

(1935) 08 BOM CK 0006
In the Bombay High Court
Case No : First Appeal No. 31 of 1932

Govindbhai Lallubhai Patel

APPELLANT

Vs

Dahyabhai Nathabhai Patel

RESPONDENT

Date of Decision : 06-08-1935

Acts Referred:

Bhagdari and Narwadari Act, 1862 — Section 3, 5
Evidence Act, 1872 — Section 110

Citation : (1936) 38 BOMLR 175 : 163 Ind. Cas. 632

Hon'ble Judges : Macklin, J;Broomfield, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Broomfield, J.—Desaibhai Jivabhai, the maternal uncle of the plaintiff, had a one-third share in a recognised sub-division (eleven annas eleven pies) in the Narwadari village of Ode in the Anand taluka. He made a will on September 5, 1891, leaving his property, which was partly narwa and partly non-narwa (sanadia), first to his senior wife Jhaver, then to his junior wife Saker, then to his daughter Divali, and finally to the plaintiff. Jhaver inherited and after her Divali, Saker having died before Jhaver. (Actually it seems there were two wives named Saker; the first one died before the testator). Divali died on January 27, 1918, and on her death, according to the finding of the trial Judge, plaintiff was for a time in possession of the estate or part of it. The defendants, who were co-sharers with Desaibhai in the recognised subdivision of the narwa but are not his heirs nor the heirs of Divali, deny that plaintiff got possession and claim to have been in possession themselves. They have admittedly had possession at any rate from 1921 of all the property left undisposed of by Jhaver and Divali except one house, lot No. 193 in suit, which is with the plaintiff. Plaintiff sues to recover possession from them relying firstly on his title under the will and alternatively on his possession after Diva-li's death. The suit was filed first in the Umreth Subordinate Judge's Court in 1925 but was returned for presentation to the Subordinate Judge's Court at Nadiad. The plaint was filed there on September

30, 1928.

2. The trial Court has found on the construction of the will that Jhaver took an absolute estate, that Divali succeeded as her heir and that the plaintiff takes nothing, he not being Divali's heir; secondly, that in any case the will could not affect narwa property owing to the provisions of the Bhagdari and Narwa-dari Act V of 1862; and thirdly, that plaintiff's temporary possession under the circumstances in which it was obtained gives plaintiff no right to evict the defendants. The suit was accordingly dismissed. We hold that the findings of the lower Court on all these points are substantially correct.

3. The first point to be considered is that of the construction of the will. The provisions which are material for our purpose are the following:-

After my death I make my first and senior wife Jhaver as kul malik of all my properties because she is advanced in age and has good understanding and so she is not such as to waste away or cause loss to my estate unnecessarily. Hence Jhaver should take all my properties into her possession and management after my death and should do its vahivat in right of khas ownership.

Then follow a number of legacies mostly to charities but including a gift of land to the plaintiff. Provision is also made for the maintenance of the testator's step-mother and of Saker and Divali during the lifetime of Jhaver. The next material provision is Clause 12 :-

My wife Jhaver is old. Hence after her death I make my second wife Saker the heir of the properties that remain and after her death I make my widowed daughter Divaliba the heir of all the properties that remain. These three are the heirs of my properties one after the other and they are entitled; in law to inherit my properties. Hence I of my free will make them my heirs one after the other. As they go on getting inheritance they should take my properties in their possession and manage the same as they please. That is I give all my rights to my heirs which I have in law namely of managing in any way I please. They when they get inheritance have therefore full right of management and none can raise objections.

4. Then it was provided that if a son should be born to the testator, he was to be the owner of all the properties except those given by way of legacy. Then follow Clauses 14, 15 and 16 all of which are important.

(14) On the death of one after the other of the heirs abovenamed or one predeceasing the other, the rest should inherit according to their turn and take the property in management and perform funeral ceremony of the dead according to the custom.

(15) Just as I am enjoying the abovementioned moveable and Immoveable properties as I please, that is as I have a right to sell, gift, mortgage or do anything I please, I give the same rights to my heirs one after the other, that is first to Jhaver, then to Saker and after that to Divaliba. They may sell, gift,

mortgage or do anything they like and none can object to it.

(16) After the death of all these three heirs named by me Govindbhai Lallubhai, son of my true sister (i.e., plaintiff), should perform the funeral ceremonies of the last heir and should take the remaining properties in his possession and enjoy it in right of inheritance. He should perform my annual shraddha. So long as the three heirs one after the other are alive Govindbhai has no right to the properties except those given to him. He gets the right after all the three are dead.

5. The argument of the learned counsel for the plaintiff is as follows. He admits that the language used in respect of Jhaver, if it stood by itself, would confer absolute ownership upon her. But he says a contrary intention is expressed later when Sakerba, Divali and plaintiff are made heirs, in succession to her. Therefore the testator cannot have intended to give an absolute estate. The only way in which these persons could inherit one after the other is if a succession of life estates was intended. It was not the dominant idea of the testator, Mr. Jayakar says, that each of the persons named should have an absolute estate in the strict legal sense which would import that the estate would pass to the heirs of Jhaver. Regard must be had to the notions of Hindus. The plaintiff was the only male person in whom the testator was interested. There is evidence that he brought the boy to stay with him. He would not be likely to give an absolute estate to his widows, and as for Divali, she was a widow herself and had no children, so that on her death the estate would go to her husband's relations. Mr. Jayakar urges that his construction of the will as giving merely a life-interest in the property to the widows and daughter of the testator and ultimately giving the estate absolutely to the plaintiff gives effect to all the provisions of the will. If that is the correct view of the testator's intention, then it is argued that the law will give effect to it. The cases cited in this connection were (1874) L.R. 2 I.A. 7 (Privy Council) , 12 CWN 729 (Privy Council) , Lallu v. Jagmohan ILR (1896) 22 Bom. 409, Chunilal v. Bai Muli ILR (1899) 24 Bom. 420 : S.C. 2 Bom. L.R. 46, Mulchand v. Bai Rukshman (1922) 25 Bom. L.R. 189, and an unreported case, Shukla Balashankar Premshankar v. Bai Punji (1927) S.A. No. 557 of 1924, decided by Crump and Baker, JJ., on March 17, 1927, (Unrep).

