
(1928) 03 BOM CK 0007

In the Bombay High Court

Case No : Second Appeals No's. 388 and 391 of 1926

Gulabbhai Ranchhodbhai

APPELLANT

Vs

Bhagvan Kesur

RESPONDENT

Date of Decision : 23-03-1928

Acts Referred:

Citation : AIR 1928 Bom 377 : (1928) 30 BOMLR 980 : 114 Ind. Cas. 266

Hon'ble Judges : Patkar, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Patkar, J.—The question involved in these appeals is as to the construction of documents which are described as valatdan. The documents in all these cases have been held to be of the nature of leases and not mortgages. It is urged on behalf of the appellants that the documents were passed in consideration of previous debts, that they were described as valatdan and the word patta was not mentioned, that the relation of debtor and creditor continued, and that the documents ought to be considered as mortgages and not as leases, and reliance is placed on the decisions in *Tukaram v. Ramchand* I.L.R (1901) Bom. 252: 3 Bom. L.R. 718. and *Mahmad v. Bagas* I.L.R (1908) Bom. 569: 10 Bom. 742. On behalf of the respondents reliance is placed on the decision of the Privy Council in *Nidha Sah v. Murli Dhar* (1902) 5 Bom. L.R. 111: L.R. 30 IndAp 54.

2. It is strongly urged on behalf of the appellants that valatdan is described as a kind of mortgage in Robertson's Glossary, and also in the Dictionary of the Gujarati language published by the Gujarat Vernacular Society and in Belsare's Dictionary. It is further urged that the lower appellate Court was wrong in holding that the etymological meaning of valatdan was "rent paid in advance," and that according to *Shabdārtha-Sindhu* it meant "grain repaid" and signified a kind of usufructuary mortgage of the produce of the land, It is urged on the other hand that the etymological meaning of valatdan which is "rent paid in advance," is accepted by the learned District Judge well conversant with the

Gujarati language.

3. Assuming, however, that the meaning of valatdan is "a kind of mortgage" under which the grain and produce of the land would be taken so long as the principal and interest are realised, it is not the name given to a contract, but it is the contents and the jural relations constituted by it that determine its nature. See Subhabhat bin Babanbhat v. Vasudevhat bin Subhabhat I.L.R (1877) Bom. 113; Abdulbhai v. Kashi I.L.R (1887) Bom. 462; Tukaram v. Ramchand I.L.R (1901) Bom. 252: 3 Bom. L.R. 778 . In the case of Nidha Sah v. Murlidhar, the document described as a mortgage was held to be a lease by their Lordships of the Privy Council, and though the word "patta" equivalent to lease in "valatdanpatta" was used to describe the document in Mahmad v. Bagas I.L.R (1908) Bom. 569: 10 Bom. L.R. 742, Batchelor, J. held that the document was not a lease but was a mortgage. The contents of the document have, therefore, to be looked to in determining the real nature of the document. In Nidha Sah v. Murli Dhar it was held that the document, though described as a mortgage, was not a mortgage in any proper sense of the word, that it was not a security for the payment of any money or for the performance of any engagement, that no accounts were to be rendered or required, that there was no provision for redemption express or implied and that it was simply a grant of land for a fixed term free of rent in consideration of a sum made out of past and present advances. The document in the first two appeals was in respect of a past advance and the document in the last appeal was passed in respect of a present advance. It is urged on behalf of the appellant that the words tehene pete meant "as security for that" (the amount). On the other hand, it is argued that it means "in consideration of that." The words tehene pete are not decisive either way. It is urged on behalf of the respondents that the document contained a covenant for quiet enjoyment which would be out of place in a mortgage-deed but would be necessary if the document was a lease for a long term. There is considerable force in the contention that in the case of a mortgage, the mortgagee would be entitled to recover his mortgage money in case his possession was disturbed and a covenant for quiet enjoyment would be more appropriate in a document of lease than in a document of mortgage. Further, the document contains an agreement by which the owner is not to object to alienation of the valatdan hakk by way of sale, mortgage or gift. Such a provision would be more appropriate in a document of lease than in that of a mortgage. It is conceded that the stamp required for a deed of lease and for a deed of mortgage would be the same, and therefore, no inference can be raised from the stamp affixed to the document. Special stress is laid on the words that after the completion of the specified term, "you as well as your heirs and representatives have no right over the said rupees." It is contended on behalf of the appellant that the clause shows that the relation of debtor and creditor continued till the end of the term. The words used are not that the amount advanced by you will be wiped off, but that you shall have no claim over the aforesaid rupees, and they would equally mean that you have got what you have bargained for, i.e., a

