine or premium of Rs. 90 for such renewal, and it was further provided that, if the said leases should not be renewed, the lessors would pay to the representatives of the lessee half the real value of the buildings and plantations which should then be on the land demised. The lease, therefore, unless renewed by the plaintiff, will expire upon the 1st of October 1893.

The plaintiff is now the assignee of this lease. By various mesne assignments, which have not been put in evidence, it passed to Canjee Chattoor, the

grand-father of the plaintiff. Canjee Chattoor died in 1859 having devised his property, including the Bhundarwara Hill, to his sons Runchordas Canjee and Jiwandas Canjee. Jiwandas Canjee died intestate on the 2nd March 1859 leaving the plaintiff, then a minor, his only son. Runchordas Canjee died without issue in the year 1859 leaving a will bearing date the 12th May 1859, by which, subject to certain bequests, he purported to devise and bequeath the whole of the property left by Canjee Chattoor to the plaintiff. This will was proved on the 30th June 1859, by Lakhmidas Damji, Bhanabhai Dwarkadas and Jivraj Champsi, three of the executors named in it. On the 4th May 1870, the executors made over the property comprised in the will of their testator to the plaintiff, he having then attained the age of eighteen years. The above is the nature of the tenure upon which the Bhundarwara Hill property is held by the plaintiff, and of the plaintiff's title to it.

I proceed to consider how the defendant became a tenant upon the property. The nature and incidents of that tenancy are the questions to be determined in this suit. D. and M. Pestonji were the assignees of the lease of the Hill in 1850. The earliest document connected with the defendant's title is a certificate dated the 24th January 1850 by which D. and M. Pestonji certify "that one Manekbai had their permission to build her house upon their ground, part of Bhundarwara Hill—Collector's No. 19 of ground rent for which she pays to us ground rent." No further description of the land is given in the certificate. In the first document in the bundle, Ex. G, which was produced by the defendant and put in by the plaintiff, Manekbai was the sister of the defendant's father.

The next document in order of date is Ex. D. The plaintiff says that he received it from the executors of Runchordas Canjee in 1870. It bears date the 20th March 1850. It purports to be an indenture of lease between D. and M. Pestonji of the one part and Manekbai of the other part whereby the lessors demise to Manekbai all that piece or parcel of land on Bhundarwara Hill more particularly described in the plan annexed whereon it is coloured red and which contains 189 square yards or thereabouts, to have and to hold the same unto Manekbai, her executors, etc., from the 1st January 1850, as a monthly tenant yielding and paying therefor on the first day of every month the rent or sum of Rs. 1-15-6, and whereby Manekbai covenants with the lessors to pay the said monthly rent and that she will, at any time within one month, next after any notice in writing given to her, quit and deliver up the demised premises to the lessors, and that she will not assign or part with her interest in the said demised premises or in any part thereof without the consent in writing of the lessors first had. And it is provided that in case of the rent being in arrears for ten days after demand, or if the lessee attempt to assign or shall not deliver up possession to the lessors after notice, the lessors may re-

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enter, and that the lessee shall be liable to pay Rs. 5 per diem for every day she shall remain on the premises after the expiration of the notice to quit.

This document purports to be signed and sealed by Manekbai. No corresponding document executed by the lessors is produced by the defendant and he says that he never saw or heard of such a document.

There is no ground for doubting the genuineness of Ex. B. It is more than thirty years old and came from the proper custody. From the first rent receipt produced by the defendant it appears that Manekbai paid Rs. 23-10 as a year's ground rent for 189 square yards at Bhundarwara to the trustees of D. and M. Pestonji for the year ending 31st December 1850 : see Ex. G2. In that year at all events Ex. B may be presumed to have been acted on and to have contained the terms upon which Manekbai held the 189 square yards of land demised by it.