6. These authorities, in my opinion, do establish this, viz., that where it is clear on reading the instrument as a whole that the testator intended an absolute gift over after a life estate or series of life estates, then that intention will be given effect to in spite of the fact that the language used would ordinarily, that is apart from the contrary intention appearing from the context, have sufficed to confer an absolute estate on the person taking in the first instance. Those taking the estate ultimately will then get a vested interest at once. The cases cited by the learned counsel for the respondents in this connection, (1907) L.R. 35 I.A. 17 (Privy Council) , Bhaidas Shivdas v. Bai Gulab (1921) L.R. 49 IndAp 1 : 24 Bom. L.R. 551 , 26 CWN 713 (Privy Council) , 26 CWN 425 (Privy Council) , and 1 CWN 387 (Privy Council) , contain nothing inconsistent with this proposition, since

what is laid down in those cases as to the nature of the estate taken by a Hindu widow, is all subject to the condition that a contrary intention does not appear from the context.

7. The question is whether there is anything in the context of this will which qualifies the words importing an absolute grant in the case of Jhaver and Divali, and cuts their interests down to a life estate. Leaving out of account the provision in favour of a son, since in fact no son was born or adopted, I do not think it can be seriously contended that the widows and the daughter were intended to have merely a life interest and plaintiff a vested interest in the whole estate. Apart from the improbability of the testator intending that the estate of his daughter Divali should be thus limited (daughters in Bombay taking absolutely as heirs), the power of alienation is conferred upon each of the persons named in the clearest possible terms, and it is also expressly provided that what each successive heir after Jhaver is to get is merely the residue and not the estate as a whole. In fact, I think, Mr. Thakor is right when he says that what the testator purported to do was not to create a series of life estates—a life estate with unrestricted power of disposal is a contradiction in terms but a series of absolute estates. The only limitation of the estates of the widows and daughter, which can be said to be indicated at all, is that the succession was to be as dictated by the testator, that is to say, their estates were not to be heritable estates. But if that was the testator's intention, it appears to me that it cannot be given effect to. There is, as far as I am aware, no clear authority for holding that a will of this nature may be construed as conferring merely a life interest on the person first designated as absolute owner. In *Mahomed Shumsul v. Shewukram* the testator left his property to his son's widow who was described as heir and malik, and after her death there was a gift over to the daughters. It was held that the gift over to the daughters displaced the expressions indicative of an absolute grant to the son's widow and that she took only a life estate. As to this case it is to be noted that the will did not give the widow the power of alienation, and it was held that she had no such power. In *RadhaPrasad Mullick v. Ranimoni Dassi* a gift to the testator's daughters was held to convey merely a life interest by reason of a gift over to the daughters' sons. But here there were no very clear words indicating an absolute gift to the daughters, and the provision in favour of the sons was contained in the same sentence.

8. The case on which Mr. Jayakar has relied perhaps more than on any other is *Lallu v. Jagmohan*, The testator in that case had made the following will:-

When I die, my wife named Suraj is owner of that property. And my wife has powers to do in the same way as I have absolute powers to do when I am present, and in case of my wife's . . . death, my daughter Mahalaxmi is owner of the said property after that.

It was held that Suraj took only a life estate with remainder over to Mahalaxmi after her death. But, as pointed out by Macleod C. J. in *Mulchand v. Bai*

Rukshmani, this case was decided before Surajmani's case had overruled the view previously current in Bombay, that there is a presumption that a widow is not intended to have the power of alienation. Therefore in Lallu v. Jagmohan the Court might not have held that the widow had an absolute estate anyhow even apart from the gift over. The same considerations apply to Chunilal v. Bai Muli, which merely followed Lallu v. Jagmohan.

9. As for Mulchand Jekisondas v. Bai Rukshmani, the gift over in that case was to the testator's son, and that was the circumstance on which the Court mainly relied in holding that the widow was intended to have a life interest only. In the unreported case it was possible for the Court to hold, and it did hold, that the widow had not been given the power to alienate.

10. All these cases, therefore, are distinguishable from the present, for here there cannot be the slightest doubt as to the power of disposal. It is true that the testator says referring to Jhaver that she was advanced in age and of good understanding and not such as to waste away or cause loss to the estate unnecessarily. But this at most is no more than a pious wish that the estate should be kept intact as far as possible. Unambiguous dispositive words in a will are not to be controlled or qualified by any general expression of intention; 1 CWN 387 (Privy Council) . Moreover, in Divali's case there are no similar words. I think it is impossible to argue on the construction of this will that the plaintiff got a vested interest. The most he was intended to get was the residue, if any, remaining undisposed of after Divali's death.

