

(1928) 04 BOM CK 0009
In the Bombay High Court

Kisan Yemaji and Others

APPELLANT

Vs

Shripat Tatya and Others

RESPONDENT

Date of Decision : 03-04-1928

Acts Referred:

Mamlatdars Court Act, 1906 — Section 5

Citation : AIR 1929 Bom 114

Hon'ble Judges : Madgavkar, J

Bench : Division Bench

Judgement

Madgavkar, J.—The question raised in this application is on the construction of the newly added explanation to S. 5, Mamlatdars' Courts Act (Bom. Act 2 of 1906).

2. The lands originally belonged to one Magan. He passed a conveyance in favour of Tatya, the father of opponent 1, Shripat. The purchaser sued both Magan and his son Sandu for possession on the ground that the entire survey number had passed to him. He succeeded in the trial Court. But in appeal the appellate Court held that Sandu's share had not been transferred, and granted opponent 1 a declaration that he had a half-share and was only entitled to joint possession. Opponent 1 took no steps to execute the decree or to be placed in joint possession. On 15th May 1927, Sandu placed the applicants-plaintiffs in possession under a lease for 11 months as tenants. On 13th June 1927, opponent I dispossessed them. The applicants brought the present suit under the Mamlatdars' Courts Act for being reinstated in possession and succeeded before the Mamlatdar who disbelieved the opponent's defence that he had obtained peaceful possession from Sandu. In revision the Collector upheld the plea not expressly taken before the Mamlatdar and held that the opponent had taken possession as a cosharer on the strength of his decree, and that he was, therefore, protected by the explanation to Section 5, Mamlatdars' Courts Act. The plaintiffs apply in revision.

3. The argument for the petitioners is that in the light of the history of the

addition of the explanation to Section 5 and on the findings of fact of the Mamlatdar, as opponent 1 had taken the law into his own hands and had dispossessed the petitioners within six months, the petitioners are entitled to succeed. For the opponent it is contended that as a cosharer and, therefore, a part owner within the period of 12 years before the suit, the opponent is protected by Section 5, Illus. 1 and, if, as held by this Court a cosharer cannot be placed in joint possession, neither can the tenants of a co-sharer such as the present petitioners avail themselves of the Mamlatdars' Courts Act. Section 5 does not apply to a cosharer such as opponent 1 with his right to a share unless within 12 years.

4. The Collector was, in my opinion, wrong in allowing a plea not merely absent from the pleas taken before the Mamlatdar but in fact entirely inconsistent with them. Before the Mamlatdar the opponent's case was expressly that Sandu had placed him in possession of the southern half of the field now in question. His argument before the Collector was expressly based on joint possession of the whole field taken by him as a cosharer without Sandu's consent. Further, the view of the Collector with regard to the explanation is not, in my opinion, correct. It has been held by this Court in *Keso Dinkar v. Moro Sakham* [1883] P.J. 120, that a plaintiff cosharer who never had sole possession but only claimed to have been in joint possession could not be re-instated in such joint possession against another cosharer inasmuch as the issues and the decrees open under the Mamlatdars' Courts Act did not provide either for joint possession or for partition. This view was followed in subsequent cases such as *Krishna v. Gopala* [1890] P.J. 316 and doubted in others such as *Shivdevrao v. Bhagvantrao* [1895] P. J. 502. The subsequent addition of the explanation now in question was, as held in *Jinajibhai v. Mathurajibhai* AIR 1922 Bom. 126 in confirmation of the view in the earliest case above: *Keso Dinkar v. Moro Sakham* [1883] P.J. 120. In *Jinajibhai v. Mathurajibhai* AIR 1922 Bom. 126 the whole field was in the joint possession of the plaintiff and the defendant. The defendant had ousted the plaintiff from joint possession. This Court in revision held, as in *Krishna v. Gopala* [1890] P.J. 316 that the Mamlatdar had no jurisdiction under the explanation to decree joint possession to the plaintiff and set aside his order, which the Collector had upheld.

5. The present case, where admittedly a cosharer such as Sandu had sole possession, could not, in my opinion, fall within the scope of the explanation or of these cases,--all of which related to the admitted joint possession prior to the alleged dispossession of one of the co-sharers. And speaking for myself, I am unable to see why a cosharer, when he actually has sole possession, and is dispossessed by another cosharer who has taken the law into his own hands should be less entitled to the summary remedy of the Act than any other person. In the present case, the actual dispossession has been not of the cosharer Sandu but of his tenant the petitioner. As has been held by this Court in *Goma v. Narsingarao* [1895] 20 Bom. 260 (F.B.) the Act being concerned with actual physical possession a tenant dispossessed must sue himself and the landlord

cannot sue, and for the purposes of that Act, the possession of a tenant is not on behalf of the landlord. To an obstruction by one cosharer to a tenant in possession the Mamlatdars' Courts Act applies: *Shiddapa v. Vishnu* [1898] P.J. 147.

6. In regard to the argument based on Section 5 land Illus. 1, the words "'not being a person who has been a former owner or part-owner" in that clause qualify only the words immediately preceding "of any other person" the determination of whose tenancy or other right is in question, as is also plain from the illustration; and is is, therefore, of no avail to the opponent.

7. As regards the expiry of the period of the petitioner's lease within a few days, this Court is concerned with the rights of the parties on the date of the institution of the suit rather than with the consequences of the enforcement of the order. The petitioners were in possession as their lessor. The cosharer, Sandu, had himself been in possession. The opponent, for some reason or other, not apparent, failed in the civil suit to claim joint possession in the alternative and has never obtained it from Court. But instead, he took the law into his own hands and ejected from the southern half the petitioner who was in legal possession. On these facts, the Mamlatdar, in my opinion, was right and Collector's order was wrong. The rule is made absolute, the Collector's order is set aside, and the order of the Mamlatdar restored with costs throughout on opponent 1.