# APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*

PURSHOTTAM HARGOVAN PAREKH (ORIGINAL PLAINTIFF, APPLICANT), APPELLANT, *v.* HARBHAMJI AMARSANGJI THAKAR AND OTHERS (ORIGINAL DEFENDANTS, OPPONENTS), RESPONDENTS.*

1900. *April* 14.

*Gujrat Talukdars' Act (Bombay Act VI of 1888, as amended by Act II of 1905), section 31†—Decree—Execution against Talukdar's Estate—Consent of the Talukdari Settlement Officer—Civil Procedure Code (Act XIV of 1882), sections 320, 323.*

In execution of a money decree against a talukdar several villages belonging to him were attached: and the darkhast was sent to the Talukdari Settlement Officer (who combined in himself the functions of Collector and Talukdari Settlement Officer for the purpose of execution of decrees against or in respect of talukdari lands) to be dealt with under sections 320—325 of the Civil Procedure Code, 1882. That Officer acting under the sections framed a scheme of management and placed the decree-holder in possession of one of the villages for a given number of years. All this was done after the death of the original judgment-debtor and after the amendment of section 31 of the Gujrat Talukdars' Act, 1888, was made in 1905, but in ignorance of the amendment. The Talukdari Settlement Officer then took up the position that what he had

* First Appeal No. 97 of 1908.

† Gujarat Talukdars' Act (Bombay Act VI of 1888), section 31 runs as follows:— The section originally stood thus:—

"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 talukdár'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."

To this were added the following words by the Gujrat Talukdars' Amendment Act, 1905 (Bombay Act II of 1905):—

"And after the death of a talukdar no proceeding for the attachment, sale or delivery of, or any other process affecting the possession or ownership of, a talukdar's estate, or any portion thereof, in execution of any decree obtained against such talukdar or his legal representative, except a decree obtained in respect of an incumbrance made with such consent as aforesaid, or made before this Act comes into force, shall be instituted or continued except with the like consent."

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done was done by him under the Civil Procedure Code, 1882; and that as he had not given his written consent to the arrangement as provided by the amended section 31, the darkhast preferred by the decree-holder should be disposed of.

*Per CHANDAVARKAR, J.*—If a person holding a certain office is empowered by law in virtue of that office to give previous consent in writing to certain proceedings or acts as a condition precedent to their legality or validity, and the person as a matter of fact gives such consent, it cannot be the less a consent previously given in writing, merely because at the time of giving it he happened to be unaware of the law empowering him to consent, or, being aware of it, he thought he was consenting in virtue of another office which he held. His ignorance of the law giving him the power cannot make the consent not a consent and is no legal ground or excuse for withdrawing it after he has once given it.

Where a certain act requires the concurrence of an official person, there is a presumption in favour of its due execution on the ground of the legal maxim *omnia præsumuntur rite et solenniter esse acta donec probetur in contrarium.* In such cases, "everything is presumed to be rightly and duly performed until the contrary is shown." That presumption can be rebutted by proof that certain forms required by law were not complied with.

Where the two offices are combined in one and the same person on grounds of public convenience or expediency, his action must be referred to the exercise of his discretionary powers under both the capacities if it can be so referred.

Section 31 of the Gujrat Talukdars' Act (Bombay Act VI of 1888) requires that there must be (1) consent, (2) it must be previous, and (3) it must be in writing. If these conditions are fulfilled the requirements of the section are complied with. No particular form is requisite.

APPEAL from the decision of Chimanlal Lallubhai, First Class Subordinate Judge at Ahmedabad.

Proceedings in execution.

The plaintiff obtained a money decree for Rs. 5,007 against the original defendants (represented by the heirs the respondents) on the 26th September 1891.

In execution of this decree, several villages belonging to the respondents were attached; and the Court sent the darkhast to the Collector to be dealt with under sections 320—325 of the Civil Procedure Code (Act XIV of 1882). The Collector transferred this decree to the Talukdari Settlement Officer, who was competent to deal with it for the purpose of execution of decrees against or in respect of talukdari lands.