11. Now an absolute estate may be made defeasible in certain circumstances (there is for instance, Section 131 of the Indian Succession Act; see also Bai Dhanlaxmi v. Hariprasad (1920) 23 Bom. L.R. 433), but it cannot be cut down to a life estate merely by a gift over of the residue. In Raghunath Prasad Singh v. Deputy Commissioner Partabgarh (1929) L.R. 56 IndAp 372 : 32 Bom. L.R. 129 their Lordships say (p. 377):-

Attempts on the part of a testator in India to restrict devolution of properties which he bequeaths to a legatee absolutely and to prevent: alienations of such properties are quite common, and wills containing such provisions have often come up for decision before the Board. The question for determination has always been whether there are dispositive words creating an estate of inheritance, in the first instance; and, if so, whether the subsequent restrictive clauses are sufficient to displace the effect of such dispositive words or whether such subsequent clauses are merely repugnant to the absolute estate.

12. In that case the estate in question was in terms declared to be a heritable estate and their Lordships held that the restrictions on alienation imposed by the testator were void as repugnant to the absolute estate conferred. Here we have what is really the converse case. The estates conferred on Jhaver and Divali were clearly alienable estates. Can it be held that they were not also heritable estates ? The Privy Council has decided (Lalit Mohan Sing Roy v. Chukkun Lai Roy

and *Surajmani v. Rabi Nath Ojha*) that the use of the word "malik" is ordinarily sufficient to connote an estate both heritable and alienable even in the case of a Hindu widow. " Warns" or heir has the same connotation : *Chunilal v. Bai Muli*. Mr. Jayakar has admitted that the language used in this will would suffice to confer such an estate both on Jhaver and Divali, but he urges that this language is controlled by the gift over to the plaintiff after Divali's death. It may be arguable that the various Privy Council rulings still leave it open to the Court to hold that if the intention that an estate should be alienable but not heritable be sufficiently clearly expressed, it might be given effect to, but I cannot think that the argument is sound. For what would be the meaning of a restriction which could be immediately and completely defeated by the exercise of the power of alienation ? It seems to me that such an interference with the normal course of devolution of the estate, or rather of the residue thereof, if any, would be just as much repugnant to the absolute character of the estate conferred as any restriction on the alienation of a heritable estate.

13. Mr. Thakor referred us to two English cases: *Perry v. Merritt* (1874) L.R. 18 Eq. 152 and *In re, Percy*: *Percy v. Percy* (1883) 24 Ch. D. 616. In the former case where the whole residue of the testator's personal estate was given to his wife for her own absolute use and benefit, a gift over after her death was held void as too indefinite and repugnant to the power of disposition given to her. In the latter case a gift of ₹10,000 was held to confer an absolute interest in spite of a gift over. Mr. Jayakar points out that these cases and also the previous authorities referred to in them were cases of gifts of personalty, and argues that in the case of realty the rule would be different. He cited *In re Stringer's Estate*: *Shaw v. Jones-Ford* (1877) 6 Ch. D. 1, where the facts were these. The testator gave his real and personal estate to his brother J with full power to sell and dispose thereof by deed, writing, will, or otherwise; but in case J should not dispose of the said real and personal estate, or any part thereof, he gave the same, or such part thereof as he should not dispose of, to J H for " life, with remainders over. The testator also made various dispositions with special reference to the alternative of the survivorship of himself or J. J died in the testator's lifetime. The Court of first instance held that the gift of the real and personal estate to J was an absolute gift, but on appeal it was held, reversing this decision, that, taking into consideration the whole will, the gift to J must be read as a gift to him for life with an absolute power of appointment, and with a gift over if J should die before the testator, or if he should survive but not dispose of the estate; and that in the event which had happened the gift over was valid. In my opinion this case does not really assist Mr. Jayakar's argument. The general rule as stated both by Lord Justice James and Lord Justice Baggallay is very definitely against him. Thus Lord Justice James (p. 14) :-

It is settled by authority that if you give a man some property, real or personal, to be his absolutely, then you cannot by your will dispose of that property which becomes his. You cannot say that, if he does not spend it, if he does not give it away, if he does not will it, that which he happened to have in his possession, or

in his drawer, or in his pocket at the time of his death, shall not go to his heir at law if it is realty, or to his next of kin if it is personalty, or to his creditors who may have a paramount claim to it. You cannot do that if you once vest property absolutely in the first donee. That is because that which is once vested in a man, and vested de facto in him, cannot be taken from him out of the due course of devolution at his death by any expression of wish on the part of the original testator.

Similarly Baggallay L. J. after referring to the clause in the will " provided he shall not dispose of my said real and personal estate, or any part thereof as aforesaid ", observed as follows (p. 18):-

Now I quite agree that if that proviso was only to take effect in the event of the brother surviving the testator, and not disposing of the property pursuant to the power previously given to him, the proviso would be repugnant, and might be rejected on that account.

In the particular circumstances of that case it was held that the rule did not apply. The first donee died before the testator and the original gift never took effect at all. Moreover the testator had contemplated that it might be so, and had made various dispositions to come into effect in that event including the appointment of executors. It was, therefore, held that the will read as a whole was inconsistent with an absolute gift to the testator's brother, and also inconsistent with the notion that the testator was only dealing with what his brother had left undisposed of. In the case with which we are concerned, however, I can see no similar reasons for holding that the general rule laid down by their Lordships in *Stringer's* case should not apply.

14. Mr. Thakor cited Indian cases on the same point. In *Sures Chandra Palit v. Lalit Mohan Dutta Choudhuri* 20 C.W.N. 463 it was held that where a devisee takes an absolute interest, a gift over on his failure to dispose of the property, or of whatever part of the property he does not dispose of, is void. This was followed in *Sulochana v. Jagattarini* (1919) 30 CRI.L.J. 51. In these cases the rule was applied to real estate.

