APPELLATE CIVIL.

Before Mr. Justice Shah and Mr. Justice Pratt.

1921. *November 25.*

CHIKKO BHAGWANT NADGIR AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS *v.* SHIDNATH AND OTHERS, SONS AND HEIRS OF DECEASED MARTAND SABAJI NADGIR (ORIGINAL PLAINTIFFS), RESPONDENTS*.

Land Revenue Code (Bom. Act V of 1879), section 83—Permanent tenancy—Tenancy dated back to a particular year—Presumption of permanent tenancy cannot arise.

The plaintiffs sued for a declaration that the defendants were annual tenants. It was found that the tenancy commenced in or after 1805 and since then the defendants continued in possession of the land on payment of a fixed sum of Rs. 8 either by way of assessment or rent. Both the lower Courts applied section 83 of the Land Revenue Code and presumed that the tenancy was permanent. On appeal to the High Court,

Held, that the tenancy having commenced in a particular year the presumption of permanent tenancy did not arise under section 83 of the Land Revenue Code, 1879.

Ramchandra Narayan Mantri v. *Anant*[1], commented on.

APPEAL under the Letters Patent, against the decision of Macleod C. J. reversing the decree passed by E. Clements, District Judge of Dharwar, confirming the decree passed by V. V. Bapat, Subordinate Judge of Haveri.

Suit for a declaration.

The land in suit originally belonged to one Narsinha bin Shantacharya. He sold it to the plaintiffs for Rs. 500 on the 3rd February 1909. The defendants were in possession of the lands as tenants paying Rs. 8 as yearly rent. In reply to a notice from Shantacharya in 1901, the defendants had stated that they held the lands as permanent tenants. In 1912, after their purchase the

*Appeal under the Letters Patent No. 24 of 1921. (S. A. 340 of 1917.)

[1] (1893) 18 Bom. 433 at p. 437.

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plaintiffs sued for a declaration that the defendants were annual tenants and also claimed to recover three years' arrears of rent.

The defendants contended that the plaintiffs were estopped from denying the defendants' permanent tenancy because their vendor had, before the sale to the plaintiffs, admitted it and passed receipts for rent accordingly; and that the suit was barred under Article 120 or 144 of the Limitation Act.

The Subordinate Judge held the plaintiffs' claim for a declaration barred under Article 120 of the Limitation Act though the defendants had not acquired permanent tenancy by adverse possession. He passed a decree for Rs. 24 arrears of rent for three years.

On appeal the District Judge confirmed the decree.

In second appeal Macleod C. J., reversed the decree and remanded the suit to the trial Court to find "whether the defendants were permanent tenants or annual tenants."

The trial Judge found that the defendants were permanent tenants. His reasons were :—

"That the land was leased to the benefactors by Narsinhacharya directly it was acquired is thus proved. When was it then acquired? The defendants say in their written statement (Exhibit 13) that the land was acquired by way of gift in about 1805 A. D. This statement has nowhere been challenged by the plaintiffs or shown to be untrue by the documents in the hand-writing of the predecessors of the plaintiffs' vendor. I, therefore, see no reason to disbelieve that the land was acquired in about 1805 A. D. The tenancy of the defendants was thus about 107 years old when the suit was brought. The payment of rent at an unvarying rate of Rs. 8 per annum is admitted and is also borne out by the receipts produced in this case."......"The terms under which the tenancy arose as regards the duration of it are not known in this case. The fact that the lessor and lessee are known and the probable date of the lease is also known does not militate against the presumption of permanent tenancy neither does it take the case out of the

applicability of section 83 of the Land Revenue Code of 1879. The facts above mentioned satisfy the requirements of that section. The case at I. L. R. 15 Bom. 647 is cited by the learned pleader for the plaintiffs. It was held there that mere long possession at an invariable rent could not establish permanent tenancy. It was decided on the authority of the case I. L. R. 3 Bom. 340, a case decided before the Land Revenue Code of 1879 was passed. Their Lordships of the Bombay High Court have held at page 437 of I. L. R. 18 Bom. 433 that it is of no use to refer to the decisions passed before the Act became law. The decision was not followed in I. L. R. 18 Bom. 433. Moreover in the present case the basis on which permanent tenancy is presumed is not mere long possession at an invariable rent. The presumption is drawn on other circumstances coupled with long possession at an invariable rent."

The finding was confirmed by the District Judge.

In second appeal to the High Court Macleod C. J., held that the tenancy having commenced in a particular year, the presumption of permanent tenancy under section 83 did not arise. He therefore decreed that the plaintiffs-appellants were entitled to the declaration that they had asked for that the defendants were annual tenants.

