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the questions which have arisen decided by the Courts below. There the costs were allowed out of the estate. As regards the present appeal, their Lordships think that justice will be done if the appellant has no costs and the 10th and 11th respondents who contested the appeal have their costs, as between party and party, out of the estate. The trustees do not appear separately on the appeal. They will be entitled to have reimbursed to them any expenses to which they have been put by it.

Solicitors for appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for respondents Nos. 10 and 11: Messrs. *Latley & Hart.*

Solicitors for respondents Nos. 5 to 9: Messrs. *Sandersons & Orr Diquams.*

A. M. T.

PRIVY COUNCIL.*

P. C.* 1923. *July* 10.

MADHAVRAO WAMAN SAUNDALGEKAR AND OTHERS, DEFENDANTS *v.* RAGHUNATH VENKATESH DESHPANDE AND OTHERS, PLAINTIFFS.

[On Appeal from the High Court at Bombay.]

Watan lands—Claim to permanent tenancy—Limitation—Adverse possession—Statutory restriction on alienation—Bom. Act III of 1874, sec. 5.

Persons who and whose predecessors in title have claimed to be, and were, tenants of service watan lands cannot acquire title to a permanent tenancy of the lands by adverse possession as against the watandars from whom they hold.

Radhabai v. *Anantrav Bhagvant Deshpande* (1885) 9 Bom. 198, distinguished and commented upon.

Having regard to the prohibition, imposed in the interest of the State by Bom. Act III of 1874, section 5, against alienation by a watandar,

* *Present*:—Lord Sumner, Lord Phillimore, Sir John Edge and Mr. Ameer Ali.

Quaere, whether even a stranger claiming under an absolute assignment from a watandar can acquire by adverse possession title against the grantor's successor ; also, whether, upon a contention that title has been so acquired, the Secretary of State for India in Council is not a necessary party.

Judgment of the High Court affirmed.

APPEAL (No. 89 of 1922) from a judgment and decree of the High Court (June 17, 1918) reversing a decree of the Subordinate Judge of Belgaum.

The suit was brought by the first three respondents against the appellants for rent and to recover possession of certain land between 16 and 17 acres in extent, being service watan land of the respondents' family. The appellants' claim was that they had acquired a right to be perpetual tenants of the land by adverse possession.

The facts appear from the judgment of the Judicial Committee.

The trial Judge dismissed the suit, so far as possession was claimed, but upon appeal to the High Court that part of the decree was set aside, and a decree made in favour of the plaintiffs for possession and mesne profits.

1923 June 8, 11—*Sir George Lowndes K. C.* and *Kenworthy Brown*, for the appellants :—Neither the agreement of 1872 nor the award of 1894 affected the adverse character of the appellants' possession under their claim of a permanent tenancy ; their title was complete under section 28 of the Indian Limitation Act and the suit was barred. Reference was made to *Trimbak Ramchandra* v. *Shekh Gulam Zilani*[1] and *Ram Chunder Singh* v. *Madho Kumari*[2].

E. B. Raikes, for respondents Nos. 1, 2 and 3 :—The claim was not barred by adverse possession. The appellants' position was analogous to that of the holder of a permanent lease from the mahant of a math ; upon

[1] (1909) 34 Bom. 329.

[2] (1885) 12 Cal. 484 at pp. 493, 494 ; L. R. 12 I. A. 188 at pp. 196, 197.

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payment of rent to each successor of the grantor there was a continuance of the tenancy for that successor's life: *Vidya Varuthi Thirtha* v. *Balusami Ayyar*[1]. The decision in *Trimbak Ramchandra* v. *Shekh Gulam Zilani*[2] was based upon a misunderstanding of *Radhabai* v. *Anantrav Bhagvant Deshpande*[3]. The tenants were entitled to possession, and no suit would lie to set aside their assertion of permanent rights: *Rajah Nilmony Singh* v. *Kally Churn Battacharjee*[4].

Sir George Lowndes K. C., in reply.