In the next year, 1851, Canjee Chattoor became the assignee of the lease of Bhundarwara Hill. He adopted the printed form of lease used by his predecessors-in-title changing only the names of the lessors to his own, and the plaintiff produces a document in such printed form bearing date the 8th December 1851 containing terms the same as those in Ex. B. By it Canjee Chattoor purports to lease to Manekbai 208 square yards of land at Bhundarwara Hill as a monthly tenant at the rental of Rs. 2-2-8 per month from the 1st January 1851. This also purports to be executed by Manekbai, see Ex. C. Under this lease Manekbai paid rent for 1851, for the defendant produces a receipt in her favour signed by Canjee Chattoor for a year's ground rent, from 1st January 1851 to 31st December of that year, of a spot at Bhundarwara Hill containing 208 square yards : see Ex. G3. No receipt is produced for the rent payable for this year under Ex. B.

The defendant produces a receipt signed by Canjee Chattoor in favour of Manekbai for the rent of 344 square yards of vacant ground situated at Bhundarwara Hill No. 28 for one year from 1st January to 31st December 1852, Rs. 43. Deduct as allowed Rs. 9 = Rupees 34. See Ex. G4. No. 28 is the number borne by the lease Ex. C.

The aggregate of the land leased by Ex. B and Ex. C is 397 square yards (189+208) and does not correspond with the amount of land mentioned in this receipt, Ex. G4. The rental renewed by Ex. B amounts to Rs. 23-10 per annum and that by Ex. C to Rs. 26 = Total Rs. 49-10.

The receipt produced by the defendant for 1853 is for yearly rent of the vacant ground situated at Bhundarwara occupied by Manekbai from 1st January to 31st December 1853 measuring 344 square yards, rent Rs. 43 : see Ex. G5.

The receipt produced by the defendant for 1854 is for the annual rent of the vacant ground situated at Bhundarwara occupied by you from 1st January to

30th January 1854, Rs. 19-8. From 1st July to 31st December measuring 247 square yards Rs. 15-7 = Total Rs. 34-15. Ex. G6.

The next receipt is important. I transcribe it.

"To amount of Fazendari rent of 247 square yards of ground situated at Bhundarwara Hill, Mazagaon, for one year from 1st January to 31st December 1855, Rs. 30-14, Bombay 1st January 1856, E. E. and contents received. (Signed Canjee Chattoor)" G7. The only oral evidence adduced down to the period of term is that of the defendant who says that he first knew the land in 1855; that there was then a masonry building upon it which was at that time about five years old. This, I consider, must have been on the land referred to in the receipt Ex. G7.

From the foregoing I am asked by the plaintiff to draw the conclusions :—

(1) That the 247 square yards of land referred to in the receipt Ex. G7 are the same land as the land leased by Ex. B and Ex. C together or form part of the same land which amounted to 397 square yards.

(2) That the land referred to in the receipt Ex. G7 continued to be held upon the terms of Ex. B and Ex. C at the date of Ex. G7 and after that date.

There is no description of the land leased by Ex. B other than that contained in the plan annexed to it which shows that it lay to the West of Lawrence De Lima Street. There is no description of the land demised by Ex. C other than that it was in Bhundarwara Hill, but, as Manekbai built a house before 1855 on the land comprised in receipt Ex. G7 and as it lies to the West of Lawrence De Lima Street and as it is not alleged that she held any land at Bhundarwara Hill other than the lands in respect of which the defendant produces the rent-receipts and as the number in G7 corresponds with the number in Ex. C and as no suggestion has been made to the contrary, I consider that I am justified in assuming that the 247 square yards of land referred to in Ex. G7 formed portion of the 397 square yards leased by Ex. B and Ex. C taken together.

There is of course a strong presumption that land once shown to be held under a written instrument of lease continues to be held under it as long as it is occupied by the same tenant, and, unless the contrary is shown by evidence of a cogent nature, a jury would be directed to draw an affirmative inference to that effect.

The following circumstances may be urged in this case as rebutting that presumption :—

(*a*) That the land held by Manekbai in 1855 was less by 150 square yards than the land leased to her by Ex. B and Ex. C.

(*b*) The general improbability of any prudent person building upon land held under the stringent conditions contained in the leases Ex. B and Ex. C and on the precarious tenure created by these leases.

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(c) That in 1855 the form of the rent bill sent to Manekbai was altered by the introduction of the word "Fazendari" before the word "rent".

