

## APPELLATE CIVIL.

*Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.*

1920.

January 5.

BHAIJI ISHWARDĀS SHAH (ORIGINAL PLAINTIFF), APPELLANT v. THE TALUKDARI SETTLEMENT OFFICER (ORIGINAL DEFENDANT), RESPONDENT\*.

*Gujarat Talukdars' Act (Bombay Act VI of 1888), section 31†—Talukdari estate—Incumbrance by Talukdar and his son—Son has no power to encumber property during his father's life-time—Talukdar's encumbrance valid during his life-time—Summary eviction by Talukdari Settlement Officer—Land Revenue Code (Bombay Act V of 1879), section 79A‡—Jivaidar is a Talukdar.*

\* Second Appeal No. 83 of 1917.

† The section runs as follows:—

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 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 Talukdari 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.

(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.

‡ This section runs as follows:—

79 A. Any person unauthorizedly occupying, or wrongfully in possession of, any land—

(a) to the use and occupation of which he has ceased to be entitled under any of the provisions of this Act, or

(b) of which the occupancy right is not transferable without previous sanction under section 73 A or by virtue of any condition lawfully annexed to the occupancy under the provisions of section 62, 67 or 68,

may be summarily evicted by the Collector.

The property in dispute, which was a Talukdari estate, was mortgaged with possession to the plaintiff by a Talukdar and his son. After the death of the Talukdar, the son sold the equity of redemption to the plaintiff. The estate having passed into the management of the Talukdari Settlement Officer, that officer issued a notice to summarily evict the plaintiff from the property under section 79 A of the Land Revenue Code, 1879. The plaintiff sued for a declaration that he was entitled to remain in possession of the property:—

*Held*, that all that was mortgaged was the life interest of the Talukdar, which came to an end with his death, under section 31 (1) of the Gujarat Talukdars' Act, 1888;

*Held*, further, that at the date of the mortgage the son was not a co-sharer with his father in the Talukdari property, and not having any interest in the property at the time, he was not competent to encumber the interest to which he might succeed on his father's death;

*Held*, also, that the sale by the son of the mortgaged property was an invalid alienation under section 31 (2) of the Gujarat Talukdars' Act.

*Held*, therefore, that the notice of summary eviction of the plaintiff was properly issued under section 79 A of the Land Revenue Code, 1879.

A Jivaidar is a Talukdar.

Per MACLEOD, C. J. :—"The land held in Talukdari tenure is totally distinct from land ordinarily held as joint family property by a Hindu family. It is not subject to the ordinary law of inheritance or succession, and...partition of Talukdari land is governed by particular laws. It is only a person who has obtained a final decree of a Court of competent jurisdiction declaring him to be entitled to a share of a Talukdari estate, and every co-sharer whose name has been recorded, as such, in the Settlement Register prepared in accordance with section 5 (Gujarat Talukdars' Act), who can be entitled to have his share divided from the rest of the estate.

Section 79 A of the Land Revenue Code refers to any person unauthorizedly occupying, or wrongfully in possession of, any land, and therefore, it does not matter whether a person is in unauthorized occupation of land before the date when the section became applicable".

SECOND appeal from the decision of B. C. Kennedy, District Judge of Ahmedabad, confirming the decree passed by M. J. Yajnik, Assistant Judge of Ahmedabad.

Suit for declaration and injunction.

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One Vakha, who was a Jivaidar, and his son Vaza, mortgaged a field, which was a part of the Talukdari estate, to plaintiff with possession in 1892. In 1901, Vakha died. Thereafter, Vaza sold the property to the plaintiff in 1905.

The Talukdari Settlement Officer took the estate under his management. He called upon the plaintiff in 1908 to deliver up possession of the land under section 79 A of the Land Revenue Code.

Thereupon, the plaintiff filed the present suit to obtain a declaration that the Talukdari Settlement Officer had no right to take possession of the field from him, and to restrain that officer by injunction from taking the possession.

The trial Court held that Vakha who was a Jivaidar, was a Talukdar within the meaning of the Gujarat Talukdars' Act; that the mortgage by Vakha was operative only during his life-time; that his son Vaza had, at the date of the mortgage, only an expectancy which he could not transfer; that the mortgage came to an end on Vakha's death, and that the plaintiff was liable to be evicted under section 79 A of the Land Revenue Code, 1879. The suit was therefore dismissed.