July 10.—The judgment of their Lordships was delivered by

SIR JOHN EDGE:—The suit in which this appeal has arisen was brought on 22nd October, 1914, in the Court of the First Class Subordinate Judge of Belgaum by watandars for the ejectment of the defendants from service watan lands in Mauza Bhivashi in Taluka Chikodi in the District of Belgaum, and for mesne profits. The defendants are not watandars, nor is any one of them a watandar, of the watan. The defendants Nos. 1 to 4 in their written statement allege that they, from before 1853, acquired adversely to the family of the plaintiffs a right to the possession of the lands in question as permanent tenants, and enjoyed that right for more than twelve years before suit in the lifetime of the father of the plaintiffs, and that "the cause of action arose in the year 1865, when the plaintiffs' grandfather died". The title, if any, of the other defendants depends on the title of the defendants Nos. 1 to 4.

The facts of the case will be briefly stated presently, but in order to see whether under those facts the defence of adverse possession is maintainable, it is necessary to bear in mind what the law as to the

(1) (1921) 44 Mad. 831 at p. 855; L. R. 48 I. A. 302 at p. 307.
(2) (1909) 34 Bom. 329.
(3) (1885) 9 Bom. 198.
(4) (1874) L. R. 2 I. A. 83.

alienation by a watandar of his service watan lands was, in 1853, and has been down to the institution of this suit.

Regulation XVI of 1827 was passed by the Governor of Bombay in Council on the 1st January, 1827. Before that Regulation was passed a watandar could, apparently without the sanction of the Government, assign or mortgage his service watan lands and could grant to any one a permanent lease of them, but the effect of sections 19 and 20 of that Regulation was to prohibit, in the interests of the State, all such watandars from alienating in any way the service watan lands which they held as watandars. Sections 19 and 20 of that Regulation applied to the lands in suit. Sections 19 and 20 of that Regulation continued in force until they were repealed by Bombay Act III of 1874, but the repeal of those sections by Act III of 1874 did not make valid any alienation of service watan lands which had been prohibited by Regulation XVI of 1827 (*Padapa* v. *Swamirao*[1]). Section 5 of Bombay Act III of 1874 now applies to the lands in question.

That section is as follows :

"No watandar shall, without the sanction of Government, sell, mortgage, or otherwise alienate or assign any watan or part thereof or interest therein to any person not a watandar of the same watan."

That section of Bombay Act III of 1874 was passed, as was section 20 of Regulation XVI of 1827, in the interests of the State and not in the interests of the watandars only. The granting by a watandar of a right of permanent tenancy in lands of his watan would undoubtedly be an alienation within the meaning of section 20 of Regulation XVI of 1827.

The facts of the case may be briefly stated as follows. The lands in suit are service watan lands, and were in

[1] (1900) 24 Bom. 556 at p. 561, L. R. 27 I. A. 86, 90.

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the possession of Appaji, who was the grandfather of the defendants Nos. 1 and 2 and the uncle of the defendants Nos. 3 and 4. In 1853, Appaji held those lands and other service watan lands of the watan as a tenant of Venkatrao, the watandar, at a yearly rent of Rs. 42. Venkatrao was the grandfather of the plaintiffs. Some of these lands which Appaji held as a yearly tenant were, in or before 1853, taken by the Government for the purpose of making a public road, and consequently Appaji and Venkatrao agreed to readjust the rent by reducing it to Rs. 36 a year. That agreement was embodied in a document which was signed by Venkatrao on the 15th March, 1853. That document, as translated, is as follows:—

"Shri,

In the service of Rajashriya Virajit Rajmanya Rajashri Appajipant Appa Saundalgekar residing at Nipani.