long term lease and have enjoyed the land for the specified period and shall have, therefore, no right thereafter to claim back the aforesaid money. The same words were used in a valatdan patta which formed the subject matter of the decision in *Bai Heta v. Bhagvan Morar* (1915) S.A. 1914, decided by Batchelor and Shah, JJ. On November 30, 1915 (Unrep.), and it was held by Batchelor and Shah JJ., following the, decision in *Nidha Sah v. Murli Dhar*, that the document was a lease and not a mortgage. In *Lalbhai Javer v. Ranchhod Bhagvan* (1912) S.A. 1911, decided by Chandvarkar and Batchelor, JJ. on February 20, 1912 (Unrep.) and *Adam Bagas Vali v. Ise Bagas* (1912) S.A. 1911, decided by Chandavarkar and Batchelor, JJ., Chandavarkar and Batchelor JJ. considered a similar document as a lease though it was described as a valatdan mortgage. In *Lalbhai Hathihihai v. Besai Kalan* (1912) S.A. 1912 decided by Batchelor and Shah, J. on July 17, 1912 (Unrep.) a similar document was considered to be a lease by Batchelor and Shah, JJ. In *Anandram Vithuram v. Vithu valad Khandu* (1912) App 1912, decided by Chandavarkar Ag. C.J. and Fatchelor, J. on July 4, 1912 (Unrep.) Chandavarkar Acting Chief Justice and Batchelor J. held that a similar document was a lease and not a mortgage on the ground that in a mortgage deed there is no room for a covenant for quiet enjoyment on the part of the mortgagee, because, if the mortgagee's possession under a usufructuary mortgage is disturbed by a third person, the mortgagee cannot sue the mortgagor for damages and if the third party succeeds in establishing his title to the land mortgaged and ousts the mortgagee, the mortgagee has the right given to him by law to sue to recover the mortgage-amount and interest from the mortgagor personally, and that in case of a lease, the lessor does not covenant with his lessee for title, and unless there is an express covenant to that effect the law does not imply any such covenant, and it is also usual in the case of leases to have covenants for quiet enjoyment.

4. I think, therefore, that the documents in all the three appeals are not mortgages for the reason that the transfer of the interest in the lands was not made for the purpose of securing payment of money advanced or to be advanced or for the performance of any engagement.

5. In *Tukaram v. Ramchand* there was an agreement that the amount was not to carry any interest, and that the land was given for enjoyment for a period of ten years "in liquidation of the aforesaid rupees." The terms of the document were sufficiently clear that the transaction was a security for the payment of money and that the parties had distinctly in contemplation a mortgage and not a lease. In *Mahmud v. Bagas* the land had been given on condition of valatdan as the security for the amount, and it was intended by the parties that the creditor was to appropriate the income of the lands towards the liquidation of the pre-existing debt.

6. I think, therefore, that the documents in these cases were in the nature of leases and not mortgages.

7. Second Appeals Nos. 388 and 391 of 1926 must, therefore, be dismissed with

costs.

8. In Second Appeal No. 419 of 1926, an additional point is raised on behalf of the appellant that the suit was filed by the plaintiff for redemption, and in the alternative for possession on the ground that in case the document was held to be a lease, the long lease was an unlawful alienation prohibited by Section 3 of the Bhagdari Act, and therefore void and the plaintiff was entitled to recover possession from the defendant. Both the lower Courts held that the transaction was a lease, and that as the lease was passed more than twelve years ago the alienation by way of lease being void, the defendant and his father were continuously in adverse possession for more than twelve years, and acquired a title by prescription to the limited interest and could not be evicted by the plaintiff before the fixed period.