The Talukdari Settlement Officer next framed a scheme whereby it was arranged that the plaintiff should be put in possession of one of the attached villages and allowed to enjoy the income of that village for seven years in satisfaction of the decree and that the other villages should be released from attachment. The plaintiff assented to the scheme and the Talukdari Settlement Officer, acting upon it, wrote to the Deputy Manager a letter, informing him of the scheme and asking him to put the plaintiff in possession of the village. The Talukdari Settlement Officer also recorded an order to that effect and sent it to the Court which passed the decree.

In 1905, section 31 of the Gujrat Talukdars' Act (Bombay Act VI of 1888) was amended. The scheme was made by the Talukdari Settlement Officer and the village was delivered to the plaintiff after the death of the original judgment-debtor and after the section was amended but in ignorance of the amendment.

Subsequently, on the 12th November 1907, the Talukdari Settlement Officer reported to the Collector of Ahmedabad that the plaintiff's darkhast could not be proceeded with under section 31 of Bombay Act VI of 1888 as amended by Bombay Act II of 1905. This was sent by the Collector to the Civil Court.

The Court asked the Talukdari Settlement Officer, on the plaintiff's application, to show cause why the actions taken by him from time to time should not be construed into his consent as required by the amended section 31 of the Gujrat Talukdars' Act (Bombay Act VI of 1888).

The Talukdari Settlement Officer replied as follows:—

"The consent contemplated in section 31 of the Amended Talukdari Act was never given nor was it intended to be given for the continuance of the execution proceedings as stated by the plaintiff, and the preparation of a scheme under section 323 of the Civil Procedure Code does not imply the grant of such consent which can only be given in writing. The steps shown by the plaintiff in his petition as taken by this office in connection with the execution proceedings are under the Civil Procedure Code. There has been no action taken by this office which would show that such a previous written consent as contemplated by section 31 of the amended Talukdari Act was ever given or intended to be given."

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The Court agreed with the contentions of the Talukdari Settlement Officer and ordered the darkhast to be disposed of on the following grounds :—

It is urged that the Talukdari Settlement Officer should be held to have given consent for the continuance of the execution proceedings as required by section 31 of the amended Talukdari Act. Under section 320 of the Civil Procedure Code, the execution of the decrees is transferred to the Collector and not to the Talukdari Settlement Officer, and the Collector executes them or gets them executed, through his subordinates, and so the Talukdari Settlement Officer is not wrong in saying that he adopted the steps above said under the Civil Procedure Code in execution of the decree and not under the amended Talukdari Act. It is clear from section 31 of the Act that the consent should be in writing and should not be presumed from the conduct of the Talukdari Settlement Officer, or from certain steps adopted by him in executing the decree. No consideration is required for such consent, and the Talukdari Settlement Officer cannot be said to have given consent merely because the applicant withdrew two darkhasts under the kabulayat made by him to the Talukdari Settlement Officer. The Talukdari Settlement Officer states that the consent contemplated in section 31 of the Amended Talukdari Act was never given nor was it intended to be given for continuance of the execution proceedings, and there is nothing to show that the Talukdari Settlement Officer gave express consent for continuance of the execution proceeding.

The plaintiff appealed to the High Court.

*T. R. Desai* for the appellant contended that the Talukdari Settlement Officer had given his consent as required by the amended section 31 of the Gujrat Talukdars' Act (Bombay Act VI of 1888). The framing of the scheme, the putting of the plaintiff into possession of one of the villages attached, and the communication thereof to the Civil Court are acts which clearly show that the consent of the Talukdari Settlement Officer was given to the arrangement in every sense of the term. The consent might indeed have been given in ignorance of the amendment in section 31 ; but ignorance of law is no excuse.

*L. A. Shah* for the respondent No. 1.—There is no consent here of the Talukdari Settlement Officer as required by section 31 of the Gujrat Talukdars' Act, 1888. The consent should be express, made previously and in writing. All that the Talukdari Settlement Officer has done has been done by him in his capacity as Collector under sections 320—324 of the Civil Procedure Code, 1882. The scheme framed was under section 323 of the Code.

The provisions of section 31 of the Gujrat Talukdars' Act, 1888, should be strictly construed in favour of the judgment-debtor. When an officer holds two capacities as in this case, and he has to do an act to validate a proceeding, that act, before it can be construed to have a certain effect, must be shown to have been done with intent to procure that effect.

*M. N. Mehta,* for respondents Nos. 2—5.

*T. R. Desai.*in reply.