Profound salutations of *protege* Venkatrao Narayan Deshpande, Prant Kagal. Special representation is as follows. Further. Our Deshpandki land measuring 15 bighas, situate in Mauze Bhivshi, Prant aforesaid, stands in the name of Ti. Rajeshri Dajipant Baba, and I am the owner of the same. So from before the said land has been given you for cultivation for a fixed rent of Rs. 42 forty-two in Panali coin and at the time of survey a road is shown in the said land and in it some land was covered by the road. Therefore Rs. 6 (six) out of the said amount of rent are remitted to you and that the said land is given you for cultivation by fixing a rent of Rs. 36 thirty-six in Panali coin per year. So from the Fasli year 1262 (1852-1853) you should pay every year thirty-six rupees the amount of said rent by four instalments, and you should cultivate the land permanently. In the interval we shall never interfere with the land (that is) with you. After you, your heirs also should pay the amount of rent according to the said agreement and permanently enjoy the land. We are entitled to receive the amount of rent of the land and we are not at all entitled to take away the land from you and you should not give it up. Neither we nor our heirs will put forth any obstructions to act according to the agreement. The agreement is duly given in writing as above. Date 15th March, 1853 being Sur year 1253. Fasli year 1262. May you be gracious. This is the request.

Written by Abaji Nilkant Kulkarni, Mauze Shirgopi.

Venkatrao Narayanrao Deshpande, Sadal.

ATTESTATIONS.

1 Keshawa Vithal Mutnalkar, residing at Nipani, my own handwriting.

1 Narhar Yeshwant Dahiwadkar, my own handwriting."

That document was registered, and in accordance with it, Appaji paid the yearly rent of Rs. 36 to Venkatrao until Venkatrao died in 1864 or 1865.

Venkatrao was succeeded as watandar by his son, Ramchandra, who was the father of the plaintiffs. After Venkatrao had died, one Gundo, in 1869, brought a suit against Venkatrao's widow, to recover a debt which had been due to him by Venkatrao, and obtained against her a decree. In execution of that decree Gundo caused the land now in suit to be attached. Appaji intervened with an application to set aside the attachment on the ground that he held the lands as a permanent tenant, and thereupon the Court, on the 20th June, 1870, ordered that the landlord's interest in the lands should be sold without affecting Appaji's interest as a permanent tenant. At the sale, in execution of his decree, Gundo became the purchaser. It is not necessary to consider whether the Court had any power to order that sale.

On the 17th January, 1872, it was agreed between Gundo and Appaji, by registered document, that Appaji, as the permanent tenant of the lands in suit, should pay to Gundo the Rs. 36 rent and for twenty years an additional sum of Rs. 42 a year. The Rs. 36 and Rs. 42 were paid yearly from 1872 to 1890 to Gundo by Appaji and after his death by his son Waman, who was the father of the defendants Nos. 1 and 2.

On the 16th May, 1887, Ramchandra, the father of the plaintiffs, who was then the watandar, executed a document, which was registered, by

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which he purported to grant to one Sintre a permanent lease of the lands now in suit at a rent of Rs. 50 a year, with a nazrana of Rs. 700, and put Sintre in possession of the lands. This led to disputes between Sintre, Waman, Gundo and one Nana Babaji Patil, who claimed to have bought the lands in execution of some decree: the disputes were referred by those persons to arbitration. Ramchandra was not a party to that arbitration. In that arbitration, Waman stated that he had been temporarily deprived of the possession of the lands. On the 1st January, 1894, the arbitrators made their award and by it ordered that Waman should pay Rs. 700 to Sintre, Rs. 340 to Gundo and Rs. 1,150 to Nana Babaji, and should continue to enjoy the lands as a permanent tenant. That award was, on the 29th March, 1894, made a decree of Court. The payments so ordered were made by Waman. From 1895 to 1902 Waman paid the rent of Rs. 36 a year to Ramchandra. In Ramchandra's receipts for those payments he acknowledged that Waman held the lands as a permanent tenant. In the Record of Rights of 1911-12 the defendant No. 1 was entered as the permanent tenant of the lands. Upon the death of Ramchandra the defendants tendered to the plaintiffs the rent of Rs. 36 yearly as their rent as permanent tenants, but the plaintiffs refused to receive the money so tendered. Ramchandra died on the 29th October, 1902, and the plaintiffs succeeded him as the watandars. Upon the facts which have briefly been stated being proved the Subordinate Judge found that the evidence in favour of the permanent tenancy alleged by the defendants Nos. 1 to 4 was overwhelming. He stated in his judgment that :—

"It is undisputed that the land sued for is a Deshpande Vatan (Watan) Inam. There is no doubt that the original grantor (Venkatrao) had only a life interest in it and had no power to lease it beyond his lifetime.