9. It is urged on behalf of the appellant that the defendant could not acquire title by adverse possession to a limited interest in respect of property of which alienation was prohibited by the Bhagdari Act, and reliance is placed on the decision in AIR 1923 205 (Privy Council) doubting the correctness of the decision in Radhabai and Ramchandra Konher v. Anantrav Bhagvant Deshpande I.L.R (1885) Bom. 198., and on the cases of AIR 1924 65 (Privy Council) , Vishnu v. Tukaram (1924) 27 Bom. L.R. 449, and Bhailal Ntahabhai Vs. Kalansang Gulabsang, . It is urged that it is of the essence of the title by adverse possession that it must relate to some property which is recognized by law, and the alienation of an unrecognized portion of a bhag being void u/s 3 of the Bhagdari Act, a permanent lease could not be acquired by adverse possession, and reliance is placed on the remarks of Chandavarkar, J. in Jethabhai v. Nathabhai I.L.R (1904) Bom. 399: 10 Bom. L.R. 428. It was held in Adam Umar v. Bapu Bawaji I.L.R (1908) Bom. 116: 10 Bom. L.R. 1128 that possession acquired under an alienation made in contravention of Section 3 of the Bhagdari Act, can become adverse so as to bar a suit for recovery by the individual alienor or his representatives in interest, and that the Bhagdari Act contains nothing which by express provision or necessary implication abrogates the law of limitation in favour of a private person, and at p. 121, Batchelor, J. has distinguished the remarks in Jethabhai's case Pathar, J. ILR 28 Bom. 399 on the ground that the passage had reference to the particular claim advanced by the then plaintiffs who professed to hold the land as forming part of a narva holding and as subject to all the incidents of the tenure. The case of Jethabhn v. Nathabhai related to a compromise between the parties and not to an alienation, and it was claimed by the plaintiffs that by virtue of their possession for more than twelve years, they were entitled to hold the land against the defendants as a recognized sub-division of a bhag. In the present case, the defendants are not claiming to hold the property as a recognized sub-division of a bhag by adverse possession, but they are resisting the claim of the plaintiff to recover possession from them on the ground that the alienation is invalid and prohibited by Section 3 of the Bhagdari Act and was void in its inception and their possession was wrongful from that date, and the plaintiff's suit for possession was therefore

beyond time.

10. In the case of Chaturbhai Lallubhai Patel Vs. Motibhai Bapuji Patel, , where the defendants held the land adversely under an alienation which was void under the Bhagdari Act, it was held that the defendants were entitled to such rights as they had acquired by the document by adverse possession. The powers of the Collector under the Bhagdari Act are unfettered by any limitation of time. There is nothing in the Bhagdari Act to prevent any person from acquiring rights to bhag property by adverse possession against the previous proprietor of a bhag. See Talukdari Settlement Officer, Gujarat v. Rikhavdas Parshottamdas I.L.R (1912) Bom. 380: 15 Bom. L.R. 378. It is, therefore, unnecessary to discuss the cases relied on on behalf of the appellant with I regard to watan property which have no application to the present case under the Bhagdari Act, In the case of watan property, the State is really the owner, and the property is given for service, whereas the reason of the enactment of the Bhagdari Act; was to protect Government in collecting the revenues from the village. See The Collector of Broach v. Venilal Keshavbhai I.L.R (1896) Bom. 588 and Umar Amnaji Miaji Vs. The Secretary of State for India, . Bhagdari lands, therefore, are amenable to adverse possession as any other property. In Bhailal Ntahabhai Vs. Kalansang Gulabsang, the point as to whether the decision in AIR 1924 65 (Privy Council) would necessarily prevent a title by adverse possession being ever obtained to a permanent tenancy was not decided, In the present case the alienation by way of a lease was void in its inception, and the relation of landlord and tenant did not come into existence and the possession of the alienee would be wrongful from the commencement. I would, therefore, dismiss all the three appeals with costs.