CHANDAVARKAR, J.:—The appellant, having obtained a money decree against a Talukdar, who is now deceased and is represented by the respondents, presented a *darkhast* for its execution. Several villages, belonging to the Talukdar, were attached and the Court sent the *darkhast* to the Collector to be dealt with under sections 320 to 325 of the Code of Civil Procedure of 1882, then in force. The Collector in his turn transferred the *darkhast* to the Talukdari Settlement Officer, the reason for that being that the latter combined in himself, according to a rule having the force of law, the functions of Collector and Talukdari Settlement Officer for the purpose of execution of decrees against or in respect of *talukdari* lands. That Officer, acting under the sections in question, framed a scheme, whereby it was arranged that the appellant should be put in possession of one of the attached villages and allowed to enjoy the income of that village for seven years in satisfaction of the decree and that the other villages should be released from attachment. The appellant assented to the scheme, and the Talukdari Settlement Officer, acting upon it, wrote to the Deputy Manager a letter (Exhibit 54), informing him of the scheme and asking him to put the appellant in possession of the village. At the same time the Talukdari Settlement Officer recorded an order and sent it to the Court which had passed the money decree. That order (see Exhibit 22) is as follows:—

"The Kabulayat, given by the plaintiff to accept in Pulachut the income of Karsanpura for 7 years in satisfaction of his Darkhast No. 614—1899 and 552—1899 is put in the case; order is given to the Deputy Manager to carry it out accordingly. This darkhast is to be entered in the list of Japti Vahivat (management of attached estates) under section 323, Civil Procedure Code, and order is given to send its account every year and therefore this darkhast is taken out of the list of cases under inquiry and entered in the list of attached estates."

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The scheme was made, the order was passed and delivery of possession of the village was given to the appellant after the judgment-debtor had died and after the amendment of section 31 of the Talukdars' Act had come into force.

[His Lordship then read section 31 of the Talukdars' Act and continued :—]

It appears that the Talukdari Settlement Officer was not aware of the latter portion of section 31 when he settled the scheme, passed his order, and put the appellant in possession of the village. Accordingly, the Court was requested to dispose of the *darkhast* by holding that the appellant could not retain possession of the village under the scheme.

The lower Court has allowed the Tálukdari Settlement Officer's objection to the *darkhast* on the ground that there was no previous consent in writing of his such as is required by the last part of section 31 of the Tálukdári Act.

The Talukdari Settlement Officer's contention in the Court below was that he had never given any such consent as the section required, because all he had said and done had been not under that section but under section 323 of the Code of Civil Procedure.

I am unable to accept this contention. All that section 31 required was his previous consent in writing. That there was such consent is clear from Exhibit 5 and the Officer's order quoted above. It may be that the Talukdari Settlement Officer was not aware of the amendment of section 31 and so had not the remotest consciousness that he was acting in conformity with it when he settled the scheme and allowed the appellant to be put in possession of the village. But if a person, holding a certain office, is empowered by law in virtue of that office to give previous consent in writing to certain proceedings or acts as a condition precedent to their legality or validity, and the person as a matter of fact gives such consent, it cannot be the less a consent previously given in writing, merely because at the time of giving it he happened to be unaware of the law empowering him to consent, or, being aware of it, he thought he was consenting in virtue of another office which he held. His igno-

rance of the law giving him the power cannot make the consent not a consent and is no legal ground or excuse for withdrawing it after he has once given it. As was said by Lord Ellenborough, C. J., in *Bilbie* v. *Lumley*[1], "Every man must be taken to be cognisant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in almost every case." As for the plea that the consent was given by the Talukdari Settlement Officer, not under section 31 of the Talukdars' Act but under section 323 of the Code, it is answered by the rule of law that where a certain act requires the concurrence of an official person, there is a presumption in favour of its due execution on the ground of the legal maxim *omnia præsumuntur rite et solenniter esse acta donec probetur in contrarium*. In such cases, "everything is presumed to be rightly and duly performed until the contrary is shown." That presumption can indeed be rebutted by proof that certain forms required by law were not complied with. Here no form is prescribed by law. All that is urged is that the Talukdari Settlement Officer did not know of the law embodied in section 31 of the Talukdars' Act when he gave his consent to the scheme. We are, therefore, brought back to the plea of ignorance of law, which, as I have said, is no excuse.