This decree was, on appeal, confirmed by the District Judge.

The plaintiff appealed to the High Court.

*H. V. Divatia*, for the appellant:—I submit that section 31 of the Gujarat Talukdars' Act has no application to the present case for two reasons: (1) Vakha is a Bhayat and entitled only to maintenance by grant of land from the estate and as such he is not a Talukdar within the meaning of that term in section 31. Section 2 (b) of the Gujarat Talukdars' Act which explains the meaning of the word "Talukdar" does not include the Bhayats of a Talukdar, but only the

co-sharers of a Talukdari estate and a Bhayat who is entitled only to a grant of land for maintenance which is liable to revert to the main Taluka on failure of the cadet line is not a co-sharer, and therefore not a Talukdar.

Even assuming that Vakha is a Talukdar, I submit that the lands held by him for maintenance are at the most lands of Talukdari tenure as explained in the case of *Parshotam v. Bai Punji*<sup>(1)</sup>, and as such different from "Talukdar's estate" to which alone section 31 applies.

Secondly, if Vakha be regarded as a Talukdar, his son Vaza, who has joined in passing the mortgage deed was also a Talukdar at the date of the mortgage and as he is living the mortgage deed is still valid and operative. A son of a Talukdar is also a Talukdar as regards the property which is joint family property and he takes a vested interest in that property from his birth. The Talukdars' Act does not abrogate the general Hindu law of inheritance. Therefore, even during the lifetime of his father, Vaza must be regarded as a Talukdar.

Lastly, I submit that the plaintiff is not liable to be summarily evicted under section 79 A of the Bombay Land Revenue Code. That section can apply when a person is in wrongful possession but possession which begins in a valid mortgage and becomes invalid later on by operation of law is not wrongful. A regular suit must be brought by the respondent to recover possession of the lands.

*Coyaji*, with *S. S. Patkar*, Government Pleader, for the respondent, not called upon.

MACLEOD, C. J. :—The plaintiff sued for a declaration that the defendant, the Talukdari Settlement Officer of

(1) (1902) 4 Bom. L. R. 817.

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the Gujarat Prant, had no right to take from him possession of the field described in the plaint, and for a permanent injunction restraining the defendant from taking possession or causing it to be taken from him or from obstructing the plaintiff in any way. The property mentioned in the plaint is part of the Talukdari estate which had been settled in Jivai on a cadet branch of the Talukdari family. One Vakha in 1892 was the elder member of that cadet branch. He mortgaged the plaint property to the plaintiff, and his son Vaza, joined in the mortgage. Vakha died in 1901. In 1905, Vaza executed a sale-deed to the plaintiff of the property mortgaged in 1892. In 1908, the Talukdari Settlement Officer issued a notice directing him to give up possession. The learned District Judge has confirmed the decree of the lower Court which dismissed the suit.

In appeal, the first point that was taken was that Vakha and Vaza were not Talukdars within the meaning of section 31 (1) of the Gujarat Talukdars' Act, VI of 1888. That question, we think, has been decided by the decision of this Court in *Thakarshi Trikam v. Chudasama Akhubha*<sup>(1)</sup>, and we agree with the learned District Judge in thinking that that case cannot be distinguished from this case. The parties there were Bhayats, and so are they in this case. The only distinction that can be drawn between the two cases is that in *Thakarshi Trikam's case*<sup>(1)</sup>, the whole village had been granted in Jivai, whereas in this case only a few fields. The fact remains that a grant was made in Jivai to cadets of the Talukdar's family, and they therefore must be considered as co-sharers and in the same position as Talukdars.

