

that the lower Courts were wrong in precluding the plaintiff from giving proof of the statement.

It is admitted by the learned counsel for the parties that the whole case turns on the first issue framed by the Subordinate Judge. We, therefore, refer this issue for trial and finding on the two parts thereof by the District Court after taking evidence. The finding to be certified to this Court within three months.

Issue sent down.

APPELLATE CIVIL

Before the Honourable Mr. Farran, Chief Justice, and Mr. Justice Parsons.

DOSHI FULCHAND (ORIGINAL PLAINTIFF), APPELLANT, v. MA'LEK DA'JIRA'J (ORIGINAL DEFENDANT), RESPONDENT.*

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July 11

Talukdar—Gujarat Talukdars' Act (Bom. Act VI of 1888), Sec. 31—Mortgage of talukdari estate—Validity of mortgage before the Act—Decree upon the mortgage for sale of talukdari estate.

A talukdar of the Ahmedabad district mortgaged his *talukdari* property in 1886.

In 1892 the mortgagee sued to enforce his lien by sale of the mortgaged property.

The Court passed a decree against the talukdar personally, holding that it had no power under sections 31 and 32 of the Gujarat Talukdars' Act (VI of 1888)(1) to direct a sale of the *talukdari* estate.

* Appeal No. 53 of 1894.

(1). The following are the sections of Act VI of 1888 referred to :—

31. (1) No incumbrance on a talukdar's estate, or on any portion thereof, made by the talukdar after this Act comes into force, shall be valid as to any time beyond such talukdar's natural life, unless such incumbrance is made with the previous written consent of the Talukdari Settlement Officer or of some other officer appointed by the Governor in Council in this behalf.

(2) No alienation of a talukdar's estate or of any portion thereof, or of any share or interest therein, made after this Act comes into force, shall be valid, unless such alienation is made with the previous sanction of the Governor in Council, which sanction shall not be given except upon the condition that the entire responsibility for the portion of the jama and of the village expenses and police charges due in respect of the alienated area, shall thenceforward vest in the alienee and not in the talukdar.

32. (1) No consent or sanction given under the last preceding section shall be deemed to affect any right of Government under section 3 of Bombay Act VII of 1863 (*an Act for the Summary Settlement of claims to exemption from the payment of Government land-revenue, and for regulating the terms upon which such exemption shall be recognised in future, in those parts of the Bombay Presidency which are not subject to the operation of Act XI of 1852 of the Council of India*).

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Held, reversing the decree, that the mortgage having been effected prior to the coming into force of the Gujarát Talukdars' Act (1888) was not invalidated by clause 1 of section 31 of the Act, and that the Court was bound to pass a decree for sale in default of payment of the mortgage-debt.

Quere—Whether the property could be sold without the sanction of the Governor in Council, regard being had to the provisions of clause 2 of section 31 of the Act.

Nagar Pragji v. Jivabhai⁽¹⁾ doubted.

APPEAL from the decision of G. McCorkell, District Judge of Ahmedabad, in Suit No. 26 of 1892.

The property in dispute was a *talukdári* estate belonging to Málek Dájiráj Ajambhai.

The property was mortgaged to one Tribhovan Ráichand by a mortgage-bond for Rs. 879 on 21st December, 1886.

Tribhovan Ráichand assigned the mortgage to the plaintiff, and in 1892 the plaintiff filed this suit to recover Rs. 2,438, being the amount of principal and interest due on the mortgage by sale of the mortgaged property.

The defendants, who were the heirs of the mortgagor, being minors were represented by the Collector of Ahmedabad as their guardian. They pleaded (*inter alia*) that the property in suit being a *talukdári* estate, the plaintiff was not entitled to a decree for sale of the mortgaged property, and that he could not recover interest exceeding the amount of the principal.

The District Judge held that under the Gujarát Talukdars' Act (Bombay Act VI of 1888) the plaintiff could not obtain a decree against the *talukdári* estate.

The following extract from his judgment gives his reasons:—

“It is quite true that the mortgage lien was created before the passing of the Talukdári Act. But it appears to me that under sections 31 and 32 (of the Act) Civil Courts are barred from imposing incumbrances on a *talukdári* estate, even though the basis of such incumbrances may be found embodied in contracts entered into by talukdars before the passing of the Act. No doubt a decree passed before the passing of the Talukdári Act would be binding on the estate. In this spirit—

(1) I. L. R., 19 Bom., 80.