The Judgment was as follows:—

"On the issue remanded both the lower Courts have held that the defendants are permanent tenants. Both the Courts have found as a fact that the tenancy commenced in 1805. That cannot be disputed on the defendants' own admissions. Both Courts seem to have thought that that was not enough for the plaintiffs to prove in order to prevent a presumption under section 83 of the Land Revenue Code arising. They seem to have thought that although the plaintiffs proved the actual commencement of the tenancy, they must also prove what the terms of the tenancy were. Paragraph 2 of section 83 says nothing whatever about the terms of the tenancy. As I have pointed out in previous cases, it is the tenant, who alleges that he is a permanent tenant, who in the first instance has to prove that, and if he has got no document which gives him a right on the land as a permanent tenant, the presumption is that he is an annual tenant. But if he can show that he has been on the land so long that the commencement of his tenancy cannot be ascertained, then the presumption under para. 2 of section 83 arises, and it was held in *Ramchandra* v. *Anant* (1893) I. L. R. 18 Bom. 433, that even although it was proved that the origin of the tenancy was of a later date than the lessor's tenure, still the presumption would arise, provided, as I take it, that the

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actual date of the origin was not known. It seems that the learned appellate Judge has relied upon what appears to be said by Mr. Justice Candy at page 437 of the Report; "The question is, when we are satisfied that the tenancy commenced subsequently to the tenure of the landlord, can it be said that there is no satisfactory evidence of the commencement of the tenancy? In my opinion it can. If the Legislature had intended to say, 'where by reason of the antiquity of a tenancy there is no satisfactory evidence that it commenced subsequent to the landlord's tenure,' it would have used plain words to that effect. The words 'no satisfactory evidence of its commencement forthcoming' simply mean there is nothing to show satisfactorily the origin of the tenancy, i.e., the terms under which the tenant commenced to hold." With all due respect I cannot read into the words 'origin of the tenancy' or substitute for those words, the words 'the terms under which the tenant commenced to hold'. I do not think it was necessary to do that for the purpose of that Judgment. Paragraph 2 of section 83 has only to do with the point of time at which the tenancy commences. There is not a word in that section with regard to the actual terms of the tenancy. Paragraph 2 has only to do with duration. When the presumption arises, then the Court must hold that the tenancy is co-extensive with the duration of the lessor's tenure. That means that the tenant cannot be turned out as long as the landlord's tenure continues. But there is no presumption as to what the terms of the tenancy are, that is to say, with regard to rent and other matters. It is very unfortunate that this question should have arisen again The section appears to me perfectly plain. In my opinion once it is proved in a case that the tenancy has commenced in a particular year, then the tenant cannot take advantage of the presumption under section 83."

The defendants preferred an appeal under the Letters Patent.

K. H. Kelkar, for the appellants.

Nilkant Atmaram, for the respondents.

SHAH, J.:—This is an appeal under the Letters Patent from the judgment of the learned Chief Justice allowing the plaintiffs' claim for a declaration that the defendants were their annual tenants. It is not necessary to set forth the previous history of this case. It is enough to point out that in November 1919 the case was remanded for the purpose of determining the nature of the defendants' tenancy, as to which the plaintiffs had sought a declaration. Both the lower

Courts found that the tenancy commenced after the gift by the original owners in favour of the ancestors of the plaintiffs' predecessor-in-title. They applied the provisions of section 83 of the Bombay Land Revenue Code and presumed that the tenancy was permanent, mainly relying on the observations in *Ramchandra Narayan Mantri* v. *Anant*[1].

When the second appeal came on for hearing, it was held that section 83 of the Bombay Land Revenue Code did not apply as the commencement of the tenancy was traced, and that it could not be said, as required by section 83, that by reason of the antiquity of the tenancy no satisfactory evidence of its commencement was forthcoming, having regard to the finding that the tenancy commenced after the gift in favour of the ancestors of the plaintiffs' predecessor-in-title in 1805.

The defendants, who have appealed from this judgment, have contended that section 83 does apply to this case. Though the learned pleader has questioned the finding of fact that the gift in favour of Shantacharya's ancestor was in 1805, and that the tenancy of the defendants commenced thereafter, I do not think that that contention could be allowed. Both the lower Courts have found that as a fact, and it is not shown, nor is it suggested in the memorandum of appeal, that that finding is not supported by the evidence in the case.

For the purposes of the main argument, therefore, it must be accepted as a fact that the tenancy commenced in or after 1805. It is quite true, as found by the lower Courts, that thereafter the defendants have been in possession of the land on payment of a fixed sum of Rs. 8 either by way of assessment or rent. It is not possible, however, to apply the provisions of section 83

[1] (1893) 18 Bom. 433.