Then it was argued that as Vaza was joint with his father, he had an interest in the Jivai property as if it

(1) S. A. No. 428 of 1910 (Unrep.).

were joint family property. We cannot agree with that argument. The land held in Talukdari tenure is totally distinct from land ordinarily held as joint family property by a Hindu family. It is not subject to the ordinary law of inheritance or succession, and we have only to refer to Part III of the Gujarat Talukdars' Act to see that partition of Talukdari land is governed by particular laws. It is only a person who has obtained a final decree of a Court of competent jurisdiction declaring him to be entitled to a share of a Talukdari estate, and every co-sharer whose name has been recorded, as such, in the Settlement Register prepared in accordance with section 5, who can be entitled to have his share divided from the rest of the estate. Then the subsequent sections enact how partitions should be effected. Therefore, I cannot think that in 1892 Vaza was a co-sharer with his father in the Jivai property, and not having any interest in the property at the time, he was not competent to encumber the interest to which he might succeed on his father's death. Therefore, all that was mortgaged by the document of 1892 was the life interest of Vakha, since Vakha was not competent owing to the provisions of section 31 (1) of Act VI of 1888 to enter into a valid mortgage beyond his life-time. Then it would follow that Vaza became entitled to the Jivai land on the death of his father, and there is no necessity to consider whether there was any equity between him and the mortgagee owing to his having been a party to the mortgage of 1892. But in 1905 he sold the property to the plaintiff. That clearly was an invalid alienation under section 31 (2) of the Gujarat Talukdars' Act. The Talukdari Settlement Officer, therefore, was entitled to issue notice under section 79 A of the Bombay Land Revenue Code, read with section 31 (2) of the Gujarat Talukdars' Act.

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It has been argued that because Vaza became interested in the Jivai property before section 79 A of the Land Revenue Code became applicable to alienations by Talukdars, that therefore notice cannot be given under that section. But section 79 A of the Bombay Land Revenue Code refers to any person unauthorizedly occupying, or wrongfully in possession of, any land, and therefore, it does not matter whether a person is in an unauthorized occupation of land before the date when the section became applicable. The question is whether at the date of the notice he is unauthorizedly occupying, or wrongfully in possession of, the land, and that we find was the case with the plaintiff in this case. Therefore the Talukdari Settlement Officer was entitled to serve him with notice, and this suit in which the plaintiff asked for a declaration that the Talukdari Settlement Officer has no right to take from him possession of the plaint property fails and this appeal must be dismissed with costs.

HEATON, J.:—I agree. It is quite plain that the plaintiff-appellant has acquired no valid title in virtue of the alienation by Vaza in 1905, nor indeed has it been contended that he did acquire any good title by virtue of that alienation. The appellant's case before us rests on a mortgage of 1892. This was a mortgage by Vakha, the father of Vaza, and also by the latter. If the latter had an existing interest in the property, which is Jivai property, in 1892, no doubt he could have encumbered that existing interest. The mortgage itself was drafted as if it were an ordinary mortgage of ordinary joint family property in which a father and his son were interested and were effecting the mortgage. But the property which was mortgaged was not ordinary joint family property. It was Jivai property, and as was held by this Court in *Thakarshi Trikam v. Chudasama Akhubha*<sup>(1)</sup> the Jivaidar is a co-sharer in the

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Talukdari estate and as such a Talukdar. The Jivaidar in 1892 was Vakha. Having regard to the nature of Talukdari property, to the nature of the grants by Talukdars which come under the name of Jivai, and having regard to the provisions of the Gujarat Talukdars' Act, it seems to me that we must hold, as did the District Judge, that the only person entitled to deal with this Jivai property was the Jivaidar at the moment, and that was Vakha and not Vaza. This conclusion is fortified by the provisions of the Gujarat Talukdars' Act relating to partition. Vaza in 1892 was not a person who according to the provisions of section 10 of that Act had any right to have any interest or share partitioned on the ground that it was his. Holding, therefore, that Vaza at that time had no existing interest which he could part with, the fact that he joined in the execution of the mortgage deed of that year makes no difference whatever to the interest which the mortgagee acquired. He only acquired such interest as the Jivaidar Vakha could mortgage to him. That mortgage ceased to have any effect from the date of Vakha's death in 1901. Thereafter the possession of this property was possession contrary to the provisions of the Gujarat Talukdars' Act, and in particular contrary to the provisions of section 31 of that Act; and, therefore, the Talukdari Settlement Officer was empowered to issue a notice under section 79 A of the Land Revenue Code which in the year 1905 by Bombay Act II of that year was made specifically applicable to the use or occupation of land in contravention of any of the provisions of the Gujarat Talukdars' Act. In my opinion there is no doubt that the appeal was rightly decided by the Court of first appeal, and that we must dismiss the appeal before us.

*Appeal dismissed.*

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