and which only state the ordinary well accepted procedure under this type of legislation, that the onus of proof is on the applicants to allege that they are entitled to the benefit of the Act.

Under these circumstances the appeal will be dismissed with costs.

Appeal dismissed.

J. G. R.

APPELLATE CIVIL

Before Sir Amberson Marten, Kt., Chief Justice, and Mr. Justice Crump

1927
August 23

BHAILAL NATHABHAI (ORIGINAL DEFENDANT), APPELLANT *v.* KALANSANG GULABSANG AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Landlord and tenant—Tenant claiming permanent tenancy—Unsuccessful plea of permanent tenancy in suit brought in Mamlatdar's Court under Mamlatdars' Courts Act (Bombay Act II of 1906)—Tenant remaining in possession after decision—Such possession is not adverse in sense of substantiating plea of adverse possession.

The defendant was a tenant of the plaintiff. He claimed to be a permanent tenant. In 1898, the plaintiff brought a possessory suit against the defendant in the Mamlatdar's Court, when the defendant raised the plea of adverse possession. The plea was unsuccessful and the plaintiff obtained a decree. But the decree was not executed and the defendant continued in possession. In 1921, the plaintiff sued again to recover possession from the defendant who contended that his claim to permanent tenancy had ripened into a title by his assertion of adverse title since 1898 :—

Held, negativing the plea, that there was nothing to show that the defendant remained in possession in assertion of an adverse title after 1898, and that he could not base his title on prescription.

Mohammad Mumtaz Ali Khan v. *Mohan Singh*[1]; *Madhavrao Waman Saundalgekar* v. *Raghunath Venkatesh Deshpande*[2] and *Nainapillai Marakayar* v. *Ramanathan Chettiar*,[3] followed.

Budesab v. *Hanmanta*[4] and *Thakore Fatesingji* v. *Bamanji A. Dalal*,[5] distinguished.

SECOND APPEAL from the decision of F. X. DeSouza, District Judge of Ahmedabad, varying the decree passed by J. D. Rana, Subordinate Judge at Kaira.

* Second Appeal No. 800 of 1923.

(1) (1923) L. R. 50 I. A. 202.
(2) (1923) L. R. 50 I. A. 255.
(3) (1923) L. R. 51 I. A. 83.
(4) (1896) 21 Bom. 509.
(5) (1903) 27 Bom. 515.

1927

BHAILAL NATHABHAI
v.
KALANSANG GULABSANG

Ejectment suit.

The defendant was a tenant of the plaintiff. He claimed to be a permanent tenant.

In the year 1898, the plaintiff filed a suit under the Bombay Mamlatdars' Courts Act, 1906, to recover possession of the land from the defendant. The defendant raised a plea of permanent tenancy, but did not succeed in establishing it. The Court passed a decree awarding possession to the plaintiff. The decree remained unexecuted, and the defendant continued in possession. The rent was enhanced from time to time.

In 1921, the plaintiff again sued to recover possession, and the defendant again pleaded permanent tenancy. The trial Court came to the conclusion that the defendant was a permanent tenant and gave the plaintiff a decree for rent.

On appeal, the District Judge held that on the evidence the defendant had failed to establish that he was a permanent tenant and further held that he could not be treated as a permanent tenant by virtue of adverse title since 1898. The plaintiff was given a decree for possession.

The defendant appealed to the High Court.

G. N. Thakor, with *R. J. Thakor* for *M. K. Thakor*, for the appellant.

H. C. Coyajee, with *N. P. Desai*, for respondents Nos. 1 to 7, 9, 10 (1), 10 (2), 12 and 13.

CRUMP, J.:—[His Lordship first dealt with the question whether the defendant was a permanent tenant and on a consideration of the evidence held that he was not. The plea of acquisition of permanent tenancy by adverse possession was dealt with as follows :]

I now turn to the second question which has been raised in this case, and that is that, even though the defendants may have been at one time annual tenants, they may have by adverse possession acquired the rights of permanent tenants. The argument proceeds thus, Before the suit

in the Mamlatdar's Court in 1898 the defendants asserted their right to hold as permanent tenants. True those rights were not allowed in those judicial proceedings, but the assertion of those rights made it necessary for the plaintiffs to take some action to assert their title, and as they did not do so, the possession being adverse for twelve years, ripened into a title by prescription. Now here again the first answer is to be found in the judgment of the lower appellate Court. It is significant, as I have said before, that the appellant's counsel can point to no assertion of adverse title of this nature after the decision in the Mamlatdar's Court, and the Judge has held upon the facts, though he expresses his conclusion in somewhat different language, that the inference really is that the defendants agreed to continue in possession as annual tenants after these decisions by the Mamlatdar for possession. If that is so, there is of course an end of the matter, and here again that is a conclusion which it was open to the Judge to draw upon the evidence in the case, and one therefore which cannot properly be challenged in second appeal.

But even supposing that was not so, though no doubt there are decisions of this Court in *Budesab* v. *Hanmanta*[1] and *Thakore Fatesingji* v. *Bamanji A. Dalal*,[2] that a limited interest can be acquired by adverse possession, it will be seen that the facts upon which at least the former of these cases proceeds are very different from the facts now before us. There the tenant successfully resisted an attempt by the landlord to oust him, pleading a permanent tenancy. And it was held, that being so, adverse possession for twelve years of the limited interest thereby set up was sufficient to confer upon the defendant the character which he claimed. But we have not got here facts resembling those. Here there was no successful resistance by the tenants of a claim to recover possession. The matter was the precise contrary. The plaintiffs succeeded, and though the defendants did

(1) (1896) 21 Bom. 509. (2) (1903) 27 Bom. 515.