Plaintiff's grandfather (Venkatrao), who passed (granted) the lease of 1853, died in 1864-5, and the plaintiffs' father (Ramchandra) had 12 years from that time for disputing the lease. Not having done so, plaintiffs' right of disputing the permanent lease and of claiming possession is barred : *Rama* v. *Shamrao*[1]; *Radhabai* v. *Anantrav*[2]."

The Subordinate Judge gave the plaintiffs a decree for six years' rent at the rate of Rs. 36 a year, amounting to Rs. 216, and otherwise dismissed the suit with costs.

From that decree the plaintiffs appealed to the High Court at Bombay. The appeal was heard by Sir Basil Scott, C. J., and Mr. Justice Hayward. Those learned Judges stated that : " The only question which really arises in this appeal is whether the defendants can claim to have established a right to a permanent tenancy by adverse possession." They held that adverse possession commenced to run on the death of Venkatrao, but they referred to the agreement of the 17th January, 1872, between Gundo and Appaji, and holding that Gundo, after the purchase by him in 1870, represented the watandar so far as these lands in question are concerned, they decided that it was impossible to hold that adverse possession in favour of the person claiming to be a permanent lessee continued to run after that agreement. If that decision were correct, as to which it is not necessary for their Lordships to express any opinion, Appaji and his son Waman were not holding adversely from January, 1872, until 1891. Those learned Judges also held, and their Lordships think rightly, that there had been two breaks in the alleged adverse possession within 12 years of the death of Venkatrao, but they do not base the advice which they will give to His Majesty upon that fact. Those learned Judges, in conclusion, stated in their judgment that : " It appears to us, therefore, that the defendants

(1) (1904) 7 Bom. L. R. 135. (2) (1885) 9 Bom. 198.

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cannot, on a review of the occurrences during the lifetime of the plaintiffs' father (Ramchandra), contend that there has been any continuous adverse possession for 12 years until the plaintiffs' father's death in 1902, which would entitle them to claim to occupy the land in suit as permanent tenants. It is not disputed that since 1902 the plaintiffs declined to accept rent from the defendants, and that their suit has been filed within 12 years of their father's death. For these reasons we set aside the decree of the lower Court and pass a decree in favour of the plaintiffs for possession and mesne profits of the land in the occupation of the defendants", with all costs. From that decree the appeal has been brought by the defendants Nos. 1 to 4. The other defendants are nominal respondents to this appeal; they have not appeared.

One of the authorities upon which the Subordinate Judge relied for his decision that the suit of the plaintiffs was barred by limitation was *Radhabai* v. *Anantrav Bhagvant Deshpande*[1]. That was a Full Bench decision of the High Court of Bombay in which Sir Charles Sargent, C. J., delivered the leading judgment. The judgments of the late Sir Charles Sargent always deserve and receive careful consideration by the Board. The material point of that decision, so far as it has a bearing on the present case, is briefly stated in the head note to the report of that case thus :—

"*Held* (1), that, in the absence of fraud and collusion, adverse possession for twelve years during the lifetime of one holder of service *watan* lands is a bar to succeeding holders."

The lands there in question were service watan lands, to which section 20 of Regulation XVI of 1827 applied. The plaintiff there sued for the possession of service watan lands and for mesne profits. The defendants claimed to be in possession of the lands under a

[1] (1885) 9 Bom. 198.