The reduction in the quantity of land held by Manekbai is not a matter of weight. The land was held upon a monthly tenure. Part of the extra quantity taken up in 1851 was probably necessary for her when engaged in building her house which she would naturally give up when her house was completed. She apparently gave it up at the end of the year 1851. That of itself would not alter the tenure of the residue or raise any presumption tending in that direction.

The apparent imprudence of Manekbai building upon land held upon such a frail tenure is not of great importance inasmuch as the building certificate of 1850 and her having built or commenced to build in that year show that she must have considered the terms of Ex. B such as to justify her in laying out her money upon the land held under it. Land was less valuable then than it is now and she probably relied upon the honour of D. and M. Pestonji and of Canjee Chattoor, forgetting that their successors-in-title might not possess or inherit the same feelings.

There remains the introduction of the word "Fazendari" into the rent bills.

The circumstances existing at the time this was done do not favour the contention that the tenure was then altered.

The rent was continued at the same rate As. 2 per square yard per annum. It is unlikely the lessor would have abandoned the advantages he possessed under the leases B and C without obtaining some corresponding advantage in the shape of an increased rental. Manekbai's house had been then long completed. There was no change in ownership; why then a change of tenure? The time when Manekbai commenced to build would presumably be the time when she would have taken steps to strengthen her tenure and not when her house had been completed and she had no means of compelling her landlord to accede to her wishes.

At this time Canjee Chattoor was granting leases in the same form as Ex. B and apparently for building purposes. See Ex. H and I put in as specimens. One of these is a monthly, and the other is a yearly tenancy. He has not been shown to have leased any land upon a more permanent tenure.

If such a very important change was effected in 1855 in Manekbai's tenure it must have been of design on Manekbai's part, and at her request. Would she not have obtained some writing evidencing the change, and not rested content with a mere change of wording in her rent bills?

The whole theory of a change of tenure rests therefore upon the introduction of the word 'Fazendari' into the rent bills, and this leads to a consideration of

what is the generally accepted meaning of that word. ' No evidence has been given upon this point. My experience is that it is used with reference to tenants holding under a private landholder to indicate sometimes an indefeasible right to hold in perpetuity on payment of a small quit or ground rent and sometimes any kind of tenure agreed upon between the parties.

Perry C. J. in *Doe d. Dorabji* v. *Bishop of Bombay*(1) thus says that the true meaning of ' Fazendari land ' is land not belonging to Government. " A Fazendar occupying and tilling land himself, and paying a fixed rent to Government ; or one making contracts with tenants to occupy the Fazendari land on terms to be agreed between them ; or one merely receiving a certain fixed sum by virtue of ancient usage, are all Fazendars in the eye of Government, and in the popular language of the Bazar. But in these three persons we perceive three different characters, with wholly different legal relations attachable to them, and for the most part equivalent to our English notions of a tenant in fee simple holding of a superior lord by rent service, a landlord demising at rack rent, and a party seized of an ancient rent issuing out of the land. But as this ambiguity is contained in the word Fazendar, we must be cautious how we apply general propositions to the term."(2) Yardley J. at page 508 of the report attaches similar meanings to the term ' Fazendar ' in Fazendari tenure.

The word being thus ambiguous it would be dangerous to assign to its introduction into a rent bill an indication that the parties thereby intended that a monthly tenancy should be converted into a perpetual one. In this case the framers of the rent-bills produced by the defendant have varied the language in describing the rent paid by the holder of the land in question from time to time. The description is generally inaccurate. In my judgment the introduction of the word ' Fazendari ' into the rent bills may indicate a change in the person of the English writer who drew them out for Canjee Chattoor or a desire on the part of that gentlemen to have the title of Fazendar attached to his name just as much as a change in the tenure under which the land was held. The title of Fazendar as it was used to describe the plaintiff in the case of *Doe d. Dorabji* v. *Bishop of Bombay*(1) was quite inapplicable to Canjee Chattoor who held under the leases from Government of which he was assignee.

For these reasons I am unable to hold that there is any proof that Manekbai's tenure of the land she held was of a permanent character such as is described as a Fazendari tenure in the more limited sense.

(1) (1848) Perry O. C. 498. (2) (1848) Perry O. C. 506