15. By way of conclusion to this part of the case I may quote the observations of Lord Davey in *Lalit Mohun Singh Roy v. Chukkun Lai Roy* (p. 89):-

It is possible that a testator may have imperfectly understood the words he has used, " or may have misconceived the effect of conferring a heritable estate; but this would not justify the Court in giving an interpretation to the language other than the ordinary legal meaning.

16. I think the trial Judge's view that Jhaver took an absolute estate both alienable and heritable is right, though the authority on which he mainly relies, *Bhaidas Shivdas v. Bai Gulab*, is hardly relevant to the present case.

17. Next there is the point that the alienation in favour of plaintiff is void under the *Bhagdari* and *Narwadari* Act. The relevant sections for our purpose are

Sections 3 and 5 which are as follows :-

Section 3. " It shall not be lawful to alienate, assign, mortgage or otherwise charge or incumber any portion of any bhag or share in any bhagdari or narwadari village Other than a recognised sub-division of such bhag or share, or to alienate, assign, mortgage or otherwise charge or incumber any homestead, building-site (gabhan) or premises appurtenant or appendant to any such bhag or share or recognised sub-division, appurtenant or appendant thereto, apart or separately from any such bhag or share, or recognised sub-division thereof.

Section 5. " Nothing in this Act contained shall be construed as prohibiting the alienation, assignment, mortgaging, charging or incumbering any bhag or share, or recognised subdivision of any bhag or share, in any such village as aforesaid, conjointly and in the gross with its homestead, building-site (gabhan) and other proper appurtenances, if such alienation, assignment, mortgage, charge or incumbrance be in other respects warranted by law, the object and intention of this Act being to prevent the dismemberment of bhags or shares, or recognised sub-divisions thereof, in bhagdari or narwadari villages, and also to prevent the severance of homesteads, building-sites (gabhan) or other premises, appurtenant or appendant to bhags or shares, or recognised sub-divisions of bhags or shares, from the same or any of them.

18. The learned counsel for the plaintiff admits that the will is an alienation, but argues that Desaibhai had a distinct and separate interest which should be regarded as a recognised sub-division within the meaning of the Act. The facts on which he relies are these. In 1872 Jethabhai Nathabhai, Nathabhai Mathur and Desaibhai Jivabhai, representing three branches of the narwadari family, partitioned their houses and house sites among themselves. In 1880 they also partitioned some of their lands, not by metes and bounds, but by an arrangement dividing the rents paid by the tenants. In 1893 when Nathabhai Mathur died, the names of his widows were entered in the narwa khata along with those of Desaibhai and Jethabhai. In the same year Dahyabhai, who is defendant No. 1 in the present suit, was adopted by one of these widows. Desaibhai objected to the adoption and filed a suit to contest its validity. The Court held that the adoption was valid and that the three persons Nathabhai Mathur, Dasaibhai Jivabhai and Jethabhai Nathabhai were separate and had a distinct and separate interest in the property. The judgment in that suit is exhibit 206. Mr. Jayakar's contention is that as Desaibhai dealt in his will with the whole of his interest, which has been recognised by the Court as a separate share, and which would have gone to his widows and heirs apart from the will, there has not in fact been any dismemberment of the narwa which is what the Act is intended to prevent. That had already happened long before. That is the argument. But what had happened before was a private arrangement among members of the narwadar family. The assignment of Desaibhai's interest to the plaintiff can hardly stand on the same footing, for he is not a narwadar. Moreover, apart from that, I think there can be no doubt that " recognised sub-division " in the Act

means a sub-division recognised by Government. There is no definition of the term, but the origin of these tenures-as to which see *Dolsang Bkavsang v. The Collector of Kaira* ILR (1879) 4 Bom. 367 and the fact that the liability to pay the Government assessment is imposed upon recognised sharers, point to the conclusion that Government and no other authority is to determine the bhags and sub-divisions thereof. There is authority for this view in *Gulab Narotam v. The Secretary of State for India in Council*. It was held in that case that a bhag means an aliquot share of a village subject to an aliquot portion of the total land-tax imposed on it, and not any sub-division by partition or otherwise. It is an admitted fact that the Government records show annas eleven and pies eleven as a recognised s.I.L.R. (1884) 8 Bom. 596-division, and no shares in that sub-division have so far been recognised by Government. The gift of a share therein to plaintiff would, therefore, be an alienation prohibited by the Act. It follows that even if plaintiff got an interest under the will, it could give him no title to the narwa land in suit.

19. Then we come to the point of plaintiff's alleged possessory title. Mr. Jayakar's argument on this issue is as follows. If the will was invalid, it should have been challenged within six years or twelve years at most. It is now too late to challenge the alienation as the period of limitation expired at latest during the life of Divali. Plaintiff went into possession in 1918 when his name was entered in the records and he began to collect rent. He was dispossessed in 1922, the dispossession being finally confirmed in 1924. The present suit was brought originally in 1925. So, Mr. Jayakar says, the plaintiff got into possession under a prima facie title and was dispossessed by mere trespassers. Therefore he is entitled to be restored to his possession unless the defendants can prove a superior title. But the defendants have none. Plaintiff is entitled to hold possession until evicted by the rightful heir or by Government. Mr. Jayakar does not say that he can tack his possession on to that of the widow and daughter of the testator, but he does argue that his case is strengthened by what he calls the continuous dispossession of the true owner.