grant of 1838 to them of the lands made by the plaintiffs' grandfather, who was, at the time of the grant, the watandar, and they pleaded limitation by adverse possession ; the adverse possession relied upon by the defendants being apparently their having continued in undisturbed possession for a period of 12 years after the death of the grantor. The plaintiff's case was that his grandfather, the grantor, had no power to make a grant of the lands except for his lifetime and that his (the plaintiff's) father had no authority to allow the lands to continue in the possession of the defendants. Sargent, C. J., and Mr. Justice Nanabhai Haridas had referred three questions to the Full Bench. It is only necessary to refer to the first of those questions which was: "1. Whether adverse possession for 12 years during the lifetime of one holder is a bar to succeeding holders?" The Full Bench decided that in the absence of fraud and collusion, the first question should be answered in the affirmative, leaving what is to be considered an adverse possession to be determined in each particular case. The question and answer to it of the Full Bench would, when looked at in ignorance of the facts of the case, appear to be general and not confined to a case of an absolute assignment of service watan lands by a watandar to a stranger, who alleged that he had obtained title by 12 years of undisturbed possession. It is necessary to see what that answer to the first question really meant. And for that purpose, it is, in their Lordships' opinion, necessary to see what the alienation then in question really was. It was not an alienation by a lease of a permanent tenancy to a tenant of the watan ; it was a sale and absolute assignment to a stranger to the watan and to the family of the watandar, followed by a period of 12 years after the death of the grantor, during which the stranger assignee was allowed by the successors of the watandar grantor to

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continue in undisturbed possession of the watan lands. In either case the grant would be beyond doubt an alienation which was prohibited by section 20 of Regulation XVI of 1827, but having regard to the facts of the case which was before Sir Charles Sargent, C. J., and Mr. Justice Nanabhai Haridas, which justified their order of reference to the Full Bench, all that the Full Bench can be taken as having decided was that a stranger to the watan, who had got possession of service watan lands by an absolute assignment to him by a grantor, who was at the time of the grant the watandar, could successfully defend a suit for possession of those lands by a subsequent watandar by proving that after the death of the grantor he had been in undisturbed possession of the lands for a period of 12 years. A careful consideration of Sir Charles Sargent's judgment, as given in *Radhabai and Ramchandra Konher* v. *Anantrav Bhagvant Deshpande*[1] shows that he was considering the question referred to the Full Bench from the point of view of the grantee having been a stranger to the watan. It is not necessary for their Lordships to decide in this case whether the answer of the Full Bench, limited as it must have been to the case of a stranger to the watan, setting up as a defence, 12 years' adverse possession, was or was not correct, although they are constrained to say that it is somewhat difficult to see how a stranger to a watan can acquire a title by adverse possession for 12 years of lands, the alienation of which was, in the interests of the State, prohibited. Their Lordships may say, further, that if it was necessary for them to decide whether the answer of the Full Bench to the first question referred to that Bench was or was not correct it would be necessary for them to consider whether the Secretary of State for India in Council, as representing

[1] (1885) 9 Bom. 198 at p. 210.

the interests and rights of the Crown in service watan lands, was not a necessary party to a suit in which a stranger claimed that he was entitled to those lands by a right of adverse possession.

In the present case the defence of 12 years' adverse possession as permanent tenants is set up by persons who and their predecessors in title, always claimed to be and were tenants of service watan lands, and in the opinion of their Lordships neither the defendants nor their predecessors in title could have acquired any title to a permanent tenancy in the lands by adverse possession as against the watandars from whom they held the lands.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor for appellants: Mr. *Edward Dalgado.*

Solicitors for respondents Nos. 1, 2 and 3: Messrs. *T. L. Wilson & Co.*

A. M. T.

ORIGINAL CIVIL.

Before Mr. Justice Mulla.

K. F. NARIMAN, PLAINTIFF *v.* MUNICIPAL CORPORATION OF BOMBAY, DEFENDANTS*.

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March 19.

City of Bombay Municipal Act (Bombay Act III of 1888), sections 36 (p), 16 (g) to (l)†*—'Interest' of councillors to vote at meetings of Corporation,*

* O. C. J.: Suit No. 753 of 1923.

† The material portion of these sections are :—

36 (*p*). A councillor shall not vote or take part in any discussion of any matter before a meeting in which he has, directly or indirectly, by himself or by his partner, any share or interest such as is described in clauses (*g*) to (*l*), both inclusive, of section 16, or in which he is professionally interested on behalf of a client, principal or other person.