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of the Bombay Land Revenue Code, as the commencement of the tenancy is traced. It seems to me that the view taken by the learned Chief Justice on this point is right, and the observations in *Ramchandra Narayan Mantri* v. *Anant*[1] must be taken to have been made with reference to the facts of that particular case, and cannot be so read as practically to modify the terms of the section.

In view, however, of the observations of the lower Courts in their judgments we adjourned the hearing of the appeal on the last occasion to have certain necessary documents translated in order to see whether apart from section 83 there was anything in the case to show that the tenancy in favour of the defendants was of a permanent character. Having regard to the length of time for which they had been in possession on payment of a fixed sum, it seemed to us necessary in the interests of justice to see whether the plea of permanent tenancy might be otherwise made out. It must be said, however, with reference to this aspect of the case that no such point was taken either before the learned Chief Justice when the second appeal was heard, nor is it taken in the memorandum of appeal now. After having read the documents I am unable to hold that there is any real basis for the inference that the tenancy was of a permanent nature. Exhibit 76 is the most important document on this point. It has been read and discussed before us. I am satisfied that there is nothing in that document to support the inference that the tenancy was of a permanent nature. On the contrary it seems to me from the letter, the date of which cannot be ascertained, that Shantacharya, who was the father of the plaintiffs' vendor, wrote to one of the defendants, representing the tenants, that it was not fair on his part merely to offer the assessment, but that he should

(1) (1893) 18 Bom. 433.

hand over the land to him (Shantacharya), particularly when he or his ancestors had helped Shantacharya's ancestors in retaining the benefit of the gift which the other members of the Nadgir family had made in favour of Shantacharya's ancestors. The letter, as I read it, shows that Shantacharya then appealed to the Nadgir tenant that it was proper for him to hand over possession of the land to him. This position becomes intelligible on the footing that the Nadgirs were not the permanent tenants of Shantacharya and that they were liable to restore possession to him. On a consideration of this letter and other documents, to which we have been referred, I am satisfied that there is no sufficient basis for inferring that the defendants are permanent tenants. I would, therefore, dismiss the appeal with costs.

PRATT, J.:—I agree with the construction put upon section 83 of the Bombay Land Revenue Code in the judgment of the learned Chief Justice and that the presumption under that section is not available to the tenants in this case. I agree also that the further documents which we have had translated for the purposes of this appeal do not disclose evidence that the tenancy was as a matter of fact a permanent tenancy. Shantacharya's letter, Exhibit 76, shows that he originally derived title to the land in suit from the ancestors of the present defendants. Shantacharya's title was attacked by one Ittaji Subappa, and the defendants' ancestors assisted Shantacharya in repelling that attack by suit. The defendants' case is that as a reward for that assistance they were granted the tenancy of the land in suit. That is probably true. But the letter, Exhibit 76, does not show that that tenancy was a permanent tenancy. *Per contra* in that letter Shantacharya seems to be protesting against the defendants retaining the tenancy. However they did remain in possession as tenants; and the further

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documents, i.e. the rent receipt in 1899, Exhibit 79, and the notice, Exhibit 28, in 1901, go no further than to establish, what is in fact admitted, that the defendants had as a matter of fact paid rent at an unvarying rate of Rs. 8 per annum ever since they got their tenancy. But it cannot be inferred from that that the tenancy is not annual. Therefore I agree that this appeal should be dismissed with costs.

Decree confirmed.

J. G. R.

ORIGINAL CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice.

1921.
July 2.

BAPUJI RUSTOMJI KERAWALLA (PLAINTIFF) *v.* HAJI ESMAIL HAJI AHMED (DEFENDANT)*.

Will—Bequest for life—Restraint on alienation—Power of appointment "by will or by any deed or writing"—Effect.

A testator by his will bequeathed a house to his nephew, the plaintiff, for his life-time and directed that the nephew should, after defraying all expenses of repair and paying assessment out of the rents of the house, appropriate to his own use the nett amount of rent. The will further provided: "He (i.e., nephew) cannot either sell or mortgage the said house and after decease of my said nephew...the house shall be received by such persons and in such manner as this my said nephew may by his will or by any deed or writing whatever appoint and if he should not have made (his) will or deed or writing as stated above I give the said house in gift after his decease to his children in equal shares". The plaintiff entered into an agreement to convey the house absolutely to the defendant. The defendant contended that in view of the restrictions imposed upon the plaintiff in the will the plaintiff had no marketable title to convey an absolute estate. The plaintiff, thereupon, took out an originating summons:—

Held, that in spite of words of restraint, the power defined by the will was sufficient in itself to convey an absolute estate to the plaintiff, inasmuch as

* O. C. J. Suit No. 1591 of 1921.