20. Now Jhaver as Desaibhai's widow would of course have got the estate anyhow as his heir, and Divali would have succeeded anyhow as Jhaver's heir or as the heir of the testator. But Mr. Jayakar relies on the fact that they both carried out the provisions of the will: the lands directed to be given as legacies to charitable institutions were given; plaintiff himself got his legacy of twenty bighas; various mortgages were effected by Jhaver and Divali. The defendants were aware of this and did not protest. After Divali's death plaintiff's name was entered in the mutation register of the Record of Rights on February 21, 1918 (exhibit 216); he was shown as the heir of Divali-There is nothing in the register to indicate that any inquiry took place, and in fact the plaintiff has admitted that there was none. But he says that defendant No. 1 was the Ughratdar or Revenue Patel at the time and knew all about it. In April, 1918, the Talati proposed that plaintiff's name should be entered as Divali's heir in the Warsa Patrak or heirship register (exhibit 120.) In his proposal he referred to the will and stated

that plaintiff was in possession. The Mamlatdar, however, disagreed with this recommendation; and his order, with which the Deputy Collector concurred, was that plaintiff's name could not be entered and that Divali's name must be deleted. The Mamlatdar's order was on June 8, 1918, that of the Deputy Collector on March 2, 1919. Plaintiff made an application to the Collector. That officer's reply is exhibit 57, dated October 10, 1919. The plaintiff was informed " that he not being a member of the narwadar family his name cannot be entered in the place of the deceased narwadar. This, however, will not prejudice his actual possession of the land." However, the plaintiff carried his appeal to Government, and ultimately on June 2, 1922, his name was entered in the narwa khata (exhibit 149). In the meantime on August 23, 1921, defendant No. 1 made an application, which is contained in exhibit 229, complaining that although he himself was in possession of Divali's land the plaintiff's name had been wrongly entered. The Mamlatdar inquired of the Talati how it happened that plaintiff's name was entered, and the Talati reported on September 24, 1921, that the lands had been entered in plaintiff's name in place of Bai Divali as heir on the authority of the will produced by him, but on inquiry the said lands were found to be in the possession of the applicant, i.e., defendant No. 1. Thereupon an inquiry was held by the Mamlatdar. The tenants and the Matadars supported defendant No. 1, and on June 15, 1922, the Mamlatdar decided against plaintiff, whose name was ordered to be removed from the Record of Rights. The Takrari Register containing the details of the inquiry is exhibit 72. Plaintiff appealed to the Deputy Collector, but his appeal was dismissed on November 5, 1922. He then appealed to Government, but also without success. The Government resolution finally disposing of the matter is exhibit 230. In consequence of this decision the plaintiff's name was removed from the narwa khata also.

21. Mr. Jayakar contends that the plaintiff was in possession of the estate from 1918 to 1921. But at the beginning of 1921 his rent-notes were lost or stolen, and that enabled the defendants to win over the tenants and get plaintiff's name deleted from the record by false evidence. In January, 1921, it appears the plaintiff did publish a notice (exhibit 89) stating that some rent-notes had. been taken from his house by somebody, and offering a reward of Rs. 25 for their return. He afterwards sent notices to the tenants calling on them to pay rent and referring to the loss of the rent-notes, and he brought a couple of assistance suits. But the tenants did not pay. The assistance suits were dismissed, and plaintiff did nothing more until he filed this suit.

22. It is desirable, I think, to state what exactly the trial Judge's findings are, as to the fact of plaintiff's possession. He says at p. 11 of the print, " It is clear that plaintiff somehow or other got into possession and got his name entered in the Record of Rights on the strength of the will of Desaibhai." Again at p. 13 :-

After the death of Divali plaintiff began to take rents from some tenants. It is not that all the tenants attorned to the plaintiff. There was no question of taking rent-notes immediately after the death of Divali. He might have been successful even

in taking some rent-notes from the tenants later on in July, but when the question of entry of his name in the narwa khata cropped up the narwadars objected and the fight began.

Later on on the same page he says: " The conduct of both the parties proves that plaintiff was in possession in Samvat 1974 (1918 A. D.) of some lands but was not in possession thereafter. " At p. 14 he says " The result is that , plaintiff was in possession of some lands after the death of Divali for some time, but the defendants anyhow won over the tenants. " Finally summing up at p. 18 he says:

In the present case I have already held that plaintiff might have got possession of some of the lands and taken rent-notes of the same. Plaintiff could not get possession of the lands which were joint nor of the property which was in possession of the mortgagees. I have also found that plaintiff was in possession of some lands only for a year. It has further been found that plaintiff did not peaceably enter into possession, and since his name was entered in the mutation register there was a dispute about his title to the land.