It is to be remarked that the powers under section 323 of the Code of Civil Procedure conferred on the Collector and those conferred on the Tálukdári Settlement Officer by section 31 of the Tálukdári Act are both enabling or discretionary and are not necessarily of a mutually contradictory character. Where the two offices are combined in one and the same person on grounds of public convenience or expediency, his action must be referred to the exercise of his discretionary powers under both sections, if it can be so referred. It is not that in respect of one office the action was without, and in respect of the other it was with jurisdiction.

If he had the discretionary jurisdiction as to the action in both capacities, the law will refer it to both of them and then the question is reduced simply to this—had he given previous consent

(1) (1802) 2 East 469 at p. 472.

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in writing as required by section 31 of the Tálukdárs' Act? That section prescribes no particular form for the consent. All it requires is that there must be (1) consent, (2) that it must be previous, and (3) that it must be in writing. It is not disputed before us that these three conditions are satisfied by Exhibit 54 and Exhibit 22. As to the first of these conditions, all we have to see is that the person who gave the consent occupied at the time the office of Tálukdári Settlement Officer and that he acted deliberately in the matter of the scheme and gave his sanction to it freely, because "consent is an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side," that is, it must not be due to fraud, or undue influence. (Story's Equity Jurisprudence, 2nd edn., section 222). The Tálukdári Settlement Officer is shown by the evidence to have given his sanction to the scheme after fully considering the circumstances of the case. The argument that such consideration was bestowed by him on the scheme in his capacity as Collector ignores the fact that though he held two offices it was one mind which considered the scheme before consenting to it. And that consent was embodied in writing in Exhibit 54, the letter he wrote to his Deputy, asking him to give delivery of possession to the decree-holder, and in the order, forming part of Exhibit 22, sent to the Court with the *darkhast*. Both these were put in writing before delivery of possession to the decree-holder.

On these grounds, in my opinion, the decree appealed from must be reversed and the *darkhast* should be allowed to continue. The appellant must have the costs both in this Court and the Court below from the respondent No. 1 who is to bear his own.

HEATON, J.—By Bombay Act II of 1905, section 31 of Bombay Act VI of 1888 was so amended that thereafter "no proceeding for the attachment, sale or delivery of, or any other process affecting the possession or ownership of, a Tálukdári estate, or any portion thereof in execution of a decree" could be instituted or continued without the previous written consent of the Tálukdári Settlement Officer.

The decree-holder in these proceedings had several unexecuted decrees against a Tálukdár of which applications for execution were pending. In the proceedings on one of these applications

an order was made for selling the estate of the Tálukdár or a portion thereof and the proceedings were sent to the Collector under section 320, Civil Procedure Code. It fell to the Tálukdári Settlement Officer, who in certain cases is the Collector for execution purposes, to deal with the matter. He entered into an arrangement with the decree-holder by which a scheme was made as permitted by section 323, Civil Procedure Code, under which the decree-holder was to have possession of one Tálukdári village for seven years in discharge of his decrees. Meantime two out of four applications for execution were to be withdrawn, and the remaining two, kept pending. The negotiations had begun before the amendment of section 31 came into force; but the scheme was finally arranged, accepted and given effect to after the amendment. The question is whether the execution proceedings were continued with the previous written consent of the Tálukdári Settlement Officer as required by section 31 of the Act. I think they were. The Tálukdári Settlement Officer undoubtedly did consent to the continuance; that is plain from the letters he sent to the Court. It is equally plain that the consent was in writing and that it was previous to the delivery of possession to the decree-holder. The only argument of any importance against holding the previous written consent to be of the kind contemplated by section 31, is that it was not given for the purpose of section 31 and was given in ignorance of or without regard to the provisions of that section and merely in pursuance of execution proceedings which the Tálukdári Settlement Officer was bound to conduct. I do not think that after the amendment of section 31 he was bound to conduct them. It was open to him to refuse to consent to their continuance and to refer them back to the Court. I also do not think the evidence establishes the contention of ignorance or that the consent was not given for the purpose of section 31. The Tálukdári Settlement Officer of the time was not examined as a witness and there is no direct evidence on the matter. We are left to conjecture and I do not think the circumstances justify the conjecture urged by the respondent. Therefore I concur in the order proposed.

*Decree reversed.*

R. R.