1927

BHAILAL NATHABHAI v. KALANSANG GULABSANG

remain in possession, it is not shown that they remained in possession in assertion of an adverse title. For no such assertion is proved after the date of the decision in that case. As for the second case, *Thakore Fatesingji* v. *Bamanji A. Dalal*,[1] the facts there were of a special and peculiar nature, and can certainly not form a precedent for the present case.

Further with reference to these cases and with reference to the general question it is important to bear in mind the remarks of their Lordships of the Privy Council in *Mohammad Mumtaz Ali Khan* v. *Mohan Singh*.[2] Their Lordships say at page 208 of the report :—

"The Board are unable to hold that the simple assertion of a proprietary right in a judicial proceeding connected with the land in dispute which *ex hypothesi* was unfounded at the date when it was made, can, by the mere lapse of six or twelve years, convert what was an occupancy or tenant title into that of an under-proprietor. It is true that the defendant might, if he had chosen, have at once instituted proceedings for a declaratory decree that the plaintiff was not an under-proprietor, but such a course was equally open to the plaintiff. Each party had had his supposed rights judicially challenged by the other, the plaintiff by the notice of ejectment, of which he had obtained cancellation, the defendant by the assertion in the proceedings for cancellation of the notice for ejectment that he was not liable to be ejected because of his rights as under-proprietor."

That is very much the case which we have here. Then further on they say :—

"They (The Board) are unable to affirm as a general proposition of law that a person who is, in fact, in possession of land under a tenancy or occupancy title can, by a mere assertion in a judicial proceeding and the lapse of six or twelve years without that assertion having been successfully challenged, obtain a title as an under-proprietor to the lands. Such a judgment might have very far-reaching results and would almost certainly lead to a flood of litigation."

Those remarks are pertinent to the present case, and were affirmed by their Lordships of the Privy Council in *Madhavrao Waman Saundalgekar* v. *Raghunath Venkatesh Deshpande*.[3] In that case their Lordships say (p. 264) :—

"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

(1) (1903) 27 Bom. 515. (2) (1923) L. R. 50 I. A. 202.
(3) (1923) L. R. 50 I. A. 255.

the lands by adverse possession as against the watandars from whom they held the lands."

Comment is made upon this that it is a case of watan lands and may depend in some way upon the special statute which governs property of that kind, but in a further case in *Nainapillai Marakayar* v. *Ramanathan Chettiar*,[1] their Lordships lay down a far broader proposition. The passage is at page 98, and runs as follows :—

"One of the reasons for these consolidated appeals as stated in the case for the appellants is : '4. Because the appellants have acquired permanent occupancy right by prescription.' No tenant of lands in India can obtain any right to a permanent tenancy by prescription in them against his landlord from whom he holds the lands : see *Saundalgekar* v. *Raghunath Venkatesh*.[2]"

Thus the proposition in the case of *Madhavrao* v. *Raghunath*[2] has been given a very wide extension in this latter case. Therefore apart from the finding of fact of the lower appellate Court to which attention has been drawn, it would appear upon these authorities that no title to a permanent tenancy could have been acquired by prescription in such a case as the present.

It follows that the decree of the lower appellate Court must be affirmed and the appeal dismissed with costs.

Similarly the other appeals are also dismissed with costs.

MARTEN, C. J. :—I agree. We have here the advantage of a clear and concise judgment from the learned District Judge with which I quite agree. It is unnecessary, therefore, so far as the findings of fact or law are concerned for me to add anything to what my brother Crump has just stated. But as regards the second point about prescription in connection with a permanent tenancy I may state that in the present case we are not called on to decide whether the statement in *Nainapillai Markayar* v. *Ramanathan Chettiar*[3] would necessarily prevent a title by adverse possession being ever obtained to a permanent tenancy in our Presidency. It is sufficient in the present case to apply what their

[1] (1923) L. R. 51 I. A. 83. [2] (1923) L. R. 50 I. A. 255.
[3] (1923) L. R. 51 I. A. 83 at p. 99.

1927

BHAILAL NATHABHAI v. KALANSANG GULABSANG

Lordships have laid down in *Mahammad Mumtaz Ali Khan* v. *Mohan Singh*[1] and to say that applying those principles they would clearly prevent the appellants from successfully establishing their right to a permanent tenancy by adverse possession after 1894 or 1898, having regard to the findings against them by the lower appellate Court.

I respectfully agree that the landlord here established his title by judicial proceedings, and that the true inference is that the tenants accepted that position and took their khatas acquiescing in the view that they were annual tenants. That being so, as in my judgment they took their khatas as ordinary annual tenants, prescription would not run in their favour by mere assertions that they were permanent tenants notwithstanding these existing annual tenancies. Nor, indeed as my brother Crump has pointed out, is there on the evidence any real assertion of their rights as permanent tenants after 1898.

Therefore the facts of this case are clearly distinguishable from those of the earlier Bombay authorities such as *Budesab* v. *Hanmanta*[2] where it was held that a tenant successfully denying in 1862 the landlord's right to possession could claim that he was holding adversely as permanent tenant to the landlord. Further as regards the khatas that were passed in the present case, I think there is a broad distinction between them and other cases where an isolated khata has been passed in a long series under circumstances pointing otherwise to a permanent tenancy, or where the evidence points to the fact that the tenant who passed the khata did not appreciate the precise significance of the document he was executing. I accordingly agree that these appeals should be dismissed with costs.

Appeals dismissed.

R. R.

(1) (1923) L. R. 50 I. A. 202 at p. 208.

(2) (1896) 21 Bom. 509.