23. These findings are very tentative and indefinite. The learned counsel for the plaintiff taking it that it has been held in his favour that plaintiff was in possession for a time, at any rate, after Divali's death (he says it was for three years and not one), contends that on the authorities his client is entitled to evict the defendants who have dispossessed him without any title. They are, he says, no better than trespassers, and possession is a good title against all persons except the rightful owner. We have had the benefit of a very full and learned argument at the Bar on this as on other points in the case. If I do not propose to refer in detail to the authorities, it is not out of any disrespect to the arguments of learned counsel but because on the view which we take of the facts no question of law arises on this part of the case. That possession by itself may in some cases be sufficient to relieve the person who is or has been in possession from the necessity of proving his title, is a proposition which I think cannot be disputed: see *Pemraj Bhavaniram v. Narayan Shivaram Khisti* ILR (1882) 6 Bom. 215, (1893) ILR 20 834 (Privy Council) and *Hanmantrav v. The Secretary of State for India* ILR (1900) 25 Bom. 287 : 2 Bom. L.R. 1111. These were not actually suits in ejectment, but the doctrine has been applied to suits in ejectment: *Krishnarav Yashvant v. Vasudev Apaji Ghotikari* ILR (1884) 8 Bom. 371, *Ali v. Pachubibi* (1903) 5 Bom. L.R. 264 and *Bhagwansing v. Secretary of State* (1906) 10 Bom. L.R. 571. It would seem, however, that in such cases it can have only a very limited and occasional operation. In spite of some dicta in a few of the cases to which we have been referred, which may seem to indicate a different view, I take the law to be this. (I am not speaking of possessory suits u/s 9 of the Specific Relief Act which are in a special category and which of course must be brought within six months of dispossession.) When a person who has lost possession sues to recover it, he cannot rest upon his prior possession alone, unless it was such as to amount to prima facie evidence of title. For both title and possession have to be proved in such a case: *Dharni Kanta v. Gabar Ali*

(1912) 15 Bom. L.R. 445, P.C., (1889) ILR 16 473 (Privy Council) , Ramchandra Mart and Waikar v. Vinayah Venkatesh Kothekar ILR (1914) Cal. 384: 16 Bom. L.R. 863; also (1916) L.R. 43 I.A. 192 (Privy Council) . Moreover, although the presumption that title goes with possession (s. 110 of the Indian Evidence Act) may come to the assistance of a person who has had possession but has lost it, as held in Bhagwansing v. Secretary of State, it must be open to the defendant who is in possession at the date of the suit to disprove the plaintiff's title. That seems clear from the language of Section 110. If the plaintiff's title is disproved, as in the present case we hold that it is, he cannot succeed on the basis of his possession only. The facts that plaintiff in this case has admittedly been out of possession for several years, and that defendants, who have admittedly had possession at any rate from 1921, have succeeded in showing that he has no title, are enough, in my opinion, to distinguish all the cases on which Mr. Jayakar has relied. There is an additional point, though I am not sure that it makes much difference in principle. It does not appear that either under the Bhagdari and Narwadari Act or otherwise, the defendants have any right to possession of the estate of Desaibhai. Nevertheless they were co-sharers with Desaibhai in the narwa, and the interests of the narwadars, who are responsible for the payment of the assessment, may be said to be affected by alienations of unrecognised subdivisions. The defendants can hardly therefore be regarded as mere trespassers. For these reasons, I hold that even if plaintiff had proved his possession for three years, it would not have entitled him to evict the defendants in the circumstances of this case.

24. But as a matter of fact we do not find plaintiff's possession proved. The entries in the records and the orders of the revenue authorities on which Mr. Jayakar has mainly relied, do not really prove that he had actual possession. The fact that the Talati entered his name in the mutation register in February, 1918, and proposed to enter it in the warsa patrak in April, 1918, mentioning in the latter case that he was in possession, cannot be relied upon, in the face of the Talati's explanation in his report to the Mamlatdar in September, 1921, that the entries had been made on the strength of the will and that inquiry had shown that plaintiff was not in possession at all. In that connection it should be mentioned that the entry in the mutation register was made within a month of Divali's death. At that time, and even in April when the Talati referred to the plaintiff's possession in the warsa patrak, it is hardly possible that there can have been any tangible evidence of a change in the possession of the property to the knowledge of the Talati. The actual possession of the lands was with the tenants and there would be no question of new rent notes at that time. The rent notes which plaintiff says he took afterwards were not entered in the Talati's tenancy register. Then some of the narwa lands belong to the co-sharers jointly and are managed by a private Talati, who collects the rents and pays to the co-sharers. The private Talati at the material time was one Tribhuvan. He was dead at the time of the suit, but he made a statement in the inquiry held by the Mamlatdar in June, 1922, exhibit 196. This statement is a strong piece of

evidence against plaintiff, for Tribhuvan said that he had never at any time paid the plaintiff any rent on account of Divali's share in the joint lands but had paid it all to defendant No. 1. The trial Judge says that this statement of Tribhuvan is inadmissible, though it was in fact admitted in evidence. His reason seems to be that the signature of Tribhuvan is not sufficiently proved by the evidence of his son, exhibit 195. But the document forms part of the revenue inquiry papers, and I can see no reason why the evidence of Tribhuvan's son should not be accepted. He has sworn that the statement bears his father's signature, and in my opinion his cross-examination does not suggest that he was not in a position to identify it. The statement is therefore sufficiently proved and it is admissible as having been made in the course of business or professional duty. The fact that in all these protracted inquiries the plaintiff failed to satisfy the authorities of his possession tells heavily against him, for it clearly appears that if he had possession they were prepared to recognise him.

25. Mr. Jayakar lays stress on the Collector's letter of October, 1919, exhibit 57, by which plaintiff was informed that although his name could not be entered it would not prejudice his actual possession of the land. But I do not think that that means that the Collector was satisfied that he had possession in fact, and even if he was under that impression at that time, the evidence shows that after full inquiry the authorities decided otherwise.

26. Much has been made of the fact that defendant No. 1 did not complain to the authorities about the entry of plaintiff's name until August, 1921. But if he was in possession all along, as he asserted in his application, exhibit 229, his inactivity can hardly be regarded as suspicious. In 1921, plaintiff began sending notices to the tenants and filing assistance suits, and it was that apparently which moved the defendant to take action.

