
(1920) 01 BOM CK 0035

In the Bombay High Court

Case No : Second Appeal No. 83 of 1917

Bhaiji Ishvardas Shah

APPELLANT

Vs

The Talukdari Settlement Officer

RESPONDENT

Date of Decision : 05-01-1920

Acts Referred:

Gujarat Taluqdars Act, 1888 — Section 31(1)

Citation : (1920) 22 BOMLR 906 : 58 Ind. Cas. 88

Hon'ble Judges : Norman Macleod, J;Heaton, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Norman Macleod, Kt., C.J.—The plaintiff sued for a declaration that the defendant, the Talukdari Settlement Officer of the Gujarat Prant, had no right to take from him possession of the field described in the plaint, and for a permanent injunction restraining the defendant from taking possession or causing it to be taken from him or from obstructing the plaintiff in any way. The property mentioned in the plaint is part of the talukdari estate which had been settled in Jivai on a cadet branch of the talukdari family. One Vakha in 1892 was the elder member of that cadet branch. He mortgaged the plaint property to the plaintiff, and his son Vaza joined in the mortgage. Vakha died in 1901. In 1905 Vaza executed a sale-deed to the plaintiff of the property mortgaged in 1892. In 1908, the Talukdari Settlement Officer issued a notice directing him to give up possession. The learned District Judge has confirmed the decree of the lower Court which dismissed the suit.

2. In appeal the first point that was taken was that Vakha and Vaza were not Talukdars within the meaning of Section 31 (1) of the Gujarat Taluqdars' Act, VI of 1888. That question, we think, has been decided by the decision of this Court in Thakarshi Trikam v. Chudasama Akhubha (1911) S.A. No. 438 of 1910, decided on 5-5-1911 (Unrep) and we agree with the learned District Judge in thinking that that case cannot be distinguished from this case. The parties there

were Bhayats, and so are they in this case. The only distinction that can be drawn between the two cases is that in Thakarshi Trikam's case the whole village had been granted in Jivai, whereas in this case only a few fields. The fact remains that a grant was made in Jivai to cadets of the Talukdar's family, and they therefore must be considered as co-sharers and in the same position as Talukdars.

3. Then it was argued that as Vaza was joint with his father, he had an interest in the Jivai property as if it were joint family property. We cannot agree with that argument. The land held in talukdari tenure is totally distinct from land ordinarily held as joint family property by a Hindu family. It is not subject to the ordinary law of inheritance or succession, and we have only to refer to Part III of the Gujarat Talukdars' Act to see that partition of talukdari land is governed by particular laws. It is "only a person who has obtained a final decree of a Court of competent jurisdiction declaring him to be entitled to a share of a talukdari estate, and every co-sharer whose name has been recorded, as such, in the settlement register prepared in accordance with s 5, who can be entitled to have his share divided from the rest of the estate. Then the subsequent sections enact how partitions should be effected. Therefore I cannot think that in 1892 Vaza was a co-sharer with his father in the Jivai property, and not having "any interest in the property at the time, he was not competent to encumber the interest to which he might succeed on his father's death. Therefore all that was mortgaged by the document of 1892 was the life-interest of Vakha, since Vakha was not competent owing to the provisions of Section 31 (1) of Act VI of 1888 to enter into a valid mortgage beyond his life-time. Then it would follow that Vaza became entitled to the Jivai land on the death of his father, and there is no necessity to consider whether there was any equity between him and the mortgagee owing to his having been a party to the mortgage of 1892. But in 1905 he sold the property to the plaintiff. That clearly was an invalid alienation u/s 31 (2) of the Gujarat Talukdars' Act, The Talukdari Settlement Officer, therefore, was entitled to issue notice u/s 79A of the Bombay Land Revenue Code, read with Section 33 (2) of the Gujarat Talukdars' Act.

4. It has been argued that because Vaza became interested in the Jivai property before Section 79A of the Land Revenue Code became applicable to alienations by Talukdars, that therefore notice cannot be given under that section. But Section 79A of the Bombay Land Revenue Code refers to any person unauthorizedly occupying, or wrongfully in possession of, any land, and therefore, it does not matter whether a person is in an unauthorized occupation of land before the date when the section became applicable. The question is whether at the date of the notice he is unauthorizedly occupying, or wrongfully in possession of, the land, and that we find was the case with the plaintiff in this case. Therefore the Talukdari Settlement Officer was entitled to serve him with notice, and this - suit in which he asked for a declaration that the Talukdari Settlement Officer has no right to take from him possession of the plaintiff's property fails and this appeal must be dismissed with costs.

Heaton, J.

5. I agree. It is quite plain that the plaintiff-appellant has acquired no valid title in virtue of the alienation by Vaza in 1905, nor indeed has it been contended that he did acquire any good title by virtue of that alienation. The appellant's case before us rests on a mortgage of 1892. This was a mortgage by Vakha, the father of Vaza, and also by the latter. If the latter had an existing interest in the property, which is Jivai property, in 1892, no doubt he could have encumbered that existing interest. The mortgage itself was drafted as if it were an ordinary mortgage of ordinary joint family property in which a father and his son were interested and were effecting the mortgage. But the property which was mortgaged was not ordinary joint family property. It was Jivai property, and as was held by this Court in *Thakarshi Trikam v. Chuda sama Akhubha* (1911) S.A. No. 428 of 1910, decided on 5-5-1911 (Unrep) the Jivaidar is a co-sharer in the Talukdari estate and as such a Talukdar. The Jivaidar in 1892 was Vakha. Having regard to the nature of "Talukdari property, to the nature of the grants by Talukdars which come under the name of Jivai, and having regard to the provisions of the Gujarat Talukdars" Act, it seems to me that we must hold, as did the District Judge, that the only person entitled to deal with this Jivai property was the Jivaidar at the moment, and that was Vakha and not Vaza. This conclusion is fortified by the provisions of the Gujarat Talukdars" Act relating to partition. Vaza in 1892 was not a person who according to the provisions of Section 10 of that Act had any right to have any interest or share partitioned on the ground that it was his. Holding, therefore, that Vaza at that time had no existing interest which he could part with, the fact that he joined in the execution of the mortgage deed of that year makes no difference whatever to the interest which the mortgagee acquired. He only acquired such interest as the Jivaidar Vakha could mortgage to him. That mortgage ceased to have any effect from the date of Vakha's death in 1901. Thereafter the possession of this property was possession contrary to the provisions of the Gujarat Talukdars" Act and in particular contrary to the provisions of Section 31 of that Act; and, therefore, the Talukdari Settlement officer was empowered to issue a notice u/s 79A of, the Bombay Land Revenue Code which in the year, 1905, by Bombay Act II of that year was made specifically applicable to the use or occupation of land in contravention of, any, of the provision of the Gujarat Talukdars" Act. In my opinion there is no doubt that the appeal was rightly decided by the Court of first appeal, and that we must dismiss the appeal before us.