(2) And nothing in the last preceding section shall apply to the property of any thakur to which section 28 of the Broach and Kaira Encumbered Estates Act, 1881, is applicable, or be deemed to affect the power of the manager of any thakur's immovable property under section 24 of the said Act.

read the ruling at page 94 of the Printed Judgments for 1892. (Kallian Moti v. Pathubhai⁽¹⁾)

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On these grounds the District Judge passed a decree for Rs. 2,438 and costs against the personal estate of the deceased talukdár so far as the same might have come into the possession of his heirs, the defendants on the record. He directed the plaintiff to pay the costs incurred by the defendant Collector.

Against this decision the plaintiff preferred a second appeal to the High Court.

F. R. Vicáji (with him *Ganpat Saddashiv Rao*) for appellant:—The mortgagee is entitled to a decree against the mortgaged property. Our mortgage was executed before Bombay Act VI of 1888 was passed. Sections 31 and 32 of the Act are not retrospective. They apply in the case of any charge or incumbrance made after the Act came into force. Our mortgage is, therefore, perfectly valid; and we are entitled to a decree for sale of the mortgaged property—*Nagar Práji v. Jivabhai*⁽²⁾. We are also entitled to interest, at the stipulated rate, till date of payment.

Ráo Sáheb Vdsudev J. Kirtikar, Government Pleader, for the respondent:—The object of the Talukdári Act is to preserve talukdári estates and prevent their passing into the hands of strangers. With this object sections 31 and 32 of the Talukdári Act appear to have been framed. No alienation of a talukdár's estate is valid except when made with the previous sanction of the local Government. The object of the Act would be defeated if the Civil Courts were to pass decrees for sale of talukdári property. A sale by the Court, followed by confirmation of sale and grant of sale certificate, is an "alienation" within the meaning of section 31, clause 2, of the Act—*Kallian Moti v. Pathubhai*⁽¹⁾. The ruling in *Nagar Práji v. Jivabhai*⁽²⁾ is not correct.

PARSONS, J.:—The mortgage sued on being prior in date to the coming into force of the Gujarát Talukdárs' Act, 1888, is not invalidated by clause 1 of section 31 of that Act, and is one which the deceased talukdár had power to execute. We think, therefore, that the Court was bound to give the plaintiff the rights which he acquired under that mortgage and pass a decree for sale in default of payment of the mortgage-debt.

(1) I. L. R., 17 Bom., 289.

(2) I. L. R., 19 Bom., 80.

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The point taken before us, that the property cannot be sold having regard to the provisions of clause 2 of the section above mentioned, will only arise if the plaintiff applies for an order absolute for sale (under section 89 of the Transfer of Property Act) and is then unable to show the sanction of the Governor in Council to the proposed sale. It would, therefore, be premature for us to discuss that point.

As, however, the case of *Nagar Praggi v. Jivabhai*⁽¹⁾ has been cited to us, we think it right to record our doubt as to the correctness of that decision, which should, we think, if the case again comes before this Court, be tested by a reference to a Full Bench.

We consider that the decree sufficiently declares the personal liability of the defendants. They will under its execution have to account for the assets of the deceased which have come into their hands, and will, of course, be liable personally in case of failure to account.

The Judge has refused to award interest from date of suit. In this he is wrong. In a suit on a mortgage the plaintiff is entitled to interest down to the date of the decree. We must award the plaintiff Rs. 870 with interest at two per cent. per month from December 21st, 1886, to September 19th, 1893, and we allow further interest on the 870 rupees at six per cent. from September 20th, 1893, to payment.

The Judge has given the Collector costs as against the plaintiff, but the Collector appeared in the suit only as guardian for the suit of the minor defendants, and the plaintiff is not liable for the costs incurred by him in so appearing which the Collector can charge to the estate of the minors.

We amend the decree by altering the decretal amount as above stated, and by striking out the order directing plaintiff to pay the costs incurred by the defendant Collector and by adding an order to the effect that, in default of the payment of the decretal amount with costs in the lower Court and this Court within six months of this date, the plaintiff may apply for an order absolute for sale of the mortgaged property.

Decree amended.