27. Next after the revenue records, Mr. Jayakar relies mainly on plaintiff's account book, exhibit 92, which purports to show the receipt of rent from the tenants of separate lands and from the private Talati. But exhibit 92 is only a rough memorandum book in which entries could be made at any time. Its appearance is not such as to inspire any confidence and there is no corresponding ledger. Moreover it cannot be said to be properly proved. Plaintiff says that the book is written partly by himself, partly by the Talati Tribhuvan and partly by other persons. Tribhuvan's son, however, deposes that the entries pointed out to him are not in his father's handwriting, and the other persons have not been called. There is no other documentary evidence. Plaintiff's Story is that the rent notes were stolen, but I am very sceptical about that. I doubt very much if he ever had any. It would have been a different matter of course if there had been any reference to the rent notes in the tenancy register.

28. Then there is the oral evidence. A large number of witnesses have been examined but they do not include any of the tenants. The tenants whose names have been mentioned by plaintiff have been called by the defendants and they repudiate the plaintiff's case. The suggestion is that they are colluding with the

defendants, which I suppose is possible, but does not seem at all probable. The plaintiff's witnesses are mostly people who say they were called to write rent notes for him. Some depose to the payments of rent by such and such a tenant, on a single occasion mostly. Some support specific entries in the plaintiff's accounts. The most important perhaps is Bhikabhai, exhibit 119. He was the Ugharatdar or Revenue Patel. But his statement that plaintiff was in possession and was recovering rent is flatly contradicted by a statement which he signed as one of the Matadars in the inquiry before the Mamlatdar in May, 1922, exhibit 121. The learned trial Judge was obviously not much impressed by the evidence of these witnesses. I think myself it is worth little or nothing.

29. The defendants examined many of the tenants and produced the rent notes. They have also produced account books, though at a late stage of the case. These books were brought by Tribhuvan's son, and, as they were produced late, were apparently not admitted in evidence. But it was obviously the plaintiff's duty to produce the books kept by the joint Talati. The trial Judge thought that the defendants' evidence was most unsatisfactory. In my opinion it is better than the plaintiff's evidence anyhow, and the force of the learned Judge's criticism is very much weakened by the fact that he thought that defendants had not produced their rent notes in the revenue inquiry. It seems quite clear that they did (see the Talati's report in column 6 of the Takrari register, exhibit 72). Anyhow, of course, plaintiff must prove his case and cannot rely on the weakness of the defendants' evidence. I am not satisfied that the plaintiff ever got real or effective possession. The evidence proves no more than an unsuccessful attempt to obtain it.

30. The result of our findings is that the appeal fails and must be dismissed with costs.

31. This is subject to one small exception. In our opinion the plaintiff is entitled to the declaration and injunction which he asks for in respect of house lot No. 193, which has admittedly been in his possession at any rate from the time of Divali's death. The evidence does not appear to make it clear that this house forms part of the narwa property. Even if it does, the defendants have not been able to show that they have any right to it. If the plaintiff were evicted, he could sue to recover possession u/s 9 of the Specific Relief Act and would be entitled to recover without proof of his title. That being so, we declare that plaintiff is entitled to the possession of this house lot No. 193 as against the defendants, unless and until they establish their right to it in due course of law. We also grant an injunction restraining the defendants from interfering with plaintiff's possession until such time. This is a minor point which should not affect the costs of the appeal.

32. There are cross-objections by the defendants in respect of the order made by the trial Judge as to the costs in his Court. He has ordered the parties to bear their own costs. Learned counsel for the defendants contends that in view of the findings of this Court costs should follow the event according to the ordinary rule.

It appears to us, however, that probably this litigation would never have arisen but for the ambiguity of the provisions of the will. The difficulty in the construction of the will has been caused by the language used by the testator himself.

33. Moreover, as the defendants have been in possession for a number of years, of property to which apparently they are not entitled, we see no reason why they should not be ordered to pay their own costs. The trial Court's order as to costs will therefore stand. The cross-objections are dismissed with costs.

Macklin, J.

34. I agree. The main questions for consideration in this case are whether the plaintiff has proved his title to the property in suit by reason of the will, or in the alternative whether he has proved a title by reason of his having been in possession of the property. The will gives an estate to two women Jhaverba and Divaliba and then an estate to the plaintiff, and it is Mr. Jayakar's contention that upon a true construction of the will the estates to the two women are no more than life estates. He relies first upon (1874) L.R. 2 I.A. 7 (Privy Council) , and upon 12 CWN 729 (Privy Council) , where it was held that in construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. But the rule laid down in these two cases is subject to a further rule laid down in (1907) L.R. 35 I.A. 17 (Privy Council) , that the mere fact of the legatee being a woman, who does not ordinarily take an absolute estate, is not enough to cut down the full rights that the word " malik " confers. Those rights can be cut down only if there is something in the context of the will itself which clearly qualifies the use of the word. This proceeds from the ordinary rule of construction that clear and unambiguous dispositive words ought not to be controlled or qualified by any mere general expression of intention, and that technical words or words of known legal import, for example " malik ", must have their legal effect, unless there are such inconsistent words in the will as would make it clear that the testator did not intend to use in their technical sense words which happen to be technical words.

35. Mr. Jayakar then cited certain cases in which the facts are superficially similar to the facts of the present case, and where words which appeared at first sight to confer an absolute estate were taken as conferring only a limited estate. But it is evident that every will must be construed by itself on its own merits, and that two wills which read as a whole may appear to be superficially similar in their terms may, when fully considered, show that the testators had different intentions. In the present will, along with the gift of an absolute estate to Jhaver and Divali is a provision that an absolute estate of what remains of the property shall go to the plaintiff. This last provision is clearly inconsistent with the notion of an absolute estate for Jhaver or Divali, since an absolute estate carries with it the right to bequeath it to any one that the owner pleases, or (in the case of intestacy) the right of the heirs to succeed to the estate.

36. The question then is whether the plaintiff's legacy of an absolute estate to take effect after the death of Divali ought to be allowed to show an intention on the part of the testator that the previous estates of Jhaver and Divali were only limited estates. Apart from the inconsistency raised by the provision that the estate in the end must go to the plaintiff, I do not think that it is possible, on reading the will as a whole, to say that the intention of the testator was not that the earlier estates should be absolute estates but that they should be only limited estates. The women are described as " malik ". They are allowed to sell, gift, mortgage, or do anything they like with the property; and after the last of them is dead, what is given to the plaintiff is an absolute estate in what remains. I take this to mean that the testator intended the women in turn to have an absolute estate to deal with as they liked; but that if there happened to be anything left, then they could not dispose of that by a will but it must go to the plaintiff. I do not take it to mean that they were to have only a life estate which should afterwards go to the plaintiff. In my opinion the use of the expression " what remains of the property " rules out the latter interpretation. Clearly the provision that what remains of the estate will go to the plaintiff is inconsistent with what has gone before, viz. the bequest of an alienable and heritable estate to Jhaverba and afterwards to Divali. The provision as regards the plaintiff is in fact repugnant to the earlier provisions; it is clearly inconsistent with the notion of an absolute estate in his predecessors, and clearly also Jhaver could have defeated the provision in favour of the plaintiff by selling the property and so preventing there being any remaining property to go to the plaintiff. That being so, I do not think that it is possible to give effect to the will so far as the plaintiff is concerned.

37. In *Sulochana v. Jagattarini* (1919) Cri.L.J. 51 it was held that where a widow takes an absolute estate a gift over of what might remain over at her death is inoperative. In *Perry v. Merritt* (1874) L.R. 18 a bequest to trustees for the absolute use of the testator's wife, with provision for the estate to go after her death to certain legatees after paying the debts of the wife, was held to be invalid as regards the gift over, and the wife's property went to her heirs. Similarly in *In re Percy: Percy v. Percy* (1883) 24 Ch. D. 616 there was a legacy of ₹10,000 to the wife in terms which show that it was hers absolutely, and the will provided that it should go to a certain legatee after her death. It was held that the wife took absolutely and that the bequest to her was not affected by the words following, which were described as inapt. So, too, in *Raghunath Prasad Sing v. Deputy Commissioner, Partabgarh* (1929) L.R. 56 IndAp 372 : 32 Bom. L.R. 129, it was held that where there are clear dispositive words creating in the first instance an absolute estate of inheritance in the legatee, subsequent restrictive clauses to come into operation after he has inherited are void, being repugnant. That being the case with the present will, I think that it is inoperative so far as the plaintiff is concerned and that the plaintiff can get no rights at all under the will. On this view of the case, it is not necessary for me to discuss the subsidiary point raised, viz. the effect of the Bhagdari Act upon the validity of the

will.

38. The other main question for consideration in this case is whether plaintiff has acquired title to the property by reason of his possession. I do not think that in fact he ever was in possession of the property. His possession, if any, seems to have been a paper possession only. The entry of his name in the Record of Rights and in the heirship register amounts to very little, because the entry does not seem to have been made after inquiry. Then too he has produced no rent notes in support of his possession. He says that they were stolen; but I have great difficulty in believing that, especially as he did not take the trouble to have his rent notes (if any) entered in the appropriate register. Then there is the statement of the private Talati Tribhuvan made at an earlier inquiry, to the effect that he never at any time paid rent recovered from the tenants to the plaintiff and that he never executed any rent notes on behalf of the plaintiff. I think too that the accounts which the plaintiff professes to have kept are irregular and do not help him, and that the oral evidence of his possession is thoroughly unsatisfactory. I need not say any more in this respect, because this question has been fully discussed in the judgment: just delivered by my learned brother.

39. That being so, the effect of plaintiff's possession of the property as regards his title to the land scarcely survives. There were, however, a number of cases cited before us with the object of showing that mere possession can justify a declaration of title as against a trespasser, or even justify a Court restoring possession to a person who has lost possession. But I think that the examination of all those cases shows that they are based upon the theory that possession is prima facie evidence of title. When, however, as in this case, it is shown that plaintiff's title under the will is definitely disproved and plaintiff bases his title upon nothing other than the will and the fact of his possession, it is clear that the mere fact of plaintiff's possession, if any, could not by itself give rise to any presumption of title in his case. I think, therefore, that the ordinary rule applicable to ejectment suits, except those falling u/s 9 of the Specific Relief Act, must be applied to this suit also, viz. that besides proving possession within twelve years the plaintiff must also prove title. In the result I hold that the plaintiff has no title to the property and that his suit was rightly dismissed.

40. There is, however, one house (lot No. 193) of which plaintiff is still in possession, and has been shown to have been in possession since the death of Divali. He has sued for a declaration of his title to that house and for an injunction restraining the defendants from interfering with his possession. I agree that in this respect there is no reason why he should not receive a declaration as against the defendants that he is at any rate entitled to remain in possession of the house until dispossessed in due course of law, and that they must be restrained from interfering with his possession.

41. In other respects I agree that the appeal must be dismissed with costs.

42. As regards the cross-objections I agree that in the circumstances of the case

there is no reason why the defendants should not pay their own costs in the first Court, and that the cross-objections also should be dismissed with costs.